THE

LAW TIMES REPORTS

OF

Cases Decided

IN

THE HOUSE OF LORDS, THE PRIVY COUNCIL,

THE COURT OF APPEAL,

THE CHANCERY DIVISION, THE QUEEN'S BENCH DIVISION, THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION,

THE QUEEN'S BENCH DIVISION IN BANKRUPTCY,

THE COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED,

AND THE RAILWAY AND CANAL COMMISSION COURT.

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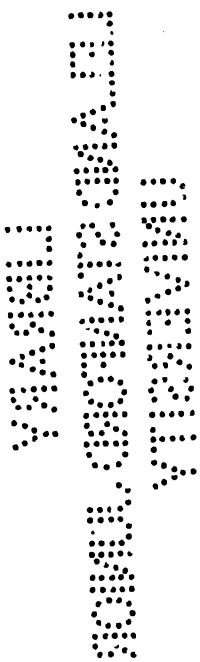

THE REPORTERS

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PRIVY COUNCIL, by C. E. MALDEN, Esq., Barrister-at-Law.

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Assets—Money paid under an execution—Money paid to sheriff to prevent seizure — Right of execution creditor.—The Bankruptcy Act 1890 by sect. 11, sub-sect. 2, provides that, "where under an execution in respect of a judgment for a sum exceeding 20*l.* the goods of a debtor are sold or money is paid in order to avoid sale," the sheriff shall retain the balance for fourteen days, and pay it to the official receiver, if he has notice of a bankruptcy petition presented against the debtor within that time and a receiving order is made. A warrant of execution having been issued to the high bailiff upon a judgment for 23*l.*, the debtor's father paid the high bailiff the amount of the judgment in order to prevent possession being taken under the warrant. Notice of a bankruptcy petition against the debtor was given to the high bailiff within fourteen days, and a receiving order was made. The high baillff paid the money to the official receiver. Held, that the money was not paid "under an execution," or "in order to avoid sale," within sect. 11, sub-sect. 2 of the Bankruptcy Act 1890, and that the execution creditor was entitled to recover the amount from the high bailiff. (Bower *v.* Hett.) 176

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Form of bankruptcy notice—Address of creditor.—A bankruptcy notice must contain an address of the creditor at which the debtor can pay, or secure, or compound for the debt. Therefore, where the address of the creditor given in a bankruptcy notice was "White's Club, St. James's," and the creditor was out of England at the service of the notice and for seven days after: Held, that the notice was bad on account of the insufficiency of the address. (*Re* Stogdon: *Ex parte* Leigh.) 279

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into an agreement with their landlord altering the terms on which the rent was to be paid under the demise. The rent was paid for a short period on the new basis, when on the assignees becoming bankrupt the landlord distrained after the bankruptcy for the rent then due according to the demise, and not on the altered basis. The trustee paid the rent claimed under protest. Held, that the landlord was entitled to distrain after the bankruptcy for the rent due according to the terms of the demise, as the effect of the agreement was merely to postpone the landlord's rights under the demise so long as the rent was paid on the altered basis according to the agreement, and as the rent had not been so paid, the landlord's rights under the demise could be enforced. (*Re* Smith and Hartogs; *Ex parte* The Official Receiver.) ... ...*page* 221

Money paid into court to meet certain debts—Annulment of receiving order—Application by debtor for payment out six years after payment in—Statute of Limitations.—By the Bankruptcy Act 1883, sect. 35, the court has power to annul an adjudication on proof that the debts are paid in full, and where an adjudication is annulled all dispositions of property duly made by the official receiver are valid, but the debtor's property shall vest in the appointee of the court, or in default shall revert to the debtor on certain terms, and by sect. 36 a debt due to a creditor who cannot be found shall be considered as paid in full if paid into court. The court will deal with the annulment of a receiving order upon the same basis that it deals with the annulment of an order of adjudication. A debtor having paid all his creditors in full except two, who could not be found, and having paid into court the debts of these two, obtained an order annulling the receiving order made against him. No proof had been put in by these two creditors for their debts, nor was any claim made to the money in court. Six years afterwards the debtor applied that themoney paid in might be paid out to him. Held. that the money paid into court belonged to the creditors whenever they liked to come for it, and that the Statute of Limitations did not bar their rights. But held further, that, if the court were satisfied that there was practically no possibility of the creditors or their representatives turning up and claiming the money, and reasonable security was given by the debtor for the replacement of the money in such an event, the court would authorise the official receiver to pay the money out to the applicant. (*Re* Dennis; *Ex parte* Dennis.) 413

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Practice — Taxation of costs — Right of official receiver to be present at Taxation.—The official receiver has no right to be present, or to be heard, at the taxation of the bill of costs of the solicitors to the trustee, or of any other party; but the court has power to order him to attend at the taxation, not as a litigant party, but merely to assist the taxing officer, or to enable himself to report efficiently to the Board of Trade in case they should require a review of the taxation. (*Re* Nash and Sons; *Ex parte* Crofton, Craven, and Worthington.) ... ...*page* 477

Protected transaction — Notice of act of bankruptcy.—Knowledge by a creditor that the debtor's solicitor has instructions to prepare a notice that the debtor intends to suspend payment of his debts is not notice to such creditor that the debtor has committed an act of bankruptcy, and an assignment of a debt taken by such creditor from the debtor, with such knowledge, is consequently valid. (*Re* Morgan; *Ex parte* Turner.) 448

Realisation of property—Pension of bankrupt—Pension of Indian officer—Order for payment of pension to trustee—Jurisdiction—Discretion.—In the case of a pension granted to a retired officer of the Indian army under the Indian Pensions Act 1871, the court has jurisdiction to make an order, under sect. 53, sub-sect. 2, of the Bankruptcy Act 1883, directing payment of the pension to the trustee in bankruptcy of the officer, and it is a matter of discretion in every case whether such an order should be made or not. (*Re* Saunders; *Ex parte* Saunders.) 172

Trustee—Liability to render an account—Undistributed funds—Jurisdiction of Board of Trade—Lapse of time.—The power given to the Board of Trade under clause (*b*) of sect. 162, sub-sect. 2, of the Bankruptcy Act 1883, to require a trustee in a liquidation under the Bankruptcy Act 1869 to furnish an account of his receipts and expenditure as such trustee, is not limited to the case of trustees who have been shown to have had in their hands, since the passing of the Bankruptcy Act 1883, any unclaimed or undistributed funds such as are mentioned in clause (*a*) of the same sub-section. A trustee in a bankruptcy, being an officer of the court, cannot rely upon the provisions as to lapse of time contained in sect. 8, sub-sect 1 (*b*) of the Trustee Act 1888. (*Re* Cornish; *Ex parte* The Board of Trade,) ... 478, 602

BILL OF EXCHANGE.

Cheque—Fictitious payee—Ignorance of drawer.—Where a cheque has been drawn payable to a fictitious or non-existing person, and has been delivered by the drawer to be used as a cheque, it is, under sect. 7, sub-sect. 3, of the Bills of Exchange Act 1882, a cheque payable to bearer, and the drawer is liable upon it to a holder in due course although he was not aware at the time he signed it that the payee was a fictitious or non-existing person. (Clutton and Co. *v.* Attenborough.) 64, 49

Foreign bill—Negotiation—Payment under a mistake of fact as to bill having been met—Action for repayment—Estoppel.—A., the indorsee of a bill of exchange, resident abroad, indorsed it to the defendants, his agents in London, for the purpose of collection. The defendants indorsed the bill to the plaintiffs, and sent it to them for the same purpose, and they forwarded it to their agents. The plaintiffs, under a misunderstanding, informed the defendants that the bill had been paid, and sent them a cheque for the amount. Thereupon the defendants intimated the same to A., and credited him with the amount of the bill. It was decided by Mathew, J., on the authority of *Skyring* v. *Greenwood and Cox* (4 B. & C. 281), that, as the plaintiffs had wrongfully informed the defendants that the bill had been paid, they could not recover the amount of the bill when the defendants had nothing to do with the mistake of fact; and also that the plaintiffs were estopped by the representation which they had made to the defendants, and upon which the defendants had acted. On appeal: Held that the action failed. (Deutsche Bank (London Agency) *v.* Beriro and Co.) 669

Forged indorsements on bill — Acceptance and payment of bill under belief that indorsements are genuine—Right to recover money back—Mistake of fact.—When the person upon whom a bill of exchange is drawn accepts the bill with forged indorsements thereon under the belief that

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form given in the Registration Order 1895. There were twenty-seven parishes in the borough of E. The revising barrister held that the omission rendered the notice bad, but having found as a fact that it arose through mistake, and had misled no one and caused no hardship, he amended it and allowed the objection. Held, that the revising barrister was right. (Sandford, app., *v.* Beal, resp.) ... ... *page* 406

Registration—Parochial electors—Ownership qualification—Married woman—Parliamentary register.—The only qualification entitling a person to be on the register of parochial electors established by the Local Government Act 1894 is the fact that the person in question is on the parliamentary register or the local government register for the parish. Accordingly a married woman owning but not occupying property in a parish, being debarred by the want of occupancy from getting on the local government register, and being debarred by her sex from getting on the parliamentary register, cannot be placed on the register of parochial electors. A., a married woman, owned freehold property in the parish of B. sufficient to qualify her to be on the register of parliamentary voters of the parish, had she been a man. Her husband had no interest in this property, nor was he on the register in respect of it. She did not, however, occupy any property in the parish. She claimed to be put on the register of parochial voters for the parish in respect of her property qualification. The revising barrister disallowed her claim. Held, that his decision was right. (Drax, app., *v.* Ffooks, resp.) 407

Successive occupation — Amendment — Parliamentary and Municipal Registration Act 1878.—The qualification of a voter was stated in the third column of his claim to be in respect of the occupation of a "dwelling-house," and the description of the qualifying property in the fourth column consisted of the names of two different houses. Held, that the claim must be taken to be in reality one for successive occupation, and, therefore, the revising barrister had power, under sect. 28, sub-sect. 13, of the Registration Act 1878, to amend, and ought to amend, the third column accordingly by substituting "houses in succession" for "dwelling-house." (Soutter *v.* Roderick.) 576

EMPLOYERS' LIABILITY ACT 1880.

Person having the charge or control of a locomotive engine or train upon a railway—Evidence.—An engine driver and fireman in the employment of the respondents brought a train of four waggons to be unloaded. The driver detached three of the waggons and left them standing on an incline while he took the fourth to be unloaded. The fireman scotched the wheels of the trucks so left on the incline, but did so insecurely, so that they ran down the incline and killed the husband of the appellant, who was also in the employment of the respondents. Held, that there was evidence of negligence of a person who had "the charge or control of a locomotive engine or train," within sect. 1, sub-sect. 5, of the Employers' Liability Act 1880 (43 & 44 Vict. c. 42), whether such control was in the driver and fireman jointly or of one or other of them separately. A "train" within the meaning of sect. 1, sub-sect. 5, of the Employers' Liability Act 1880 includes anything in course of being drawn along a railway by a locomotive engine, and need not consist of more than one vehicle: (per Lord Halsbury, L.C.) The words of the sub-section, "a person who has the charge or control of any train," do not necessarily point to a person in charge of the whole train: (per Lord Watson.) A person does not cease to be in charge of a train because some of the vehicles are uncoupled from the rest for the purpose of being dealt with separately in operations all directed to one end: (per Lords Herschell, Morris, Shand, and Davey.) (McCord *v.* Charles Cammell and Co. Limited.) 634

EXTRADITION.

British subject—Jurisdiction of British Government to surrender British subject to Belgium—Treaty between Great Britain and Belgium.—By an extradition treaty made between the British and Belgian Governments — to which the Extradition Acts were applied by Order in Council—it was provided that: "In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects." Held, that, under this treaty, while the executive Government of this country are not bound to surrender a fugitive criminal who is a British subject, they have a discretion to surrender and may surrender such person, although a British subject, upon a *primâ facie* case being made out and the requirements of the Extradition Acts being duly complied with. (*Re* Galwey.) *page* 756

Requisition by foreign Government — Political offence—Good faith of foreign Government—Power of courts to inquire into.—Sect. 3 of the Extradition Act 1870 provides that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character. Held, that, to come within this section, the political offence must be one which has been already committed; and that it is not sufficient to show that if the accused be surrendered he will or may be tried or punished for some offence of a political character not yet committed, such as for contempt of court in refusing to disclose political secrets, or answer questions relating to his political knowledge. Held, also, that the courts of this country have no power to enter into, and ought not to enter into, the question whether the demand for the extradition of the accused has been made by the foreign Government in good faith and in the interests of justice, or merely from political considerations. (*Re* Arton.) 687

FOOD ADULTERATION.

Margarine—Sale not for analysis but for consumption—Jurisdiction of county justices in borough—Time for serving summons.—The provisions of sect. 14 of the Sale of Food and Drugs Act 1875 apply only where the article is purchased "with the view of submitting the same to analysis," and do not apply where the article is purchased for consumption or under a contract, in which case compliance with the provisions of the section is not necessary as a condition precedent to a prosecution under the Act, or under the Margarine Act 1887. Under a contract for the supply of good fresh butter the appellant supplied and delivered to the guardians of the L. Union butter which afterwards upon analysis was found to contain 25 per cent. of margarine. The appellant was prosecuted and convicted, under sect. 6 of the Margarine Act 1887, for selling the margarine otherwise than as prescribed by that section. The summons was served more than twenty-eight days after the purchase, and the case was heard and determined by county justices in the borough of L., which was comprised within the L. Union, and which had not a separate court of quarter sessions, and the provisions of sect. 14 of the Sale of Food and Drugs Act 1875 had not been complied with. Held, (1) that the county justices had jurisdiction under sect. 27 of the Poor Law Amendment Act 1867 (30 & 31 Vict. c. 106), as the borough of L. was comprised within the L. Union, and also under sect. 154 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), as the borough had not a separate court of quarter sessions; (2) that as the justices had found that the butter or margarine was not "a perishable article," and was not purchased for "test purposes," the summons need not be served within twenty-eight days after the purchase as required by sect. 10 of the Sale of Food, &c., Act 1879; and (3) that, as the sale was

ance with the terms of the charter-party, which provided that the ship should pay "2½ per cent. commission, including insurance," and also a sum for working expenses incurred during the voyage. Held, that, as regarded the advance by the charterers at the port of loading, the defendants were entitled to deduct it, since the words "including insurance" in the charter-party showed that the parties regarded it as subject to sea risk, and it was therefore equivalent to a prepayment of freight; but that the disbursement for working the ship could not be deducted, as it had not been incurred for freight alone. (*The Red Sea.*) ... ...*page* 462

Average adjustment—Damage to goods—Whether partial or total loss—Mode of ascertaining partial loss—Costs of conditioning.—The correct mode of ascertaining the amount of a partial loss of goods as between the underwriter and the assured on a valued policy of marine insurance is to contrast the sound value of the goods on the date of arrival with their damaged value at that date, such damaged value being the gross value which the goods have actually fetched, without deducting the charges (if any) of conditioning the goods. The percentage of difference between these gross values is the proportion of the value in the policy which the underwriter ought to pay. The plaintiff insured with the defendant, an underwriter, by a policy on goods as interest might appear to cover the risks of transit in his lighters, and under this policy the plaintiff's lighter took on board a cargo of rice valued at 450*l*. During the transit the lighter came into collision and sank, and the rice was damaged. The damaged rice was afterwards offered to the owners, who refused to accept it. It was then, with the approval of the underwriter, kiln-dried at a cost of 68*l*., and sold as damaged rice for 111*l*., being about one-third of its sound value. Held (1), that, as the rice was capable of being conditioned, there was not a total loss, but a partial loss only; and (2) that the amount of this partial loss was to be ascertained by comparing the sound value of the rice with the 111*l*., the sum which the damaged rice actually fetched, without deducting the 68*l*., the costs of the kiln-drying. (Francis *v.* Boulton.) 578

Collision clause in policy—Collision with "pier or similar structure"—Vessel driven on to sloping bank or toe of breakwater.—A policy of re-insurance contained a collision clause "against risk of loss or damage through collision with (*intes alir*) piers, or stages or similar structures." Two vessels covered by this policy drifted through the violence of a storm on to the toe of a breakwater, which consisted of a long sloping bank of large stones or boulders dropped into the sea for the purposes of forming a bed or mound on which the breakwater was to rest, and these loose boulders slope down from the jetty or breakwater itself for some distance into the sea. The vessels were driven broadside on to this bank of stones, their keels being the parts that struck against the boulders, and they went to pieces on the boulders. Held, that what took place was a "collision," and that the loss was a loss or damage from collision "with a pier or similar structure" within the meaning of the clause, as the toe of the breakwater formed a part of the jetty or breakwater itself. (The Union Marine Insurance Company Limited *v.* Borwick.) 156

Insurance of "profit on charter"—Total loss of goods—Destruction of merchantable character—Concealment of material fact.—The plaintiffs chartered a vessel for a lump sum, and then goods were shipped under bills of loading at freights which amounted to more than the charter freight. They insured their "profit on charter" with a warranty against all average. The underwriters were not told, and did not inquire as to the terms of the charter, and did not know that the charter was at a lump freight. During the voyage the ship was sunk by collision, and was afterwards raised. Part of the cargo consisted of dates, which were so damaged by water as to be unmerchantable as dates, though they retained the appearance of dates, and were of considerable value. The freights payable under the bills of lading in respect of the rest of the goods amounted to less than the charter freight. Held, that there had been a total loss of the dates, and freight was not payable in respect of them; that there had been a total loss of the "profit on charter" within the meaning of the policy; and that there had not been any concealment of the fact that the charter freight was a lump sum. (Asfar and Co. *v.* Blundell and others.) ...*page* 30, 64

Policy of re-insurance—Clause in policy "to pay as may be paid on original policy"—Construction.—The plaintiffs re-insured with the defendant by a policy which provided that the re-insurance was to be "subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon, but against the risk of total or constructive total loss only": Held, that, under this clause, the defendant was only bound to indemnify the plaintiffs against a loss for which the plaintiffs were liable on their policy, and that, consequently, where the plaintiffs had in good faith paid as for a constructive total loss, when in fact there was no constructive total loss, and no liability upon them to pay, they could not recover the amount from the defendant. (Chippendale and others *v.* Holt.)... 47

Syndicate of underwriters—Policy issued by—Liability of members, whether joint or several—Partnership of members.—A syndicate of underwriters, not members of Lloyd's, was formed under an agreement which authorised a manager to underwrite policies of marine insurance on account of the several persons who formed the syndicate. The manager was to have power to insure by time policies, and was to obtain the highest rates, and in consideration of the "highest paid premium" was to be at liberty to return to the assured 20*s*. per cent. of the amount covered in the event of the vessel incurring no accident during the currency of the policy. The manager was empowered to sign these policies on behalf of the syndicate, affixing opposite the name of each member on each policy the proportion of risk taken by such member; and no liability was to attach to any member beyond his own proportion of the risk accepted in his name and the members were not to be liable for one another. The manager was to receive as remuneration a certain percentage on the premiums and the profits (if any), and was at his own expense to keep offices and the necessary staff for the business, and at the end of the stipulated time the accounts were to be closed and the profits or losses divided amongst the members in proportion to their respective interests. Under this agreement the manager accepted, on behalf of the syndicate, a risk which was described as a re-insurance on ships to the amount of 79,300*l*., valued as per original policies. The subscription on the policy was in the form "The Shipowners' Syndicate (Re-assured)." Then came the signature of the manager and the names of all the members with the proportionate amount subscribed opposite the name of each. A total loss having occurred upon the policy: Held, that the agreement did not constitute a partnership among the members of the syndicate; that the liability of the members upon the policy was not a joint, but a several liability in the proportion of the amounts subscribed by each, and that the liability to return premiums was also a several liability in the like proportion. (Tyser and others *v.* The Shipowners' Syndicate, (Re-assured) and others.) 605

Valued time policy—Depreciation in value of things insured by partial loss—Subsequent total loss by perils insured against — Right of assured to recover total loss.—By a valued time policy the plaintiffs insured their ship, valued at 20,000*l*., with the defendants, "against the risk of loss or damage by fire and (or) explosion." While the

policy was in force the ship was, by perils of the seas, driven ashore and stranded, and while stranded was totally destroyed by fire. By the stranding the vessel was seriously damaged, but was still a ship, capable of being floated and repaired, though at a cost exceeding her repaired value. Held, that the valuation in the policy was, in the absence of fraud, binding and conclusive between the parties, and that the assured were entitled to recover a total loss under the policy upon the basis of the valuation, notwithstanding the partial loss and depreciation in the value of the ship by the stranding. (Woodside and Co. *v.* The Globe Marine Insurance Company Limited.) ... ...*page* 626

LANDLORD AND TENANT.

Distress—Suspension of right to distrain—Bill of exchange given for rent—Agreement to suspend right to distrain.—The taking by a landlord of a bill of exchange from his tenant for rent is evidence of an agreement by the landlord to suspend his right of distress for that rent until the bill has become payable. (Palmer *v.* Bramley.) 329

Ejectment—Forfeiture by nonpayment of rent—Distress—Waiver—Common Law Procedure Act 1852 (15 & 16 Vict. c. 76), s. 210.—The levying of a distress by a landlord for arrears of rent is not such a waiver of his right of forfeiture as to prevent him from bringing an action in ejectment under sect. 210 of the Common Law Procedure Act 1852. (Thomas *v.* Lulham.) 146

Furnished lodgings—Implied condition of fitness for occupation—Extent of condition—Duty of landlord.—Upon the letting of furnished lodgings there is no implied condition that the premises shall continue to be fit for occupation during the term; and there is no duty upon the landlord, who lives upon the premises, and provides the tenant with attendance, to inform his tenant of anything which happens during the term to make the premises unfit for occupation. (Sarson *v.* Roberts.) 174

Lease—Implied covenant for title, or for quiet enjoyment—Determination of lessor's interest during term—Eviction of lessee.—If, in a lease by deed not containing any express covenant for title, or for quiet enjoyment, and not using the word "demise," there is to be implied a covenant for title or for quiet enjoyment, no action can be maintained upon the implied covenant if the lessor's interest determines during the term, and the lessee is thereupon evicted. (Baynes and Co. *v.* Lloyd and Son.) 250

—— Forfeiture for nonpayment of rent—Peaceable re-entry by landlord—Right of tenant to relief—*Chose in action*—Bankruptcy of tenant—Assignment of lease by trustee in bankruptcy.—The ground upon which the court gives relief in cases of forfeiture for nonpayment of rent is, that the proviso for re-entry is in the view of the court simply a security for the rent. It is immaterial, therefore, for this purpose whether the lessor obtains possession of the premises by peaceable re-entry or by process of ejectment. By sect. 212 of the Common Law Procedure Act 1852, on a tenant paying therent in arrear and costs the proceedings in ejectment are to cease, and if relieved in equity he is to hold the demised premises according to the lease thereof made, without any new lease. Held, that the section was a remedial one, and was applicable not only to cases in which there had been proceedings in ejectment, but also to cases in which the landlord had recovered possession by peaceable re-entry. The right of a lessee to be relieved from the forfeiture of a lease for nonpayment of rent is a *chose in action*, and vests on his bankruptcy in his trustee, who is entitled to sell and assign such right to a purchaser. (Howard *v.* Fanshawe.) 77

Parol agreement—Letting for non-continuous periods—Entry and payment of rent for part of period—Right of landlord to rent for remainder of period—Statute of Frauds (29 Car. 2, c. 3), s. 4.—By a parol agreement the defendant agreed to pay the plaintiff 45*l.* for the use of a piece of waste land for the three bank holidays following (Easter, Whitsuntide, and August), 15*l.* to be paid for each day, and the defendant was to have exclusive possession of the land for those days. The agreement was a single entire letting for a lump rent of 45*l.*, and not three lettings at a separate rent for each. The defendant entered under the agreement, and occupied and used the land for the first holiday, and made a payment for such occupation, but he did not occupy or use the land on either of the two other holidays, and refused to pay rent for the same. The defence of the Statute of Frauds having been raised to a claim for the balance of the rent: Held, that, as the agreement was for a single letting (although the period of the letting was not continuous), and as there had been an entry under the agreement and a payment of rent on account, the defence of the Statute of Frauds failed. (Smallwood *v.* Sheppards.) ... ...*pages* 219

Residential flat — Common scheme — Restrictive covenants.—In Feb. 1895 the plaintiff took from the defendant for a term of three years, determinable by her after the first year by a month's notice, five rooms, being Flat 21 in a building known as Oxford Mansions, Marylebone. The agreement, which was on a printed form, used in fact for all the flats which were let, provided that the tenant should not carry on any business in the rooms demised, nor use them for any purpose other than dwelling-rooms; and should observe a number of regulations thereto annexed, which provided for the use of the lift and other matters, showing that the building was intended to be used for residential flats. The defendant had begun extensive structural alterations for the purpose of turning the greater part of the building into a fashionable club. He did not propose to interfere with the plaintiff's flat or access thereto. The plaintiff brought an action to restrain the alterations. Held, that the plaintiff was entitled to have the general character of the building preserved, and the defendant must be restrained from using the building for any purpose other than residential flats, and from making any alteration therein with a view to such use. (Hudson *v.* Cripps.) 741

Tenant's fixtures—Expiration of tenancy—Removal of fixtures after such expiration—Measure of damages.—A tenant whose term has expired, and who has been required by the landlord to give up possession, cannot, after the determination of his tenancy, remove fixtures, although he is still in possession of the premises. The tenant of a public-house whose lease had expired, but who remained on in possession, although required by the landlord to give up the same, removed his trade fixtures after his tenancy had come to an end, and a writ for possession had been served upon him, but before he had actually given up possession of the premises which were not going to be carried on as a public-house. Held, that the tenant had no right to remove the fixtures at the time he so removed them, and that the landlord was entitled to damages in respect of such wrongful removal. Held also, that the measure of the damages was the value of the fixtures as chattels only, and not their value as fixtures if the premises were carried on as a going concern. (Barff and others *v.* Probyn.) 118

Underlease—Covenant to keep the demised property in repair — Breach of covenant — Measure of damages.—Where an under-lessee has committed a breach of a covenant to keep the demised property in repair, the measure of damages to which the immediate lessor is entitled is not the same as in the case of a direct lease. Where an under-lessee, who has committed a breach of a covenant to keep the demised property in repair, has notice that there is a superior landlord, the damages to which the immediate lessor is entitled are measured by his liability over to the landlord, the damages being the difference between the value of the immediate lessor's reversion with the covenant to

keep in repair performed and its value with that covenant not performed. (Ebbetts *v.* Conquest.) ... ...*page* 69

LEGACY DUTY.

Annuity—Term of years—Trust for payment out of rents of real estate—Direction to accumulate suplus rents—Annuitant tenant for life subject to term.—A testator devised certain real estate to trustees for a term of 500 years, and subject thereto he settled the same in strict settlement under the limitations whereof A. was tenant for life. The trusts of the term were (*inter alia*) to pay out of the rents and profits of the estate an annuity of 3000*l.* to the person who should for the time being (subject to the term) be entitled under the will to the possession or receipt of the rents and profits of the estate, and subject thereto to accumulate the rents and profits during a period of twenty-one years from the testator's death, and invest the same in the purchase of real estate to be settled to the same uses as the testator's real estate, and after the determination of the twenty-one years to pay the rents and profits to the person for the time being entitled to the real estate comprised in the term. Held, that during the continuance of the twenty-one years A.'s annuity was a mere charge on the estate of another person, and consequently that legacy and not succession duty was payable in respect of it under sect. 4 of 8 & 9 Vict. c. 76. (*Re* De Hoghton; De Hoghton *v.* De Hoghton.)... 27

LICENSING ACTS.

Sale of liquor elsewhere than on licensed premises.—The appellant held an off licence for the sale of beer by retail. His practice was to employ a carter, who went round to the customers' houses every week with a cart from which he delivered jars of beer, and received orders for the following week. The carter in this way received an order from a customer at the customer's own house for a jar of beer which was the following week delivered from the cart at the house and there paid for. The jar was one of several gallon jars, none of which were distinguished by any label or other mark from other similar jars in the cart. Held, that the sale of beer to the customer took place at the latter's house and not on the licensed premises, and the appellant was therefore properly convicted under sect. 3 of the Licensing Act 1872 of selling intoxicating liquor at a place where he was not authorised by his licence to sell the same. (Pletts *v.* Campbell.) 344

LIFE ASSURANCE.

Policies for benefit of wife and children—Domicile of assured—Foreign assurance company—*Lex loci contractûs — Lex loci solutionis.* — Policies of assurance on his life were effected by a domiciled Englishman with an American assurance company through their English branch office. The moneys assured were expressed to be payable to the wife of the assured, for her sole use if living, "in conformity with the statute," and, if not living, to the children of the assured, or their guardian for their use, or if there should be no such children surviving, then to the executors, administrators, or assigns of the assured. Held, that the policies, in accordance with the intention of the parties, must be construed, so far as related to the distribution of the assurance moneys, in accordance with the *lex loci solutionis*, the law of the place of domicile of the assured. Held also, that all the children of the assured took vested interests as tenants in common. (Crosland *v.* Wrigley.) 60, 327

LIVERPOOL COURT OF PASSAGE.

Practice—Summary judgment.—The judge of the Liverpool Court of Passage does not possess the powers conferred upon a judge of the High Court by Order XIV. of the Rules of the Supreme Court. (*Ex parte* Spelman.) 165

LOCAL GOVERNMENT.

Highway authority — District inclosure commissioners with jurisdiction over highways—District council—Transfer of authority—Repair of roads —Mode of raising expenses — Exemption from outside highway rates.—The expression "highway authority" in the Local Government Act 1894 is general, and has not the limited meaning given to the same expression in the Highways and Locomotives (Amendment) Act 1878. And highway expenses raised by an acre rate are not defrayed out of any property or funds other than rates within sect. 29 of the Local Government Act 1894. Commissioners of M. had under certain local and private Acts powers of inclosure and drainage, and jurisdiction over the roads in M., a district made up of parts of certain parishes, some of which were in rural and others in urban sanitary districts. Under these Acts the expenses of repairing the roads in M. were raised by an acre rate levied equally on the lands in M., and the lands in M. were exempted from all other highway expenses. The opinion of the court being asked, it was held, that the commissioners were a highway authority within the Local Government Act 1894; that their authority as to the roads in the rural district was by sect. 25 of that Act transferred to the rural district council, their authority as to the roads in the urban district to the urban district council; that the highway expenses of M., after the transfer, were not to be raised by an acre tax, but treated as general expenses under sect. 29 of the Act, and that the lands in M. were no longer exempted from general highway rates. (Marshland Smeeth and Fen District Commissioners *v.* Marshland District Council.) ...*page* 563

LONDON BUILDING ACT 1894.

Building structure or work—Contract entered into before passing of Act.—The exemption from the operation of the London Building Act 1894 contained in sect. 212 applies to contracts entered into before the passing of the Act, not merely for the erection of specific buildings, but also for the carrying out of a general scheme of buildings, the plans and details of which have not been yet agreed upon. (Tanner, app., *v.* Oldman, resp.) ... 404

LUNACY.

Bankruptcy — Adjudication after debtor found a lunatic—Property of bankrupt taken by trustee subject to powers of court in lunacy.—Where a person found lunatic by inquisition has been subsequently adjudicated a bankrupt, and a trustee in bankruptcy has been appointed, the trustee in bankruptcy can only take the bankrupt's property subject to the powers of the court in lunacy under the Lunacy Act 1890. And the court in the exercise of its discretion, having regard to the value of the lunatic's estate, will protect him by retaining such property notwithstanding the bankruptcy. Whether a lunatic can be validly adjudicated bankrupt, *quære.* (*Re* Farnham, a Lunatic.) 231

Lunatic resident in colony of Victoria—Property in England—Appointment of master in lunacy of Victoria guardian and receiver—Transfer of stock —"Vested."—B. had been found a lunatic in the colony of Victoria, where she resided, and the master in lunacy of that colony had been appointed guardian of her person and receiver of her estate, and the care, protection and management of her property had been remitted to him. By the Colonial Lunacy Act the master was empowered to take possession of and administer the estates of all lunatics, but the property was not vested in him, nor did the Act provide for the appointment of a committee. A petition was presented by the master, by his attorney in this country, for an order that English stocks belonging to the lunatic should be transferred and the dividends paid to him. Held, that sect 134 of the Lunacy Act 1890 gave the court a discretion, and that it was not confined to cases where the

personal estate of the lunatic had been "vested" in the strict technical sense in a person appointed for the management thereof; that the stocks had been vested in the master within the meaning of that section; and that the order ought to be made. (*Re* Brown, a Lunatic.) ... ...*page* 375

Person lawfully detained as a lunatic, though not so found by inquisition—Person appointed to exercise powers of committee of estate—Power of leasing.—The court has jurisdiction to authorise the person who has been appointed to exercise the powers of a committee of the estate of a person who is lawfully detained as a lunatic, though not so found by inquisition, to exercise on behalf of the lunatic the power of leasing vested in the lunatic as tenant for life under the Settled Land Act 1882. (*Re* Salt.) 598

Practice—Action in name of lunatic—Leave to bring—Jurisdiction of master in lunacy.—Under sect. 27, sub-sect. 1, of the Lunacy Act 1891 a master in lunacy has jurisdiction to authorise the committee of a lunatic to bring an action in the name of the lunatic, in respect of an alleged breach of trust by the trustees of a will under which the lunatic is a beneficiary, without any confirmation of his order by the judge in lunacy. (*Re* Emma Jane Hinchliffe.) 522

Settled land—Lunatic tenant for life—Sale of lunatic's estate—Conveyance "as beneficial owner"—Covenants on behalf of lunatic—Power of committee.—Under sect. 124 of the Lunacy Act 1890 the judge in lunacy has jurisdiction to authorise the committee of a lunatic, who is selling the lunatic's estate under an order of the judge, not only to execute a conveyance of the estate on behalf of the lunatic, but also to bind the lunatic by entering into all such covenants on his behalf as are usual and proper in such a conveyance, including the ordinary covenants for title. (*Re* Ray, a person of unsound mind.)... ... 723

MALICE.

Procuring discharge of servant.

(*See* MASTER AND SERVANT.)

MANDAMUS.

(*See* COUNTY COUNCIL.)

MANDATORY INJUNCTION.

Interlocutory application—Intended action—Notice—Evasion of service of writ.—On the 23rd May the plaintiffs wrote to the defendant objecting to a building which he was erecting as interfering with their ancient lights. On the 24th May the plaintiffs commenced an action to restrain the erection of the building. The defendant evaded service of the writ till the 28th May, when an order was made for substituted service, and the writ was then duly served. Between the 24th and the 28th May the defendant actively proceeded with the building, and completed the gable to its full height. Kekewich, J. granted an interlocutory mandatory injunction in respect of so much of the building as had been erected between the 24th and the 28th May. The defendant appealed. Held, that, although the defendant had not been served with the writ before the 28th May, he knew that an action would be brought and had evaded the process of the court; and that therefore the case came within the principle of *Daniel* v. *Ferguson* (1891) 2 Ch. 27, and the injunction was properly granted. (Van Joel *v.* Hornsey.) 372

MARGARINE ACT 1887.

Margarine—Sale by retail—In or with a paper wrapper.—The respondent sold margarine by retail in thin cardboard boxes with a ribbon of paper round each box to keep it closed. Over ribbon and box was stamped "margarine" in letters a quarter of an inch square. When the appellant bought a quantity of margarine the respondent delivered the box containing it to him wrapped up in an unstamped paper covering, but it was not clear whether the outside paper covering was put on at the request or not of the appellant. The magistrate dismissed a summons against the appellant for selling margarine not in or with a paper wrapper with "margarine" stamped on it contrary to sect. 6 of the Margarine Act 1887. Held, that the dismissal was right. (Toler, app., *v.* Bischop, resp.) ... ...*page* 403

Margarine—Using in refreshment-house—Exposed for sale—Margarine Act 1887.—The sale of margarine in a refreshment-house as a condiment with other food to be consumed on the premises is not a sale by retail within sect. 6 of the Margarine Act 1887 (50 & 51 Vict. c. 29). Respondents were proprietors of a refreshment-house, where bread with margarine spread upon it and haddock with a piece of margarine as a condiment to it, were sold to be consumed on the premises. No margarine was sold to be taken away. The large piece of margarine from which that used in the shop was taken was exposed to the view of customers, and so were the buttered slices of bread. On neither was there any label within sect. 6 of the Margarine Act. The appellant summoned the respondents for exposing margarine for sale by retail without a label contrary to the provisions of sect. 6. The magistrate dismissed the summons. Held, that the dismissal was right. (Moore, app., *v.* Pearce's Dining and Refreshment Rooms Limited, resps.) 400

MARRIED WOMAN.

Declaration of trust by deed acknowledged—Copyholds—Effect of declaration upon—"Disposition"—Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 77.—A declaration of trust by a married woman of copyholds of which she is tenant on the rolls by deed acknowledged under the Fines and Recoveries Act binds the copyholds in the hands of her customary heir. A married woman may create a trust of her non-separate copyholds by deed acknowledged under the Fines and Recoveries Act with the concurrence of her husband. A declaration of trust is a "disposition" within sect. 77 of the above Act. (Carter *v.* Carter.) ... 437

Interest in land—Reversionary interest in settled property invested on mortgage of real estate—Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 77.—By a settlement dated Oct. 31, 1855, certain real estate was conveyed to trustees upon trust for W. C. C. for life, and after his death upon trust for E. C., his wife, for life or widowhood, with remainders over, with power to the trustee to sell the property and invest the proceeds of sale upon mortgage of freehold, copyhold, and leasehold premises, but no power to invest in land was given. On the 21st July 1869 the trust property consisted, and still consisted, of 1100*l.* invested on mortgage securities. By a deed of that date W. C. C. and E. C. purported to assign to E. H. all their right and interest in the dividends, income, and produce arising from the trust fund, the deed being acknowledged by E. C. under the Fines and Recoveries Act 1833. Held, that the interest of E. C. in the trust fund was not an interest in land but in personalty, and the deed of the 21st July 1869 did not effectually pass such interest. (Miller *v.* Collins.)... 530

Judgment against married woman—Separate property—Restraint on anticipation—Equitable execution—Arrears of income due and payable at date of judgment.—A restraint on anticipation continues until the income of the separate estate has come into the hands of a married woman, and therefore such income which has become due and payable to, but has not been received by, a married woman at the date of a judgment against her, cannot be taken by any process of execution to satisfy such judgment. (Loftus *v.* Heriot.) 167

Reversionary interest in personalty—Deed acknowledged—Malins' Act (20 & 21 Vict. c. 57)—Change of reversionary interest—Date of creation.—By the will of Ann Skelton, who died in 1850, certain property was given to trustees upon trust to pay

MORTGAGE.

NEGLIGENCE.

night was dark but clear, that the engine carried a head light, that the engine driver began to whistle about ten seconds before the train passed over the crossing, and that the line was perfectly straight from the crossing for a distance of 750 yards. There was evidence also that it was the duty of the gatekeeper at the level crossing, who was in the service of the railway company, to stand by the line whenever a train passed by, whether by day or by night, and by means of signals to show to the engine driver whether the road was clear. There was also evidence that the deceased knew that that was the duty of the gatekeeper, and that he also knew that the habit of the gatekeeper was to perform that duty. On the night in question the deceased went into the gatekeeper's lodge, which stood by the level crossing, and spoke to the gatekeeper, who was sitting inside. The gatekeeper knew that a train was coming, but he did not warn the deceased, nor did he go outside, as it was his duty to do. The deceased was killed a few seconds after leaving the lodge. At the trial the jury found a verdict for the plaintiff. Held, that an application for a new trial must be refused. There was evidence upon which a jury might reasonably conclude that the deceased was misled by the gatekeeper's neglect of his duties into thinking as he left the lodge that no train was coming, and that he was justified therefore in paying no attention whether a train was coming, and was not guilty of want of reasonable care. (Smith *v.* The South-Eastern Railway Company.) ... ...*page* 614

NULLITY OF MARRIAGE.

Pressure exercised by mother of petitioner—Duress.—The petitioner, a girl of seventeen, went through a ceremony of marriage in church, by licence, in 1889. The respondent, some twelve or fifteen years her senior, had only met her a few times as a friend of her brother, and had never shown any affection for her, nor proposed marriage to her. On the day of the ceremony her mother took her for a drive. They alighted at the church, where they found the respondent, who told her she was to do as her mother bade her. Acting under her mother's influence, she went through the ceremony, which her mother told her was only a betrothal. She signed the register in a firm hand. She had never read the marriage service, nor seen a wedding. She threw away the wedding-ring outside the church, and never again saw the respondent, who left England the same day, in company with the petitioner's brother, upon whom, also, secrecy was enjoined by the mother, on his return, later in the same year, and to whom the respondent had, while in South Africa, communicated the fact of the marriage. In 1893 the petitioner married another man, and not long afterwards her father received a letter from the respondent, claiming her as his wife. The Court came to the conclusion that the petitioner was not a free agent, but that she went through the ceremony with the respondent under duress, exercised by her mother acting in concert with the respondent. The petitioner was therefore entitled to have the marriage annulled. (Clark, falsely called Stier, *v.* Stier.) 632

PARTNERSHIP.

Accounts—Concealed fraud—Investigation of partnership books—Reasonable diligence in discovery of fraud—Statute of Limitations (3 & 4 Will. 4, c. 27), s. 26.—A father and his two sons, A. and B., commenced, in 1856, to carry on business together in partnership, but under no articles of partnership. In 1870 A. married, and the partnership was continued under a fresh verbal agreement. The father having died in 1886, the sons continued to carry on the business in partnership under the same style until the death of A. in 1893. During the whole of that period there was never any settled account between the partners. A.'s widow and executrix claimed an account of the partnership dealings between A. and B. from 1886 to 1893. B. claimed that the account should be taken from 1870. A.'s widow set up the Statute of Limitations. B. proved that, between 1870 and 1886, A. had misappropriated the funds of the partnership under circumstances amounting to concealed fraud. Held, that the Statute of Limitations did not apply as between A. and B., the continuing partners; but that, even assuming that the statute applied as between existing partners, it was ousted by the doctrine of concealed fraud. Held also, that the fact that the fraud might have been discovered if the partnership books had been investigated was not an answer to the application of the doctrine in a case of this kind, unless the complaining partner wilfully shut his eyes, and did not choose to avail himself of the means of knowledge at hand. Held, therefore, that the account ought to be taken from 1870, or, if either party insisted, from 1856. (Betjemann *v.* Betjemann.)... ... ...*page* 2

Judgment debt of one partner—Charging order on interest in partnership property — Order for accounts of the partnership.—When the judgment creditor of a partner has obtained an order charging that partner's interest in the partnership property and profits with payment of the judgment debt, under sect. 23, sub-sect. 2, of the Partnership Act 1890, an order for accounts and inquiries, other than those to which an assignee of the share of a partner would be entitled, ought not to be made, under that section, except under special circumstances. (Brown, Janson, and Co. *v.* Hutchinson, No. 2.) 8

Retiring partner—Sale of goodwill—Competing business—Soliciting customers of old firm.—When the goodwill of a business is sold the vendor does not, by reason of that sale only, in the absence of any covenant, impose upon himself any obligation not to carry on a competing business. But, as the connection formed with customers constitutes the goodwill of a business, a man who has parted with the goodwill must not avail himself of his special knowledge of the old customers to attract them to his competing business. The appellants and the respondent carried on a business in partnership on the terms that, on the expiration of the partnership by effluxion of time, the goodwill of the business should belong to the appellants. Held (reversing the judgment of the court below), that the appellants were entitled to an injunction restraining the respondent from canvassing in any way by himself or his agents any person who had been, prior to the dissolution of the partnership, a customer of the firm, with a view of inducing such person to deal with him after such dissolution. (Trego and another *v.* Hunt.) 514

PATENTS, DESIGNS, AND TRADE MARKS.

Design—Copyright—Infringement.—The plaintiffs were the registered proprietors of two designs for upright hexagonal oil stoves, consisting of a church window of a particular style of architecture, with tracery above and below. The defendants sold similar stoves, and adopted the design of a church window of a different style of architecture, with tracery above and below, but the tracery was different in character. Held, that the defendants' design was an "obvious imitation" of the plaintiffs' design within the meaning of sect. 58 of the Patents, &c. Act 1883; that, although there were differences in details, yet in all essential features their designs were alike; and that in those essential features the plaintiffs' designs were dissimilar to all previous designs for oil stoves. The insertion of the words "pattern, shape, or configuration" in the application for the registration of a design, as required by rule 9 of the Designs Rules 1890, does not prevent the registration from being a registration of the design as a whole. A person who has registered a design is not deprived of his right to protection merely because he has, without fraudulent intent, put on articles that he sells registered numbers which ought not to be there. Where variations in a registered design are im-

PEDLAR.

PENALTIES.

PERPETUITIES.

POOR RATE.

PRACTICE.

SUBJECTS OF CASES.

SUBJECTS OF CASES.

SUBJECTS OF CASES.

PRINCIPAL AND SURETY.

PROBATE DUTY.

receiver and manager. On the 18th May the defendant excluded F. from possession of the premises. A receiving order founded on the act of bankruptcy of the 16th May was on the 16th June made against the defendant, and he was subsequently adjudicated bankrupt. Neither the plaintiffs nor F. ever gave the bankrupt's debtors notice of the mortgage. The receiver in the course of his management received book-debts due to the bankrupt at the commencement of the bankruptcy to the amount of 400*l*. Held, that the trustee in bankruptcy was entitled to the sum so received. (Rutter *v.* Everett.)... ... ...*page* 82

RIPARIAN OWNER.

Accretion—Owner of several fishery—Bed of river—Trespass—Adverse possession—Statute of Limitations.—A riparian owner on a non-tidal river is entitled to accretions to his land by reason of the gradual and almost insensible receding of the water, in a case where the actual river-bed belongs to a separate owner. In determining whether or no any particular piece of land forms part of the bed of a river, at any particular spot at any particular time, no hard and fast rule can be laid down, but regard must be had to all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, its growth, and its uses. (Hindson *v.* Ashby.) 468

SALE OF GOODS.

Goods left in possession of warehouseman—Charge by seller in favour of person in possession.—In Sept. 1893 A. hired from the defendants B. and Co. cellar room for 4500 dozen wine and deposited a large quantity of wine in their cellars. In Jan. 1894 A. sold to the plaintiffs 250 dozen of old port subject to an agreement that it should be left for a year in cellars to be provided by A. rent free. The plaintiffs were informed that the wine was in the cellars of B. and Co., but no delivery order was given to the plaintiffs, and no notice of the sale was given to B. and Co. The plaintiffs paid for the wine. By a letter dated the 31st May 1894, A. gave B. and Co. a lien on the wine in their cellars for 1500*l*. advanced by them, and by another letter dated the 7th Nov. 1894 he pledged the same wine as security for two bills accepted by B. and Co. for his accommodation and for any further bills they might so accept. A. became bankrupt in March 1895, there was then a balance due from him to B. and Co., charged upon the wine bought by the plaintiffs. The trustee in bankruptcy and B. and Co. put up this wine for sale by auction. The plaintiffs brought an action to restrain the sale. The defendants relied on sect. 25 of the Sale of Goods Act 1893. Held, that there was no delivery or transfer of the goods or documents of title to B. and Co. within the meaning of this section, and, as A. had no property in the wine at the date of his letters, B. and Co. obtained no charge, and the wine must be delivered to the plaintiffs, without prejudice, however, to the common law lien of B. and Co. for warehouse charges. (Nicholas *v.* Harper.) 19

Hire-and-purchase agreement—Possession of goods under—Sale by hirer—Conviction of hirer for larceny as bailee—Revesting of property in owner.—The judgment of the Queen's Bench Division (72 L. T. Rep. 110) reversed by consent in consequence of the decision of the House of Lords in *Helby* v. *Matthews* (72 L. T. Rep. 841). Payne *v.* Wilson.) 12

SETTLED LAND ACTS.

Capital money — Right of tenant for life to direct particular investment.—A tenant for life is entitled, under sub-sect. 2 of sect. 22 of the Settled Land Act 1882, to direct the particular investment in which capital money arising under the Act in the hands of the trustees shall be invested, and cannot be controlled by the trustees or by the court so long as he honestly exercises his discretion and the investment directed is one authorised by the settlement, and the trustees are bound to comply with the direction and are safe in doing so. (*Re* Lord Coleridge's Settlement.)*page* 206

Exercise of power of appointment—Whether a settlement under the Acts.—C. B. by will, dated the 19th Jan. 1865, gave real property to trustees upon trust to pay the rents thereof to his daughter M. C. for life for her separate use without power of anticipation, and after her decease to the use of her children or issue as she should by deed or will appoint, and in default of and subject to such appointment to the uses therein mentioned. The testator died in Dec. 1865. By her will of the 1st June 1881 M. C. appointed one moiety of the property to her daughter M. P. for life for her separate use without power of anticipation, and after her decease to such uses as she should by will appoint, and in default of and subject to such appointment for M. P., her heirs and assigns for ever, and the testatrix appointed the other moiety with similar limitations to her daughter E. P. After the death of M. C., M. P. and E. P., as tenants for life under the Settled Land Acts, contracted to sell the property, but an objection was taken to the title on the ground that it was doubtful whether the appointment by M. C. constituted a settlement within the meaning of those Acts. Held, by Stirling, J., that the married women could make a good title as tenants for life under sect. 58, sub-sect. (1) ix. and (2) of the Settled Land Act 1882. (*Re* Poocock and Prankerd and the Governors of Wisbech Grammar School.) 706

Married women entitled in fee restrained from anticipation — Settlement — Tenants for life.—Two married woman, each entitled under a will to an equitable estate in freeholds in fee simple for her separate use without power of anticipation, having contracted to sell the property, claimed to be able to convey the same as tenants for life, or persons having the powers of a tenant for life, under the Settled Land Acts, contending that, as their husbands, if surviving them, would be entitled after their deaths to an estate as tenants by the curtesy if they failed to dispose of the property by will (there being in each case issue born capable of inheriting), there was a settlement within the definition of that word in sect. 2, sub-sect. 1, of the Settled Land Act 1882. Held, that there was but one estate in the married women, and no limitations to the husbands by virtue of any settlement; that, if the husbands took estates as tenants by the curtesy, they would do so by the general law, and that the married women were not tenants for life, or persons having the powers of a tenant for life under the Settled Land Act. (Bates *v.* Kesterton.) 656

Sale by limited owner—Improvement rentcharge—Release of rentcharge—Exoneration of part of settled land—Consent of incumbrancers—Power of tenant for life.—The tenant for life of settled land, which was subject to an improvement rentcharge, created under the Improvement of Land Act 1864, agreed to sell, under the powers conferred upon him by the Settled Land Act 1882, a portion of the settled land free from incumbrances. The vendor and the incumbrancers undertook to execute a deed of exoneration of the charge under sect. 5 of the Act of 1882, but the purchasers required the consent of the Board of Agriculture (the successors of the Land Commissioners) as provided for by sects. 68 and 69 of the Act of 1864. Held, that there was nothing in sect. 5 of the Act of 1882 which was inconsistent with sect. 68 of the Act of 1864; that the objection of the purchasers had been fully met: and that a good title had been shown. (*Re* The Earl of Strafford and Maples.)... ... ... 440, 586

Settlement created by will and Act of Parliament—Tenant for life or persons having powers of tenants for life.—Under a will real estate which was directed to be purchased with the proceeds of personal estate was settled with a direction that the rents should be accumulated during the life

SOLICITOR.

(*See* ACTION—ATTACHMENT.)

SPECIFIC PERFORMANCE.

STAMP ACT 1891.

company, and was issued in England to a purchaser as security for money lent by him to the railway company. Some of the series had from time to time been dealt with on the London Stock Exchange. Held, that the instrument was not merely a promissory note, but was a "marketable security" within the Stamp Act 1891, and liable to stamp duty as such. (Brown, Shipley, and Co., apps., *v.* The Commissioners of Inland Revenue, resps.) ... ...*page* 377

STATUTE OF LIMITATIONS.

Covenant in settlement—Money charged on land—Devise in fee to tenant for life under settlement—Unity of possession—Presumption of payment of interest—Real Property Limitation Act 1874.—By an indenture of settlement A. covenanted with the trustees that his executors would, within twelve months after his death, pay to the trustees 4000*l.* and interest; and thereby charged the principal and interest on certain real estate. By his will A. specifically devised the same real estate in fee to the person who was tenant for life of the 4000*l.* under the settlement. In 1871 A. died, and the tenant for life under the settlement went into possession of the real estate as owner in fee, and no interest on the 4000*l.* was in fact paid to the trustees of the settlement. The real estate, which was primarily liable, having become insufficient to satisfy the charge, an originating summons was taken out, raising the question whether the trustees of the settlement were entitled to have the charge satisfied out of the personal estate so far as the real estate was insufficient. It was admitted that the Statute of Limitations (37 & 38 Vict. c. 57) had run in favour of the personal estate, unless the circumstance that the tenant for life under the settlement was in possession of the real estate as owner in fee had the effect of preventing the statute from running. Held, that the receipt of the rents and profits by the devisee in fee could not be regarded as a payment of interest such as would prevent the statute from running so as to bar the right of action on the covenant against the residuary personal estate, he being under no personal liability to pay the charge. (*Re* England; Steward *v.* England.) 237

STREET.

Meaning of—Carriage traffic—London Building Act 1894 (57 & 58 Vict. c. 213), s. 7.—The quadrangle of a block of mansions, having only one entrance from the public highway and that closed in by gates, and intended exclusively for the use of the residents in the mansions, is not a street within sect. 7 of the London Building Act 1894. (Carter Wood *v.* London County Council.) 313

TENANT FOR LIFE.

Remainderman—Capital — Income—Apportionment—Interest—Rate of.—A question arose in this case as to the rate of interest to be charged by the court in the Chancery Division where a fund was being apportioned between capital and income in accordance with the rule laid down in *Re The Earl of Chesterfield's Trusts* (49 L. T. Rep. 261; 24 Ch. Div. 643.) Held, that to fix 4 per cent. as the court rate of interest to be charged in such cases enured very greatly to the benefit of the tenant for life; 4 per cent. had been for generations regarded as the rate to be allowed by the court in the Chancery Division unless 5 per cent. was chargeable for special reasons; but, in view of the impossibility of ordinary prudent persons being able to obtain even 3 per cent. interest, the sum must be ascertained on the footing that 3 per cent. was the proper rate of interest instead of 4 per cent. as in *Re The Earl of Chesterfield's Trusts*; the time had arrived when 4 per cent. interest, except as a penal rate, ought not to be allowed. (*Re* Goodenough; Marland *v.* Williams.) 152

—— Capital—Income—Policy—Premiums—Mortgage—Interest—Apportionment.—A. at the time of his death was entitled to certain policies of assurance on the life of B., subject to a mortgage to the office on the policies for securing the repayment of a sum of money with interest at 4 per cent. per annum. By his will made Aug. 7, 1885, A. gave his real and personal estate to trustees in trust for sale and conversion, and to invest the proceeds and pay the income to certain persons for life, and then over. The testator died on the 20th June 1890. The will was proved by one executor. The executor did not sell the polices, but retained them, and paid the premiums on the policies and the interest on the mortgage out of the incoms of the estate until the death of B. in March 1895. The mortgage was paid off, and the balance of the policy moneys was in the hands of the executor. On summons: Held, that the yearly sums expended in keeping down the interest and premiums ought to be recouped to the tenants for life out of the moneys preserved by such expenditure, together with interest at 4 per cent., and the balance must be apportioned between capital and income on the principle laid down in *Re The Earl of Chesterfield's Trusts* (49 L. T. Rep. 261; 24 Ch. Div. 643). (*Re* Morley; Morley *v.* Haig.) ... ...*page* 151

TRADE PROTECTION SOCIETY.

Voluntary association — Member — Resignation — Withdrawal of resignation—Acceptance.—Under the rules of a voluntary trade protection society members, on election, were required to pay an annual subscription, in return for which they were entitled to certain benefits, but they incurred no further obligations beyond such payment. The rules contained no provision as to the retirement or expulsion of members. A member wrote to the committee resigning his membership, but before receiving any reply to his letter he wrote again withdrawing his previous resignation. The committee, however, insisted that he had ceased to be a member. Held, that the plaintiff, not being subject to any obligation to the society, was at liberty to resign his membership at any time, and that no acceptance of his resignation by the committee was necessary; but that he ceased to be a member from the date when his letter of resignation was received by the secretary; and that he could not become a member again without re-election. (Finch *v.* Oake.) 716

TRAMWAYS COMPANY.

Debenture-holders' action—Appointment of receiver and manager—Penalty for non-repair of tramway rails.—By an order made in a debenture-holders' action a receiver and manager was appointed of the undertaking, property, and business of a tramways company, which under the provisional order of the Board of Trade whereby it was formed, and sects. 28 and 56 of the Tramways Act 1870 was liable to penalties in case of neglect to keep in good repair the rails and tramways. Subsequently, at the instance of the county council for the county, an order was made by the Petty Sessional Divisional Court against the tramways company for the payment of a certain sum, the amount of penalties incurred by not keeping in good repair the rails of the tramways, such sum in default of payment to be levied by distress and sale of the company's goods. On the application of the county council for leave to distrain on the company's goods for payment of the sum notwithstanding the appointment of the receiver and manager: Held, that the order appointing the receiver and manager would not have been made since the decision of the Court of Appeal in *Marshall* v. *The Staffordshire Tramways Company* (72 L. T. Rep. 542; (1895) 2 Ch. 36); that the county council were not affected by it except that it prevented them from touching the property of the company without the leave of the court; and that the county council were entitled to the leave they asked for. (Pegge *v.* The Neath and District Tramways Company.) 25

SUBJECTS OF CASES.

TRUSTEE.

Administration — Trustee and beneficiary — Unauthorised investments by trustees—Loss resulting to trustee who was also beneficiary—Co-trustee not liable to make up any part of loss.—The two trustees of a will committed a breach of trust by investing trust moneys upon eight unauthorised mortgage securities for the purpose of giving the beneficiaries a higher rate of interest. After the date of the first four mortgage securities, one of the trustees became entitled, as legal personal representative of his wife who then died, to a beneficial interest in one-fifth of the trust estate so that, when the four remaining mortgage investments were made, he was both trustee and beneficiary. Legal proceedings were taken which resulted in the administration of the trust estate. The mortgaged properties were sold and realised less than the amount advanced upon them by the trustees, part of the loss being in respect of the four mortgages made prior to the date when the trustee became a beneficiary, but the greater part being in respect of the four mortgages made after that date. In consequence of that loss the trust moneys were insufficient, after providing for the shares of the other beneficiaries, to satisfy the claim of the trustee who had become beneficially entitled to one-fifth of the trust estate. Upon a summons by the trustee, who was also a beneficiary, asking that his co-trustee might be compelled to bear part of the loss which had been incurred: Held, that the trustee who afterwards became beneficially entitled to a share in the first estate, could not call upon his co-trustee to bear any part of the loss which he had sustained by reason of the breach of trust in which he had concurred. (Chillingworth *v.* Chambers.) ...*page* 208

Appointment of new trustees—Trustee "abroad"—Trustee also executor—Appointment by tenant for life of her own solicitor—Validity.—Although the practice of the court, upon an application under sect. 38 of the Settled Land Act 1882, or under its general jurisdiction, is to refuse to appoint, or to sanction the appointment of, the solicitor of the tenant for life as a trustee of a settlement under which he would become a trustee for the purposes of the Settled Land Acts, that practice does not prevent a tenant for life acting in the *bonâ fide* exercise of a power from so appointing. A settlement of real and personal estate contained a power to appoint new trustees, which became exercisable in case (*inter alia*) either of the trustees should "be abroad." A., one of the trustees, in consequence of his wife's ill-health, had taken a lease for five years of a house in Normandy, where he was residing. He had, however, with few exceptions, attended all the meetings of the trustees, and had been in constant correspondence with his co-trustees and the solicitors of the trust. Held, that A. was "abroad" within the meaning of the power. The mere fact that a trustee of a will is also one of the executors does not prevent his removal from being a trustee if there is no part of the testator's personal estate remaining in his hands unadministered. (*Re* Earl of Stamford; Payne *v.* Stamford.)... 559

Breach of trust—Improper investment—Constructive trustee—Solicitor.—By a settlement made in 1875 on the marriage of M. with H. R. certain securities were transferred to trustees upon trusts in favour of M. and H. R. and the children of the marriage. This action was commenced on the 7th Nov. 1890 by M., her two infant children, and A. R., and M. R., against H. B. and A. B., to make them liable as constructive trustees for losses which had resulted from the investments. The investments were not proper ones for trustees to make. The writ was issued more than six years after the date of the last mortgage complained of. Held, that from the date of the opening of the joint account in the names of J. and A. R. to the execution of the deed of May 1884, J. and A. R. were trustees of the settlement. Held also, that H. B. in all that he did acted in the capacity of solicitor to the trustees; that under the circumstances he could not be made liable as a constructive trustee; and that it was too late to make him liable for his negligence (if any) as solicitor. Held also, that it was not within the scope of the implied authority of a partner in a solicitor's business to constitute himself a constructive trustee so as to bind a partner and make him also liable as a constructive trustee although he was not aware of the dealings by which the constructive trust was established. Held, therefore, that neither of the defendants were liable; and the action must be dismissed with costs. (Mara *v.* Browne.) ... ...*page* 638

Breach of trust—Investment—Unauthorised—Liability.—Where trustees of a will had allowed certain mortgages to remain unrealised, and part of the money secured by such mortgages had been lost: Held, that sect. 4 of the Trustee Act 1893 Amendment Act 1894 had not a retrospective operation so as to exempt the trustees from liability for a breach of trust committed before the passing of the Act in retaining an investment unauthorised by the instrument or by the general law; therefore the trustees were jointly and severally liable to make good to the trust estate the deficiency on the mortgages. (*Re* Chapman; Cocks *v.* Chapman.) 658

Disclaimer — Property out of the jurisdiction — Partial disclaimer.—Where a trust estate consists of property in England, and also of property out of the jurisdiction of the court, a trustee, though resident abroad, cannot disclaim the trusts of the property in England only. (*Re* Lord and Fullerton's Contract.) 689

Power of appointing new trustees—Bankruptcy of trustee—Trustee "unfit to act"—Person nominated for the purpose of appointing new trustees by the instrument.—Under a marriage settlement made in 1864, the husband was given the power of appointing new trustees by deed in the event of any of the trustees of the settlement dying, desiring to be discharged from or refusing, declining, or becoming incapable to act in the execution of the trusts. One of the trustees became a bankrupt and absconded. The husband purported, in exercise of the powers given him by the settlement and under the Trustee Act 1893, to appoint a new trustee in his place. Held, that the settlement having specified the cases in which the power of appointing new trustees might be exercised and not having provided for the particular event of bankruptcy or unfitness, the husband was not the person nominated for the purpose of appointing new trustees by the instrument in that particular event within sect. 10 of the Trustee Act 1893; and that the appointment made by him was invalid. (*Re* Wheeler and De Rochow's Trusts.)... 661

Power of investment in such securities as trustees "shall think fit"—Honest exercise of discretion—Receipt of bribe or commission—Liability of trustees.—A testator gave his residue to trustees on trust to invest in such stocks, funds, and securities as they "shall think fit." The trustees invested a portion of the estate in debentures of a limited company. One of the trustees without the knowledge of the others who had since died, received a commission or bribe of 300*l.* for making the investment. Held that, as the surviving trustee could not have "honestly" thought fit to make the investment, having received a bribe, he was liable to make good any loss occasioned by the investment; but that the estate of the deceased trustee was not liable as he had made the investment honestly. In addition to making good any loss, the surviving trustee was also ordered to refund the bribe as money received when the investment was made on behalf of the trust estate. (*Re* Smith; Smith *v.* Thompson.) 604

UNDUE INFLUENCE.

Solicitor and client — Gift to solicitor's wife — Absence of independent advice.—The rule of law

which invalidates a gift to a solicitor unless the donor has previously had competent and independent advice in the matter, is absolute, and no evidence is admissible to rebut the presumption of undue influence which arises from the relationship of the two parties. The rule is equally applicable to a gift to a solicitor's wife, and the fact that she may be a relative of the donor is therefore immaterial. (Liles *v.* Terry and another.) *page* 429

VENDOR AND PURCHASER.

Incumbrances—Discharge of, on sale—Will—Construction—Future interests—Jurisdiction—Revocation by codicil of gift contained in will—Substitution of fresh gift.—Upon the sale of certain real estate a summons was taken out, under sect. 5 of the Conveyancing Act 1881, for leave to pay into court a sum of money in order to make provision for certain charges upon the property by the will of a deceased testator. Held, that the court could ascertain, upon the construction of the will, what was the amount of the charges upon the property, notwithstanding that it involved the determination of interests *in futuro*. A testator by his will gave to each of two of his granddaughters an annuity of 300*l*., and he directed the annuities to be raised and paid, after their respective deaths, amongst their respective children, as they should by deed or will appoint, and in default of appointment amongst the children equally. The testator charged the annuities upon certain real estate which he devised to his son. By a codicil to his will the testator revoked his gift of the annuities of 300*l*., and gave instead to his two granddaughters annuities of 150*l*. apiece, to be payable in the same manner and to be charged on the same property as the annuities of 300*l*. The testator, however, made no mention of the children of his granddaughters in the codicil. Held, that the effect of the codicil was to substitute an annuity of 150*l*. payable to each of the granddaughters, her appointees and children, for the annuity of 300*l*. given by the will. (*Re* Freme's Contract; Freme *v.* Hall.)... 367

Sale of public-house—Misrepresentation—Laches—Rescission.—When a purchaser discovers that a representation made to him by a vendor is untrue, if the vendor suggests that, if time be given him, the representation may be cured, and the purchaser put in as good a position as if the representation had been true; the purchaser, by giving the vendor time, does not lose his right to rely on the misrepresentation and determine the contract, if, at the end of the time, the vendor fails to make good his suggestion. (Tibbatts *v.* Boulter.)... 535

Specific performance — Conditional agreement — Waiver — Memorandum in writing — Statute of Frauds (29 Car. 2, c. 3).—Action by vendor for specific performance of the following agreement: "Subject to the preparation by my solicitor and completion of a formal contract, I am willing to sell to you the lease of 365, Camden-road, for a term of twenty-eight years, at a rent of 110*l*. per annum, you paying me 500*l*. premium for same, and also paying the cost of new lease, 100*l*. paid (and receipt hereby acknowledged) as conditional deposit, the balance to be paid 1st day of Jan. 1895, and possession on completion. Plants and conservatory flowers to be included in price named." Signed by the vendor and accepted by the purchaser. Held, that the condition was not for the benefit of the vendor only, and therefore he could not waive it; the condition being the essence of the contract, there was no memorandum in writing within the Statute of Frauds, and there must be judgment for the defendant. (Lloyd *v.* Nowell.)... 154

—— Condition of sale against raising objection—Defect in title—Covenant for title.—The defendant agreed to buy certain leasehold property from the plaintiff under conditions of sale which provided that the purchaser should be furnished with a copy of the lease and an assignment dated the 11th Aug. 1891, and the subsequent title and should not "make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the said assignment, notwithstanding any recital or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the said term." Objections were taken by the defendant in respect of certain facts which raised suspicion as to the title prior to the assignment, and in respect of defects in the covenants for title in the assignment of 1891, and otherwise. The Court of Appeal held (reversing the judgment of Kekewich, J.), that the defendant's objections as to the prior title were precluded by the conditions of sale, and that a good title was shown. Subsequently the defendant discovered that the title prior to the assignment of 1891 depended on a forged deed of gift, and on a conveyance from a trustee purporting to convey as absolute owner. He accordingly refused to complete the purchase, and the plaintiff brought an action for specific performance. The defendant counter-claimed that, notwithstanding the judgment of the Court of Appeal, it might be declared that a good title was not shown to the property, and for a return of the deposit paid. Held, that the defendant was not precluded by the conditions of sale from raising the objections now put forward; and that specific performance could not be enforced against him. But Held, that the defendant was not entitled to a return of the deposit money. (Scott *v.* Alvares.)... ... ...*page* 43

WATER.

Subterranean springs — Interference with flow of water—Injunction—*Mala fides*.—Where an act, apart from motive, gives rise merely to damages without legal injury, the motive, however reprehensible it may be, will not supply that element. (Corporation of Bradford *v.* Pickles.) 353

WILL.

Administration—Reversionary interest—Tenant for life and remainderman—Conversion—Rule in *Howe* v. *Earl of Dartmouth* (7 Ves. 137).—P., by his will dated 3rd Nov. 1876, gave all his property to trustees upon trust, after payment of his debts, funeral and testamentary expenses, and the expenses of executing the trust, to pay the income to his mother or permit her to receive the same during her life, and after her death to pay certain large legacies and pay the residue to a charity. There was no express direction to sell or convert. The will contained powers for the trustees to manage the estate, and if and when they thought fit to sell. The greater part of the testator's estate consisted of reversionary interests under settlements of personal estate of which his mother was tenant for life. The testator died on the 3rd Feb. 1880. His mother died on the 17th Oct. 1894. The reversionary interests fell into possession on her death. This was a summons taken out by her executors asking for the determination of the questions whether the reversion ought to have been sold at the testator's death, and whether the executors of the tenant for life were entitled to any payment out of the trust fund in respect of the income which she would have received if the reversions had been sold. Held, that the rule in *Howe* v. *Earl of Dartmouth* only applies where the testator has expressed no intention either way as to the time for the realisation of his estate; that in this case the discretion given to the trustees to sell if and when they thought fit was inconsistent with an intention that it should be sold at the testator's death, and therefore the rule did not apply, and the question must be answered in the negative. (*Re* Pitcairn; Brandreth *v.* Colvin.) ... 490

Advancement—Interest—Accumulation of income—Equal division of residue and accumulations—Option to take testator's business at a valuation—Advancement of part of share of residue.—By his will a testator, who died in 1883, gave his sons in

SUBJECTS OF CASES.

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granted, the Court sanctioned a scheme for that purpose, subject to the production of evidence showing that the ground rent to be derived from the building lease would not be less than the net rents of the property in its existing condition. (*Re* James; James *v.* Gregory.)... ... ...*page* 1

Gift for such members of a class as attain twenty-one—Intermediate income—Infants—Contingent interest—Maintenance.—A testator gave his residuary real and personal estate upon trust for all and every the present and future-born children of his son and two daughters, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares, and settled the shares of those born in his lifetime upon them for life, with remainder to their children. Some of the beneficiaries had attained twenty-one, and others were infants; and the class was capable of increase by the birth of other members. Held, on an originating summons taken out by the trustees of the will for the determination of the question who were entitled to the accumulated income of the estate, that it was divisible into as many shares as there were members of the class in existence, that one such share was payable to each adult member, and that the share of each infant member was applicable towards its maintenance under sect. 43 of the Conveyancing Act of 1881. (*Re* Jeffery; Arnold *v.* Burt.)... 332

Legacy—Misdescription—General or specific gift.—By his will, dated in Oct. 1894, a testator, who died in Dec. 1894, bequeathed to each of his two nephews "500*l.* debenture stock or shares" of the A. Company; and to each of his three cousins "350 ordinary shares," to M. "250 fully-paid shares," and to C. "50 shares," of the same company. He bequeathed "the pecuniary legacies following," a list being appended. He bequeathed to his trustees "5000*l.* debenture stock or shares" of the A. Company, "350 ordinary shares" of the same company, and "1500*l.* debenture stock or shares" of the B. Company, "upon trust to continue the same in their present state of investment," or to sell the same and invest the proceeds, and to stand possessed of the stocks and shares and the proceeds and the investments upon the trusts therein mentioned. He bequeathed his residuary estate upon trust for conversion and to "pay or provide for the payment of the pecuniary legacies and sums hereinbefore bequeathed." His trustees were empowered to postpone the conversion of his "debentures or shares" in the A. Company, or any other part of his personal estate. At the date of his will, and at his death, the testator held fully-paid shares and debentures of the A. Company; he also held debentures of the B. Company, but no shares. Neither company had issued debenture stock. Held, first, that the term "debenture stock or shares" as used by the testator was equivalent to debentures; secondly, that the trust legacy was obviously specific, having regard to the direction of the testator to allow the stocks and shares to continue in their present state of investment; and thirdly, that the other legacies of stocks and shares were also specific, having regard to the position of the gifts in the will, and to the sense in which the testator used the term "pecuniary legacies," and to the language of the residuary gift. (*Re* Nottage; Nottage *v.* Palmer, No. 1.)... 265

Married woman — Executor — Husband — Lapsed specific bequest—No residuary clause—Administration to husband refused.—Where a married woman dies leaving a duly executed will and appointing an executor, if the executor survive the testatrix, although no property pass under the will, the executor must take probate, and an application by the husband for administration must be refused. (In the Goods of Ann Dodsworth, deceased.) ... ...*page* 315

Probate—Asset consisting of right to sue here for value of property situated abroad.—A. G. T. died domiciled in England, and by his will bequeathed to F. L. T. one-fourth of his residuary estate, part of which consisted of money invested in New Zealand. Before this money had been realised and the residuary estate distributed, F. L. T. died. Held, that the right of F. L. T.'s executors to one-fourth of the property in New Zealand was not an asset in England, and therefore need not be included in the account of her estate for probate. (Attorney-General *v.* Lord Sudeley.) 256

—— Cessate grant—Special provision in will for chain of representation.—The testatrix, by her will, appointed two persons to be her executors and trustees, conferred upon the surviving trustee or trustees power to appoint new trustees, and directed that every trustee appointed under her will should, by force of his or her appointment to be such trustee, become and be an executor under her will. The persons named in the will renounced, and letters of administration with the will annexed were granted in 1852 to two persons, who died respectively in 1855 and 1870, without having administered the estate. In 1856 the Court of Chancery appointed as trustees of the will two other persons, one of whom died in 1869. The survivor of these two trustees died in 1884, leaving a will by which hr appointed his wife his sole executrix, and she, in Feb. 1895, under the Conveyancing and Law of Property Act 1881, appointed two persons to be trustees of the will of the testatrix. The Court held that these trustees became executors by force of the special clause in the said will, and granted probate thereof to them. (In the Goods of Catherine Octavia Shaw, deceased.)... 192

—— Due execution of will not denied on the pleadings—Will destroyed—Intention—Revocation—Onus of proof—Right to begin.—Where the plaintiffs claimed a decree of intestacy, and the due execution of a will propounded by the defendant was admitted by the plaintiffs in their reply, the only plea against the will being that it was duly revoked by the testatrix: Held, that the onus of proof lay on the plaintiffs, and that they must begin by opening their case. (Saqui and another *v.* Lazarus.).. 194

Undue execution—Attesting witnesses.—The Wills Act, which permits acknowledgment of his signature by a testator, allows no such latitude in the case of an attesting witness. Where the testator acknowledged his signature to his will in the presence of two attesting witnesses, and one of the latter, who had previously signed the will in the testator's presence, after seeing him sign before the arrival of the second witness, traced over his signature with a dry pen, and the second witness then attested the will, all three being present at the time: Held, that the will was not duly executed. (Horne *v.* Featherstone and others) 35

THE

LAW TIMES REPORTS:

COMPRISING

All the Cases Argued and Decided

IN THE

HOUSE OF LORDS, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, THE SUPREME COURT OF JUDICATURE, AND THE RAILWAY AND CANAL COMMISSION COURT.

FROM SEPTEMBER 1895 TO FEBRUARY 1896.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, May 30.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

Re JAMES; JAMES *v.* GREGORY. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Will — Devise of real estate — Trust for sale — Power of leasing — Building lease.

Where the terms of the power of leasing contained in a will were wide enough to include a building lease, and it appeared that the testator's real estate could be most advantageously realised by first putting it up to auction on the terms of granting a building lease to the highest bidder, and by subsequently selling the land and the buildings to be erected thereon subject to the proposed building lease when granted, the Court sanctioned a scheme for that purpose, subject to the production of evidence showing that the ground rent to be derived from the building lease would not be less than the net rents of the property in its existing condition.

Decision of North, J. reversed.

JOHN JAMES, who died on the 21st April 1850, by his will dated the 20th April 1850 devised all his real estates to trustees upon trust to permit his wife to receive the rents thereof during her life, and after her decease upon trust to sell the same "in such manner, at such times, for such prices, and subject to such conditions, whether special or not," as they should think proper, and the testator directed that the proceeds of sale should form part of his residuary personal estate; and he further directed that the income arising from his real estates until sold should after his wife's decease follow the trusts of the income of his residuary personal estate. And until sale of his real estates he empowered his trustees to let the same "either on lease or otherwise as they shall deem expedient, and upon such terms and conditions as they may consider most advisable." And the testator bequeathed his residuary personal estate upon trust for his children who should attain the age of twenty-one or marry under that age, in equal shares.

The testator had eight children, all of whom attained vested interests under the will, but some of the shares had been settled, and infants were interested therein.

The testator's widow died on the 8th Dec. 1891.

Part of the testator's estate consisted of old freehold houses in Austin Friars in the city of London, which still remained unsold. These houses were let on short tenancies which were about to expire.

The residuary legatees were advised that the most advantageous mode of realising the property in the city of London was by first putting it up to auction on the terms of granting a building lease to the highest bidder, and by subsequently selling the land and the buildings to be erected thereon subject to the proposed building lease when granted.

Accordingly an originating summons was taken out by the persons beneficially entitled to the residuary estate, against the trustees of the will, asking that the trustees might be at liberty to realise the property in the manner proposed.

On the 20th May 1895 the summons came on to be heard before North, J. sitting at chambers, but the learned judge refused the application.

From that decision the plaintiffs by leave now appealed.

Thomas T. Methold for the appellants.—It is desired to let this property on a building lease, but the difficulty is that the powers may be at an end because the settlement is at an end. The power of leasing is framed in terms wide enough to include the granting of a building lease. There is no authority exactly in point, but it has

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

been held that an indefinite period of leasing will authorise leases for any period however long:

Sheehy v. *Lord Muskerry*, 1 H. of L. Cas. 576;
Drohan v. *Drohan*, 1 Ball & Beat. 185;
Taylor v. *Mostyn*, 48 L. T. Rep. 715; 23 Ch. Div. 583;
Farwell on Powers, 2nd edit., p. 608.

The will also contemplates that there may be a postponement of the sale of the real estate beyond the death of the tenant for life, and it contains nothing which is opposed to the suggested method of realisation.

Henry T. Methold for the respondents, the trustees.

LINDLEY, L.J.—I think that we are all of opinion that the application may be granted, but an affidavit must be first produced to the registrar that the ground rent under the building lease will not be less than the rent now derived from the land with the buildings upon it. The reason why I come to this conclusion is that, according to the terms of the will, the testator contemplated letting as well as selling, and that there should first be a letting and then a sale. That would involve a sale of the reversion. Then the only difficulty is this: Does the power to lease include a building lease? The words are very wide, and I think that a building lease is within them.

LOPES, L.J.—I am of the same opinion. I have nothing to add.

KAY, L.J.—I am of the same opinion. I think that in this case the trustees were quite right to bring the matter before the court, because there is a serious question whether this proposed scheme is a proper exercise of the powers of the will. But it seems to me that, literally within the terms of the trust, they have power to let. [His Lordship read the provisions of the will, and continued:] Supposing that the trustees had granted a long lease in the lifetime of the wife. What they would have to sell would be the reversion on the expiration of that lease. It is true that there is no mention of building leases in the power, but when we look at the nature of the property, and see that it is in the heart of the city of London, it is reasonable to construe the terms of the power which are very wide as including a building lease. Then, when we come to the question of expediency, if it can be proved, as we are told it can, that this is the best way of selling the property, and that the building lease will fetch a ground rent which will be at least as great as, if not greater than, the rent of the old houses, the question of expediency seems to be in favour of the scheme which the trustees wish to carry out. On the whole, therefore, I think that we can sanction it; but the order must be made subject to the production of an affidavit showing that the ground rents will not be less than the net rents of the property at the present time. I think the order should be something like this: It must be prefaced by an expression of the opinion of the court, thus: It appearing to the court that the granting of a building lease is within the powers of the will of the testator, and that such lease will not occasion a diminution of income until the sale, and that a sale subject to such a lease will probably be the best mode of realising the property, the court sanctions the scheme, and so on.

Appeal allowed.

Solicitor for the appellants, *G. K. Abercrombie.*

Solicitors for the respondents, *Hanbury, Hutton*, and *Whitting.*

June 13 *and* 14.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

BETJEMANN *v.* BETJEMANN. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Partnership—Accounts—Concealed fraud—Investigation of partnership books—Reasonable diligence in discovery of fraud—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27) *s.* 26.

A father and his two sons, A. and B., commenced, in 1856, *to carry on business together in partnership, but under no articles of partnership. In* 1870 *A. married, and the partnership was continued under a fresh verbal agreement. The father having died in* 1886, *the sons continued to carry on the business in partnership under the same style until the death of A., in* 1893. *During the whole of that period there was never any settled account between the partners. A.'s widow and executrix claimed an account of the partnership dealings between A. and B. from* 1886 *to* 1893. *B. claimed that the account should be taken from* 1870. *A.'s widow set up the Statute of Limitations. B. proved that, between* 1870 *and* 1886, *A. had misappropriated the funds of the partnership under circumstances amounting to concealed fraud.*

Held, that the Statute of Limitations did not apply as between A. and B., the continuing partners; but that, even assuming that the statute applied as between existing partners, it was ousted by the doctrine of concealed fraud.

Held also, that the fact that the fraud might have been discovered if the partnership books had been investigated was not an answer to the application of the doctrine in a case of this kind, unless the complaining partner wilfully shut his eyes, and did not choose to avail himself of the means of knowledge at hand.

Held, therefore, that the account ought to be taken from 1870, *or, if either party insisted, from* 1856.

Rawlins *v.* Wickham (3 *De G. & J.* 304) *considered and applied.*

Dictum of Field, J., in Gibbs *v.* Guild (8 *Q. B. Div.* 296, *at p.* 305) *disapproved.*

Decision of Wright, J., sitting as an additional judge of the Chancery Division, reversed.

APPEAL by the defendant from a decision of Wright, J.

The facts of the case sufficiently appear from the head-note and judgments.

In April 1895 the action came on for trial before Wright, J.; and on the 3rd April the following judgment was delivered:

WRIGHT, J.—In this case a father and two sons carried on business in partnership for a number of years, and in 1886 the father died. On the happening of that event, if nothing else appeared, the necessary conclusion of law is that the partnership became dissolved by the death of the father. The sons, however, continued to carry on business as if nothing had happened, under the

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

same name and in the same way. In 1893 one of the sons died, and in this action his legal personal representative seeks the ordinary account in the partnership from 1886 downwards against the survivor, the defendant. The defendant does not resist that, but he seeks to carry the account back not merely to 1886 but to 1870 during the old partnership. The plaintiff's answer to that is the Statute of Limitations. Then the defendant claims to avoid the statute on two grounds. First of all, he alleges that in 1870 during the old partnership there was a verbal agreement between the father and the two sons that the partnership should continue notwithstanding the death of one of the partners. I decided yesterday that in my judgment that ground on which the defendant relies fails him. A conversation twenty-six years ago is very difficult to remember, and from the very form of the witness's answers I think that he was telling us in good faith not the words that passed but his construction of the words that passed. And the agreement which he set up was to my mind too vague and uncertain, and certainly not of the kind of which specific performance would have been ordered. Altogether I thought that case failed. Then the defendant's second answer to the Statute of Limitations (and this is the main point of the case) was, that the statute was prevented from running, by what is called "concealed fraud." Now, in order to establish a case of concealed fraud, the person who sets it up has three different things to make out. First of all he has to make out that there was fraud to start with in that which was done. I think that in this instance a strong enough case was made out that these moneys had been fraudulently misappropriated. I do not say that it was so, because I am not trying that question at present. If I had to decide it I should require further investigations to be made before I decided. But I do not hold that there was a strong enough case made out to satisfy what is requisite to establish the first of the elements, not in relation to the forgeries, because the suggested forgeries are to my mind sought to be established by evidence much too slight in a matter which took place so long ago, and now so difficult to investigate. But on the other point enough was made out. Secondly, the defendant has to make out a fraudulent concealment of the original fraud. There again I think he made enough out on that ground; without deciding definitely that it was fraudulent he made out a strong enough case. But then there is a third thing which the defendant in cases of concealed fraud has to make out, and that is, that the non-discovery of the fraud was caused by the concealment, and this requisite is not satisfied if notwithstanding the fraudulent concealment the fraud would have been discovered by ordinary and reasonable precaution and inquiry. It may be that I ought to put it even higher than that, according to the case of *Lawrence* v. *Lord Norreys* (62 L. T. Rep. 706; 15 App. Cas. 210). But at any rate that is enough. I think that the burden of satisfying that requisite is on the defendant. Now, most if not all of the cases of fraud which are alleged here must have been discovered if in the fourteen years from 1876 to 1888 or thereabouts the books had been kept and made up, or if the books had been compared with the ledger and the cheques with the counterfoils. Nothing of the kind was ever attempted till about two years ago. The business affairs of the firm were managed in an almost ludicrously unbusinesslike way. There was no book which showed the outgoings of the firm. The cash-book was imperfect for the very years that we are most considering, namely, from 1870 to 1886. No balances were ever struck. There was never any stocktaking. There were no entries of the drawings of the partners, and the account given to me was that the father took what he liked and the two brothers were to draw equally. There was no entry of what they did draw, and the way the father and one of the brothers drew was this: They made a guess as to what they wanted for wages every week and drew two cheques, one of £45 and one of £145. Out of those cheques they paid whatever wages were really wanted, and of what was left the father took the gold for his share, and one brother took the silver for his share. The other brother was left to draw what he liked without anybody inquiring what he did draw. There came two things which ought to have called attention specially to these matters. In 1883 the deceased brother drew a cheque on the firm account for 986*l.*, and paid that into his own bank. But when that cheque was presented at the firm's bankers, the firm's bankers refused to pay it, and inquired of the firm whether that was right. It was found that he had drawn this cheque without any authority whatever, and then the firm refused to pay it. Surely that is a matter which ought to have put the other members of the firm on inquiry. They were put on inquiry to an extent, that is to say, that they made some alteration in the mode of keeping their books and in the method of drawing on the firm account. But they made no investigation of any kind, nor did they establish any system of book-keeping. Then, in 1886, when the father died, it was necessary for them to certify, for purposes of probate, what the father's share in the interest of the partnership was. They made a guess at that in the same way as, during all those years, they made guesses for the purpose of the income tax. Surely they ought, on some of these occasions, to have ascertained how the firm's accounts stood. Under these circumstances I must hold that the defendant has not established the third element, and the non-discovery of the fraud was the consequence, not of the fraudulent concealment of the fraud, but either partly or wholly in consequence, I think, of the want of due diligence, precaution, and inquiry on the part of the other partners. Even if this were not so, I am doubtful whether, according to the decision of the House of Lords in *Lawrence* v. *Lord Norreys* (*ubi sup.*), the defendant has, upon his pleadings, made out sufficient specific cases of fraudulent concealment to satisfy what the law requires upon this very special matter. But it is not necessary, in my view, to decide that. Nor need I decide what, to my mind, would be a very much more difficult question. In cases of settled account I think one case of fraud, sufficiently established, reopens the whole account. But where there is not a settled account, and it is a question of the effect of concealed fraud upon the Statute of Limitations, I cannot at present see any principle on which the whole of the partnership accounts could be opened merely because one or two cases of concealed fraud were made out. I need not express any opinion on the point, but it would be very difficult to see any principle on which that

could be held. There must be judgment for the account of the new partnership—the later partnership—as asked. There will be judgment on the claim, and the counter-claim will be dismissed. But I do not think that it is a case in which there ought to be any costs in the action.

From that decision the defendant now appealed.

Sir *Henry James*, Q.C. (*Hopkinson*, Q.C. and *E. S. Ford* with him) for the appellant.—[He was stopped by the Court.]

Cozens-Hardy, Q.C. and *W. Fooks* (*Neville*, Q.C. with them) for the respondent.—The precise point arising in this case has been assumed rather than decided, but the case is somewhat similar to

Knox v. *Gye*, L. Rep. 5 E. & I. App. 656.

The only case that has raised the present point is

Gibbs v. *Guild*, 8 Q. B. Div. 296.

The principle upon which the court acts when dealing with concealed fraud was considered in

Lawrence v. *Lord Norreys*, 62 L. T. Rep. 706; 15 App. Cas. 210.

[LINDLEY, L.J. referred to *Blair* v. *Bromley* (2 Ph. 354.)] As to the opening of partnership settled accounts, see

Maund v. *Allies*, 5 Jur. 860.

Hopkinson, Q.C. in reply.—[LINDLEY, L.J.—I do not know of any case where this point has been decided.] There is one case somewhat similar to this:

Burdick v. *Garrick*, 22 L. T. Rep. 502; L. Rep. 5 Ch. App. 233, 453.

He referred also to

Lindley on Partnership, 6th edit., p. 511;
Moore v. *Knight*, 63 L. T. Rep. 831; (1891) 1 Ch. 547.

Cur. adv. vult.

June 14. — The following judgments were delivered:—

LINDLEY, L.J.—The question raised on this appeal is as to the time from which a partnership account is to be taken. The material facts are very short. It appears that a father and two sons commenced to carry on business in partnership in 1856. In 1870 one of the sons, John, married, and we are told there was some new arrangement come to at that time. In 1886 George, the father, died, and in 1893 one of the sons, John, died. An action has been brought by his legal personal representative against the surviving son, who is also an executor of the father George, for a partnership account, and the plaintiff has of course obtained the usual decree for an account of the partnership as from 1886 when the father died. The defendant does not resist that of course. But he says that the account ought to be taken from 1870, and if necessary even from 1856. The plaintiff objects to that, and the question really is, from what time this partnership account ought to be taken—whether it ought to be taken from 1886, when the father died, or from some earlier time—from 1870 or even 1856 if desired. Now the learned judge in the court below has directed the account from 1886, and he has dismissed without costs the counter-claim of the surviving partner for the account from an earlier time. The question on the appeal is whether the learned judge is right upon that. In my opinion he is wrong. There is no doubt that in 1886 when the father died there was a partnership of the three which determined—that is plain enough. One died, and, to use the expression of one of the witnesses, the other two sons went on as before *minus* one. That is quite true, and there is no doubt now, after the decision of the House of Lords in *Knox* v. *Gye* (*ubi sup.*), that the executors of the father, who had died, could set up the Statute of Limitations to an action for an account which was brought more than six years after his death. They do not do anything of the sort. The Statute of Limitations is set up by the plaintiff. But what is the plaintiff? The plaintiff is the executor of John. Although John and William, the two sons, of course continued the partnership, it was in point of law a different partnership, namely, a partnership between two. They continued the partnership account as one account and never broke it, and never wound it up. They brought in all the balances at the bankers, carried on the ledgers, and carried on the account without a break. Now, as between persons who deal with each other upon that footing, I fail to see that the Statute of Limitations has any application whatever. Notwithstanding, therefore, that the partnership was determined between the three, and that there was a new partnership between the two, there was no break in the account, and the account was never brought to an end. My view therefore is, that the learned judge in the court below misapplied the doctrine of *Knox* v. *Gye* (*ubi sup.*) in holding, as between these two brothers, who went on without a break, that the account could be treated as severed in 1886, and that there was a new cause of action arising then. Now, even if I am right in that view, it appears to me I confess that the learned judge is wrong upon the other point. The surviving partner then says, "Well, if the statute is an answer, this is a case of concealed fraud," and he proves unfortunately that John did commit frauds in the way which was explained yesterday, and which is not now disputed. The plaintiff's answer to that is, "Although John committed these frauds, you, the surviving partner, had every opportunity of discovering them, and under these circumstances this statute applies and the doctrine of concealed fraud is excluded." That appears to me, I confess, to be erroneous, and contrary to all the principles which the court of equity has been in the habit of applying as between partners. I say nothing regarding the law as between trustees and *cestuis que trust*, although I daresay that would be found to be based on similar principles. This doctrine of means of knowledge which is incorporated in terms in the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 26, is perfectly reasonable and perfectly applicable to cases of ejectment. If a man brings an ejectment action to recover property after twenty years lapse of time it is only reasonable to say, even in the case of concealed fraud, that the statute shall apply, if he has means of knowledge and has not used them. That is intelligible enough. But Field, J. in *Gibbs* v. *Guild* (*ubi sup.*) went a little too far when he said that the 26th section expressed the whole doctrine of equity applicable to concealed fraud. As between such persons as vendor and purchaser, where the maxim of *caveat emptor* applies, the

observations of the learned judge were not open to criticism that I know of. I am not aware that there is any difference between law and equity in a case of that kind. But the learned judge was not correct in applying it to partners. What right has a partner to say, "You had no right to trust me. You are bound to look at the books and see that I am not cheating you." Such a doctrine as that is unfounded. I am not expressing a view of the law for the first time, for the doctrine will be found very well put in the leading case of *Rawlins* v. *Wickham* (3 De G. & J. 304). There a partner had been induced to enter into a firm by fraudulent misrepresentations. He continued a partner for four years; he had access to the books, and he had means of knowledge and means of finding out that he had been induced by those fraudulent representations to become a partner. That circumstance was strongly relied upon as an answer to the bill, or suit in equity, brought by him to have the contract for partnership rescinded, and to be indemnified against the liabilities of the firm. How did Knight Bruce and Turner, L.JJ. deal with that? I will read the marginal note before I read the passage in the judgment. It is at the bottom of p. 304: "Where a person has been induced to enter into a contract by a material misrepresentation of the other party he is entitled to have the contract set aside, and not merely to have the representation made good. Held, that the lapse of time was no bar to the plaintiff; for that, although he had means of ascertaining the representation to be untrue, he was entitled as between him and the persons who made it to believe it to be true, and was not bound to make inquiry until there was something to raise suspicion." Knight Bruce, L J., who goes into this matter with great care, as does Turner, L.J., says (on p. 313): "If, therefore, Mr. Rawlins"—that is the plaintiff—"had discovered the misrepresentation earlier, there could not have been any doubt as to the result. The extraordinary circumstance is the duration of the partnership for four years, during the whole of which time Mr. Rawlins might have inspected the books; might at least in some sense have done so, for I am not satisfied that difficulties would not have been thrown in his way, or that Mr. Bailey would not have objected. He however did not examine them, and improbable as it may appear, I must hold that Mr. Rawlins entered into the partnership in complete ignorance of the contents of the books, and continued so for four years. Now, there are many purposes for which a gentleman, in the position of Mr. Rawlins, could not be heard to say that he did not know the contents of the books. As regards many persons it was his duty to know them; but was it his duty as between himself and Mr. Wickham and Mr. Bailey, who had brought him into partnership as they did? I think not. He was entitled to believe their representations to be accurate without looking at the books. He was entitled to continue in that belief until ground for suspicion arose or information was given him by one of the partners. No such information was given"—and so on. Turner, L.J. makes remarks to the same effect. It appears to me that that is the principle which is applicable to a case of this kind of means of knowledge unless suspicion is proved, and unless the person complaining not only has means of knowledge but does not choose to avail himself of that means. When his suspicion is aroused it is not *ad rem*. On that ground it appears to me that the defendant is right in his counter-claim. The result, therefore, is that the appeal must be allowed. Instead of the counter-claim being dismissed without costs, an account must be directed as from 1870, or logically, if the parties wish it, from 1856. I leave them to settle that. As to the costs, I take it that the costs of the counter-claim are rather material, and they ought to be the defendant's in any event, because the counter-claim included the case of fraud. That has incurred a great deal of expense, and as the defendant is right in that, as he has proved the fraud, he is entitled, I think, to the costs occasioned by the denial of that fraud. He is also entitled to the costs of the appeal. The costs of the partnership suit will be dealt with in the ordinary way, but the costs of the counter-claim and of the appeal ought to be the defendant's in any event.

LOPES, L.J.—I am of the same opinion, and I will not add anything further.

RIGBY, L.J.—I am also of the same opinion, and I should not think it necessary to add anything at all but for the respect I have for the judgment of the learned judge in the court below; and I will only state shortly the grounds—which are substantially those expressed by Lindley, L.J.—on which I think that this appeal should be allowed. First of all, there has been a continuous account from 1856, through 1870, down to 1886. There has been nothing approaching to a settled account. The account has been kept on from day to day. When the two sons formed their new partnership—for it is a new partnership—of course they did it on the terms that they would not interfere in the least; not even for a day was any alteration made. Each of the accounts with each of the customers, all the accounts of the old firm, were continued by the two sons who formed the new partnership. Under those circumstances I do not see that there is any ground whatever for applying the Statute of Limitations to this case. But, if you do apply the Statute of Limitations, it is a matter of essential importance to call to mind the doctrine of the court of equity in cases of concealed fraud. That there was concealed fraud here is abundantly plain. Apparently, if this partner had drawn out all these moneys in his own name it might have been discovered. In fact, when he did draw on anything like a large scale, it was discovered because, in that case, there was no concealment. The device adopted was such that, on examining the banker's pass-book with the cheques that were actually in their possession, I suppose they found them to correspond altogether. The very reason for drawing a cheque as if it were for a payment to a customer was to conceal the transaction from the partners. That concealment was effective, and, upon the evidence, it continued to be effective until a time well within that fixed by the Statute of Limitations. Now, that there were means of discovering the fraud there can be no doubt at all. I am not at all sure that the fraud would have been discovered by anything like a cursory inspection of the books. But clearly, if there had been anything like an audit, the fraud must have been discovered. Then the question is, whether the point arising here is involved in that case of

Gibbs v. *Guild* (*ubi sup.*), or whether it is shown to be the doctrine of the court of equity before the Judicature Acts, that concealed fraud only postpones the running of the statute in cases where there was no sufficient means of discovering it. Upon that point I can entertain no doubt. First of all, in *Gibbs* v. *Guild* (*ubi sup.*) the cases are gone very carefully through, and I will not attempt to repeat them, because I adopt all that is said by the Court of Appeal in that case. It appears that there are other cases also, such as *Booth* v. *Warrington*. The equitable doctrine came to this, that the statute did not run, or the law which the court of equity applied in these cases did not attribute laches or negligence until the discovery of the fraud. In none of them, so far as I recollect—I have not had time to look through the authorities in the way I should have thought it necessary to do if I had entertained myself any doubt about it—was it part of the defence that there were no reasonable means of knowledge. What is the duty of a man to inquire? To whom does he owe that duty? Certainly not to the person who has committed the concealed fraud. For a man in that position to say, "You ought to have inquired, and if you had inquired you would have found me out," is utterly opposed to every principle of equity. I consider that we are bound to take the law, so far as it is applicable to this case, from the Court of Appeal, and not from the judgment of Field, J. in the court below. The Court of Appeal place it entirely on what I have always understood to be the old law, that the time runs against you in the court of equity from the time when the concealed fraud has been discovered. I agree with what Lindley, L.J. has said about *Rawlins* v. *Wickham* (*ubi sup.*). It is a different case entirely, but it contains the principle on which I believe the court has always acted, and on which I think they ought to act. I agree that here, with care—with the usual care I may say—this fraud ought to have been discovered long before. But, as regards the person on whose behalf the claim is set up, it does not lie in his mouth to say, "I was fraudulent, but you ought to have found me out, and I will take advantage of the fact that you did not find me out." I agree with what Lindley, L.J. has said about the costs.

Appeal allowed.

Solicitors for appellant, *Beyfus* and *Beyfus*.
Solicitor for the respondent, *E. H. Goddard*.

May 22 and 23.

(Before Lord Esher, M.R., Smith and Rigby, L.JJ.)

Strachan *v.* The Universal Stock Exchange Limited. (*a*)

APPLICATION FOR A NEW TRIAL.

Gaming contract—Valuable things deposited as security for performance of contract—Right of depositor to recover—Gaming Act 1845 (8 *&* 9 *Vict. c.* 109), *s.* 18.

The Gaming Act 1845, *by sect.* 18, *provides that, "no suit shall be brought or maintained in any court of law or equity for recovering . . . any valuable thing . . . which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made."*

Held, not to apply to a deposit of valuable things by way of security for the performance of a gaming or wagering contract.

This was an application by the defendants for judgment or for a new trial, on appeal from the verdict and judgment at the trial before Cave, J. and a jury.

The plaintiff brought this action against the defendants for the return of certain securities deposited by him with the defendants, or their value. He had made a written contract with them, by which transactions in stocks and shares were to be carried out by them on his behalf. Subsequently he deposited with them the securities in question to secure the payment by him to them of any sums which might become due from him in respect of transactions carried out by them for him under the above contract.

Before the commencement of the action the plaintiff demanded the return of his securities. The defendants had not sold or realised or otherwise dealt with any part of the securities. There was due from the plaintiff to the defendants, in respect of transactions under the contract, a sum greater than the value of the securities.

At the trial the jury found that the contract was a contract by way of gaming or wagering, and Cave, J. gave judgment in favour of the plaintiff.

The defendants applied for judgment or for a new trial.

Lawson Walton, Q.C. and *Pollard* for the appellants.—The contract was not a gaming or wagering contract, and there was no evidence upon which the jury could find that it was. On this point they cited

Thacker v. *Hardy*, 39 L. T. Rep. 595; 4 Q. B. Div. 685;
Lowenfeld v. *Howat*, 19 Ct. of Sess. Cas. 128, 4th series;
Shaw v. *Caledonian Railway Company*, 17 Ct. of Sess. Cas. 466, 4th series.

Assuming that this was a gaming or wagering contract, these securities were a deposit to secure the payment of a wager, and the event happened upon which the wager became payable and the securities became appropriated to the payment of the wager. The plaintiff, who deposited the securities, cannot, therefore, recover them back; he is really asking the court to assist him to recover what he has lost by gaming. Sect. 18 of the Gaming Act 1845, provides that, "No suit shall be brought in any court of law or equity for recovering . . . any valuable thing . . . which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made." That provision applies to this case, and prevents the plaintiff from succeeding in this action:

Manning v. *Purcell*, 7 De G. M. & G. 55;
Varney v. *Hickman*, 5 C. B. 271.

[Smith, L.J. referred to *Hampden* v. *Walsh* (33 L. T. Rep. 852; 1 Q. B. Div. 189).]

Muir Mackenzie (with him *Bigham*, Q.C.) for the respondent.—It was competent for the jury to find that the written contract did not represent the real transaction between the parties, and there was evidence to support such a finding:

Hill v. *Fox*, 4 H. & N. 359.

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

These securities were not deposited "to abide the event upon which any wager shall have been made," within sect. 18 of the Gaming Act 1845. They were deposited by way of security only to secure the payment by the depositor of the amount of the wager if he lost. The securities were not to become the property of the winner, and, therefore, were not deposited "to abide the event." [Smith, L.J. referred to the judgment of Maule, J. in *Varney* v. *Hickman* (*ubi sup.*).] Further, in this case the depositor repudiated the gaming contract, and demanded back his securities, before the securities had in any way been dealt with by the depositor, and he can recover back his deposit as from a stakeholder.

Pollard replied.

Lord Esher, M.R.—In this action the plaintiff is suing to recover from the defendants certain securities which he had deposited with them. The plaintiff says that he placed the documents in the hands of the defendants as security for the performance of a contract which had been made between them, which was a void contract, and that he is therefore entitled to have his documents back again. The defendants answer that the securities were deposited as security for the performance of a contract, and upon the terms that, if there was a breach of that contract, they might realise the securities and pay themselves. The plaintiff replies that there never was such a contract, because the contract was a gambling contract, which was null and void. But for the provisions of the Gaming Act 1845 (8 & 9 Vict. c. 109) that reply could not be made. That statute, passed in order to put an end to gaming and wagering, says, in effect, that what is called a contract is not a contract at all; that it is "null and void." "Null" means that it is nothing; that it is not a contract, "Void" means that there is no contract at all. Therefore, that which is alleged to be a security to cover any breach of the contract is not applicable for that purpose, because there never was a contract. There could not be a breach of a contract which did not exist. The documents, therefore, which are in the hands of the defendants belong to the plaintiff, because there was no contract, and there is consequently no ground for refusing to give them back to the plaintiff. That is the real question in this case. The first question is whether the contract was a gaming or wagering contract. If it was not, then there was nothing to prevent there being a breach of that contract, and the defendants have a right to retain the securities. It has been argued that there was no evidence to go to the jury that this was a gaming or wagering contract; and that, if there was evidence, the judge misdirected the jury. The judge, indeed, expressed his own opinion; but that is not a misdirection, if the question of fact is left to the jury, unless it is expressed so strongly as to make the verdict of the jury unsatisfactory or wrong. In my opinion there was ample evidence to justify the finding of the jury, and I think that their finding was quite right. With reference to the Scotch cases which have been cited, they seem to say that, if one party swears that the written document contains the real contract between the parties, then the court cannot act. That is not the rule in this country. The jury may say whether they believe that the written document contains the real contract, or whether it is only a sham. Here the real contract was to pay differences only, and it was a gaming or wagering contract. Then the Gaming Act 1845 says that such a contract is null and void, and that "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won on any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." That being so, in this case securities were given by the one party to the other to meet any breach of contract. It is said that, such being the case, by reason of sect. 18 of the Gaming Act, the man who has deposited the securities cannot bring an action to recover them back. What would be the result of that contention? If that were so, the law would say that there was no debt due, but yet that the party had got securities and could keep them in order to pay himself. And, more than that, if the securities were worth 1000*l.*, and the damages only 5*l.*, the party could keep the whole of the securities. I am of opinion that these things which were given as security for nonpayment of damages, were not "deposited" within the meaning of sect. 18 of the Gaming Act 1845. That section applies only when the deposit is made upon the terms that, if the bet or wager is not paid, the whole deposit shall, *eo instanti*, become the property of the other party as soon as the wager is won. That is not the case here. Something else was to happen; upon breach of the contract, payment of any amount due was to be paid out of the securities deposited. That is sufficient to dispose of the question. I will, however, go further and say that, if such a deposit is within sect. 18, and the contract of deposit is annulled before the deposit is realised, the person who made the deposit can recover it back. In this case, therefore, even if the deposit was within sect. 18, the plaintiff by bringing this action put an end to the contract of deposit before the deposit was realised, and is entitled to recover back his securities. There is also another view of the case. If the defendants had realised the securities, I think that they could have been followed into the hands of any person to whom they had been transferred, if they were not negotiable securities taken without notice by a *bonâ fide* purchaser. I think, therefore, that this appeal must be dismissed.

Smith, L.J.—This action was brought by the plaintiff to recover certain shares which he had deposited with the defendants as "cover" in respect of transactions in stocks and shares to be carried on for him by the defendants. The action was tried before Cave, J. and a jury, and the question which was left to the jury was, substantially, whether the transactions were gaming transactions or not. The jury found that they were gaming transactions, and thereupon the learned judge gave judgment for the plaintiff for the return of the shares, or their value. The action is, in substance, an action for trover or detinue of the shares. The defendants refuse to return the shares, because they say there is a contract under which they are entitled to retain them. The plaintiff replies that that contract is a gaming or wagering contract, and that the defendants cannot, therefore, rely upon it. The first question, therefore, is whether there was any evidence for

the jury that the written contract was not the real contract between the parties. Was there any evidence upon which the jury could find that the contract was a gaming or wagering contract? There was clearly sufficient evidence to leave to the jury, and their finding, that this was all through a gaming or wagering transaction, was quite justified. The second point made by the defendants is that, even assuming that there was sufficient evidence that the contract was a gaming or wagering contract, the plaintiff cannot get a return of his shares, by reason of the provisions of the Gaming Act 1845 (8 & 9 Vict. c. 109). It is said that, although sect. 18 enacts that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void," yet the latter part of the section provides that "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," and that provision prevents this action being brought. In my opinion, it does not. I think that the true meaning of sect. 18 is that, where a person deposits something with a stakeholder to abide the result of a wager, the case is within the Act. But, in my opinion, a mere deposit by way of security is not within the section. More than that, it seems to me that, according to the rule which is, I think, accurately stated in Mr. Stutfield's book on the Law relating to Betting, the plaintiff is entitled to succeed. The rule is thus stated: "There is a long series of decisions to the effect that this provision only applies to actions brought by the winner of a wager, either against a stakeholder or against the loser to recover his winnings, and does not prevent either party from revoking the authority of the stakeholder before the money is paid over to the winner, and suing to recover his stakes." That is an accurate statement of the law, and is to be found in *Varney* v. *Hickman* (*ubi sup.*) and *Hampden* v. *Walsh* (*ubi sup.*). If these shares were deposited with the defendants as stakeholders, they have done nothing towards the realisation or disposal of them. and therefore they cannot now keep them. For both these reasons I am of opinion that the appeal fails, and must be dismissed.

RIGBY, L.J. — Two questions arise upon this appeal. The first question is, whether the contract in this case was a contract by way of gaming or wagering, or not. This is a totally different case from *Thacker* v. *Hardy* (*ubi sup.*), where every transaction was a real transaction carried out on the Stock Exchange. Here everything was upon paper only, and throughout there were no actual sales or purchases carried into effect. Then there is the question whether the plaintiff can recover back his securities. Treating this case independently of the Gaming Act 1845 (8 & 9 Vict. c. 109), the proposition is quite simple. Here is a person who is, so to speak, a mortgagee. For what has he got his mortgage? He has it in respect of gaming or wagering transactions, and therefore he holds his mortgage as security for nothing at all. It is obvious, therefore, from the nature of the transaction, that nothing could be due upon the mortgage, and that the mortgagee must deliver up the mortgaged property. But it is said that the provisions of sect. 18 of the Gaming Act 1845 prevent that from being so. Now, sect. 18 contains—first, an avoidance of all contracts by way of wagering or gaming; they are made null and void; all else follows from that. Then the latter part of sect. 18 provides that, "No suit shall be brought or maintained in any court of law or equity for recovering any . . . valuable thing which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made." The words "to abide the event" mean that the property deposited is to become the absolute property of the winner when the wager is won; the section provides that the winner cannot recover his winnings from the other party, or any stake which has been deposited. There is sufficient authority for that construction of the statute, and I should have come to the same conclusion independently of any authority. Was this property deposited "to abide the event," and to become the absolute property of the winner, according to the meaning of sect. 18? It is plain that it was not, and that the case is not within sect. 18. The simple result, therefore, is that there is nothing due upon the security, and it must be given up. The plaintiff is entitled to recover back his securities, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Last* and *Sons*.
Solicitor for the respondent, *T. Allingham*.

May 11 *and* 27.

(Before LOPES and RIGBY, L.JJ.)

BROWN, JANSON, AND CO. *v.* HUTCHINSON. (No. 2.) (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Partnership—Judgment debt of one partner—Charging order on interest in partnership property—Order for accounts of the partnership—Partnership Act 1890 (53 *&* 54 *Vict. c.* 39), *ss.* 23, 31.

When the judgment creditor of a partner has obtained an order charging that partner's interest in the partnership property and profits with payment of the judgment debt, under sect. 23, *sub-sect.* 2, *of the Partnership Act* 1890, *an order for accounts and inquiries, other than those to which an assignee of the share of a partner would be entitled, ought not to be made, under that section, except under special circumstances.*

THIS was an appeal by the defendants Hutchinson and Co. from an order made by Day, J. at chambers.

The plaintiffs brought an action against the firm of Hutchinson and Co., and against J. A. Hutchinson, a member of the firm, upon a bill of exchange for 3000*l.* drawn by J. A. Hutchinson upon the firm, and accepted by him for the firm. The plaintiffs obtained judgment, under Order XIV., against J. A. Hutchinson, but the firm obtained unconditional leave to defend.

The plaintiffs then applied by summons, under sect. 23 of the Partnership Act 1890, for an order charging the interest of J. A. Hutchinson in the partnership business with the amount of the

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

judgment debt, and for the appointment of a receiver of his partnership interest. This order was made at chambers, and affirmed by the Court of Appeal (72 L. T. Rep. 437).

Subsequently, on the application of the plaintiffs, the judge at chambers made an order directing the firm to deliver to the plaintiffs within one month, or such extended time as might be allowed by the judge, an account of the share of profits of the defendant J. A. Hutchinson in the partnership of the defendants Hutchinson and Co., whether already declared or accruing to him in respect of the said partnership, and of any other money which might be accruing to him in respect of the said partnership, and that the defendants Hutchinson and Co. should forthwith pay the profits and money found to be due to the receiver appointed.

The Partnership Act 1890 (53 & 54 Vict. c. 39) provides:

Sect. 23.—(1.) After the commencement of this Act, a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2.) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a County Court may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

Sect. 31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Sect. 33.—(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffer his share of the partnership property to be charged under this Act for his separate debt.

The defendants, Hutchinson and Co., appealed.

McCall, Q.C. and *H. Tindal Atkinson* for the appellants.—The judge had no power to make such an order under sect. 23, sub-sect. 2, of the Partnership Act 1890. Under that section, a judgment creditor of a partner may obtain a charging order upon the partner's interest in the partnership property, and the appointment of a receiver, and an order for accounts and inquiries. He can, however, obtain an order only for such accounts and inquiries as an assignee of the partner would be entitled to. Now, sect. 31, sub-sect. 1, provides that an assignee of a partner's share in the partnership is not entitled, during the continuance of the partnership, to interfere in the management of the business, or to require any accounts of partnership transactions, or to inspect the books, but is only entitled to the assigning partner's share of the profits, and is bound by the account of profits agreed to by the partners. The effect of that is, that a judgment creditor cannot obtain any order for accounts or inquiries respecting the partnership business while it is being carried on. In Lindley on Partnership, p. 364 (6th edit.), it is stated that: "As neither an assignee nor a mortgagee of a partner's share has any right, during the continuance of the partnership, to require any account of the partnership transactions, it is conceived that a judgment creditor, who has obtained a charging order under the above section of the Partnership Act, will not, during the continuance of the partnership, be entitled to any such account, except perhaps where, by agreement between the partners, a partner may give this right to his assignee."

Witt, Q.C. and *Bartley Denniss* for the respondents.—By sect. 23, sub-sect. 2, the right of the judgment creditor to accounts is not merely the same right as that of an assignee of the share of a partner, for the words at the end of sub-sect. 2 "or which the circumstances of the case may require" give the court a wide discretion. No effect will be given to those words if the contention of the appellants is adopted. The appointment of a receiver will be of no value if accounts are not ordered. In *Brown, Janson, and Co.* v. *Hutchinson and Co.* (72 L. L. Rep. 437; (1895) 1 Q. B. 737) Lindley, L.J. seems to have thought there was power to make such an order. The other partners can, if they choose, dissolve the partnership when the share of one partner is charged for a judgment debt (sect. 33, sub-sect. 2). They cited

Whetham v. *Davey*, 53 L. T. Rep. 501; 30 Ch. Div. 574; and

Redmayne v. *Forster*, L. Rep. 2 Eq. 467.

McCall, Q.C. replied, and cited

Irwell v. *Eden*, 56 L. T. Rep. 620; 18 Q. B. Div. 588.

Cur. adv. vult.

May 26.—Lopes, L.J.—In this case the facts are as follows: The plaintiffs brought an action against J. A. Hutchinson and the firm of Hutchinson and Co., of which J. A. Hutchinson was a member, upon a bill of exchange for 3000*l.* drawn by J. A. Hutchinson upon, and accepted by, the firm, and they obtained judgment against J. A. Hutchinson, under Order XIV., for 3034*l.*, leave being granted to the firm to defend the action. The plaintiffs then applied by summons, under sect. 23 of the Partnership Act 1890, for an order charging the interest of J. A. Hutchinson in the partnership business with the amount of the judgment debt, and for the appointment of a receiver of his said partnership interest. This order was made, and was affirmed, on appeal, by the Court of Appeal. Subsequently the learned judge at chambers ordered the defendants, A. Hutchinson and Co., to deliver to the plaintiffs an account of the share of profits of the defendant J. A. Hutchinson in the partnership of the defendants A. Hutchinson and Co. This is the order appealed against. It is said there was no jurisdiction to

make this order. The question depends on the latter part of sub-sect. 2 of sect. 23 of the Partnership Act 1890. The object of this section is to get rid of the cumbrous and inconvenient mode by which partnership property was taken in execution for a partner's separate debt. A *fi. fa.* founded on a judgment against one partner can no longer be executed against the goods of the firm, but, as in the case of public companies, a separate judgment creditor of a partner can obtain an order charging his interest in the partnership assets with the payment of the judgment debt, and the charge can be enforced by a sale or the appointment of a receiver. At the end of sub-sect. 2 are these words: "The court may . . . direct all accounts and inquiries, and give all other orders and directions, which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require." Having regard to the words "or which the circumstances of the case may require," I am of opinion that there is a jurisdiction to direct accounts; a jurisdiction to be exercised at the discretion of the judge, but a jurisdiction which ought never to be exercised except in special circumstances, as, for instance, with a view to a dissolution rendered necessary either by the conduct of the partners or at their request. I find no such special circumstances in this case. The appeal must be allowed.

Rigby, L.J.—I am of the same opinion. It is sect. 23, sub-sect. 2, of the Partnership Act 1890, which most directly deals with the question before us. It is there provided that the court may "direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor, by the partner, or which the circumstances of the case may require." Comparing that section with sect. 31, which deals with the rights of an assignee of the share of a partner, it appears that an assignee is not entitled to interfere with the management of the business or to require any accounts of the partnership transactions or to inspect the books, but that he must accept the account of profits agreed to by the partners. I think, therefore, that it is plain that, in sect. 23 the Legislature intended that the analogy of an assignment of his share by one partner should be adhered to in ordinary cases. By sect. 33, sub-sect. 2, of the Act, when, as in this case, one partner has suffered his share to be charged the other partners may treat it as a cause for dissolution. That is so in the case of an English partnership, at any rate; though it does not sufficiently appear in this case whether this is an English or a foreign partnership. If that be so, and if we have to look at the remedies of an assignee, or of a person to whom a charge has been given, when we come to the general words at the end of sect. 23, sub-sect. 2, we must treat the earlier part of the sub-section as being, *primâ facie*, the general rule. As a general rule, a judgment creditor of a partner must be treated in the same way as the assignee of the share of a partner. Then, with regard to the general words at the end of the sub-section, I think that it was recognised by those general words, that the rule with regard to an assignee might not always give a just rule with respect to a judgment creditor, and that they were meant to give the court a wide discretion, though, in general, it was to follow as far as possible the analogy of an assignee. The general rule, contained in the earlier part of sub-sect. 2 of sect. 23, was put in to instruct the court what it ought to do in ordinary cases; and then the general words at the end were added in order to give the court a wide discretion to order accounts beyond those to which an assignee would be entitled. In the present case I cannot find any circumstances to take the case out of the general rule given by sect. 23. If accounts are to be ordered in this case they ought to be ordered as a matter of course in every case. That cannot be the intention of the Act. The appeal, therefore, must be allowed.

Appeal allowed.

Solicitor for the appellants, *H. Montague.*

Solicitors for the respondents, *Hays, Schmettau,* and *Ancrum.*

Monday, May 27.

(Before Lord Esher, M.R., Smith and Rigby, L.JJ.)

Norton *v.* Gregory. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Action—Order of Probate Division to pay costs—Action in Queen's Bench Division to recover such costs—Rules of the Supreme Court, Order XLII., r. 24.

In an action in the Probate Division an order was made by the registrar that proceedings should be discontinued, and that the defendant should pay the plaintiff's taxed costs. The costs were taxed, and an order was made by the President of the Probate Division that the defendant should pay to the plaintiff 127*l.*, *the amount of the taxed costs. The plaintiff sued the defendant, in the Queen's Bench Division, upon a specially indorsed writ, to recover that sum of* 127*l.*, *and obtained leave to sign final judgment under Order XIV.*

Held (*dismissing the appeal*), *that an action could be brought in the Queen's Bench Division, upon the order of the Probate Division, and that leave to sign final judgment under Order XIV. was properly given.*

This was an appeal by the defendant from an order of Pollock, B. at chambers, for final judgment under Order XIV.

The action was brought, upon a specially indorsed writ, to recover the sum of 127*l.* due from the defendant to the plaintiff upon an order of the President of the Probate Division for payment of costs.

An action had been brought in the Probate Division by the present plaintiff against the present defendant, and on the 17th Nov. 1894 an order was made by the registrar, as follows:—"Upon hearing the solicitors for all parties, and on the application of the solicitor for defendants, I do order that the contentious proceedings in this action arising from *caveat* No. 31, entered on the 30th Jan. 1894, and also from writ of summons issued on the 6th March 1894 be discontinued, and that probate of the will dated the 13th Jan. 1894 of Elizabeth Babb Pitt, the deceased herein, be granted to the plaintiff in this

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

action if entitled thereto, the defendant to pay the plaintiff's taxed costs."

The costs were taxed, and on the 27th Feb. 1895 an order was made by Sir Francis Jeune, President of the Probate Division, as follows: "I do order that Charles Gregory the defendant do, within seven days from the service of this order, pay to Ann Hellings Norton, the plaintiff, or to Messrs. Church, Rendell, Todd, and Co., her solicitors, the sum of 127*l.*, being the amount of the plaintiff's costs, as taxed and certified by one of the registrars of this division, together with 15*s.* 2*d.*, the costs of this order, making a total sum of 127*l.* 15*s.* 2*d.*"

The plaintiff applied for judgment under Order XIV., and the defendant contended that an action could not be brought upon the order of the Probate Division.

The Rules of the Supreme Court, Order XLII., rule 24, provide:

> Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect.

The plaintiff obtained leave to sign final judgment, and the defendant appealed.

Willes Chitty for the appellant.—The question is, whether an action can be brought in the Queen's Bench Division to recover a sum of money, due upon an order of the Probate Division for the payment of costs, which order can be enforced by ordinary process of execution in the Probate Division. In *Re Boyd; Ex parte McDermott* (72 L. T. Rep. 348; (1895) 1 Q. B. 611) it was held that a judgment, obtained in an action upon an interlocutory order of the Court of Appeal for the payment of costs, was a final judgment upon which a bankruptcy notice could be issued. In that case, judgment was obtained in default of appearance, and the question was not argued or raised whether such an action could be brought. It has been held that an action cannot be brought upon an order of the Probate Division for payment of alimony:

> *Bailey* v. *Bailey*, 50 L. T. Rep. 722; L. Rep. 13 Q. B. Div. 855.

Order XLII., r. 24, does not apply to an order of this kind, so as to enable an action to be brought upon it in the Queen's Bench Division. An action is not a mode in which an order of the Probate Division can be enforced. He referred to

> *Phillpott* v. *Lehain*, 35 L. T. Rep. 855.

Pollard, for the respondent, was not called upon to argue.

Lord Esher, M.R.—The only question which arises upon this appeal is whether the learned judge at chambers was right in giving the plaintiff leave to sign judgment against the defendant under Order XIV. The action was brought by the plaintiff against the defendant, founded upon an order of the Probate Division for the payment of a sum of 127*l.* for costs. An order was made in the Probate Division that the defendant should pay that sum to the plaintiff for costs. The plaintiff has brought this action in order to obtain a judgment upon that order. The question is whether such an action will lie? If it will, then the plaintiff is right and there is no defence to the action. It was held in the Common Pleas Division that such an action would lie, in *Philpott Lehain* (35 L. T. Rep. 855). In that case I said that "It is not necessary to decide whether there could be a counter-claim where there could not be an action, for in my opinion, since the Judicature Acts, claims such as these can be enforced by action. If so, they come within Order XIV., r. 3, because they are within Order XLII., r. 20, by which 'every order of the court or a judge whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.' If, therefore, these orders are in the position of judgments, how can they be enforced? The passage which has been cited from Gray on Costs shows that a judgment may be enforced by action, subject to the penalty, imposed by statute on the plaintiff, of getting no costs if successful; but still judgment might be obtained. Therefore, under certain circumstances, there might be a certain action, and if this were an action on the judgment, what would it be brought for? It is only one means of enforcing the judgment." The question now is, whether this case is not within the provisions of Order XLII., r. 24, by which "every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." This is an order for the payment of money. Some orders, indeed, are enforceable by attachment, upon which perhaps no action can be brought. But this order is an order for the payment of money, within rule 24. I think that it has been held by the Court of Appeal, in *Re Boyd*; *Ex parte McDermott* (*ubi sup.*), that a judgment can be obtained upon such an order. There was, therefore, no defence to this action, and leave to sign final judgment was properly given by the judge at chambers. The appeal fails, and must be dismissed.

Smith, L.J.—The question is, whether an action can be brought upon this order of the Probate Division. If it can, then it is clear that the provisions of Order XIV. can be applied. I desire to point out that it is not an order like the order in *Dent* v. *Basham* (9 Ex. 469), where it was held that an action would not lie for disobedience of a judge's order for the delivery by an attorney to his client of his bill of costs. That principle was followed in *Hookpayton* v. *Bussell* (10 Ex. 24), where it was held that an undertaking contained in a judge's order though made by consent, could not be enforced by action, but only by attachment. Then there is rule 24 of Order XLII., which says that "every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." What is the effect of the order of the Probate Division? It is a final adjudication on the merits, as to the payment of costs. It is, therefore, in the nature of a judgment, and without doubt an action can be brought upon it. The order of Pollock, B. at chambers, was right, and the appeal must be dismissed.

Rigby, L.J.—I am of the same opinion. In this case there was an order of the Probate Division as to the payment of costs. Then there was a second order to pay the sum of 127*l.* in respect of such costs, which was, to all intents, a final order. That order is clearly within rule 24

of Order XLII. That is sufficient to settle the matter. Further, an order of this kind falls within the general principle, and creates a duty which can be enforced by action. As to the dictum of Lord Campbell, in *Berkeley* v. *Elderkin* (1 E. & B. 805), it is applicable to the facts of that case, because the order in that case might be varied from time to time. The same observation applies to the case of *Bailey* v. *Bailey* (*ubi sup.*), for an order for alimony is subject to special rules and principles of the Probate Division. So also there was no right to sue at common law upon a decree of a court of equity. With regard to this case I should have thought, independently of the provisions of Order XLII., r. 24, that there was a right to sue upon the order, and the case is clearly within rule 24. The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *C. Jupp.*

Solicitors for the respondent, *Church, Rendell,* and *Todd.*

Friday, June 21.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Payne *v.* Wilson. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Sale of goods—Hire-and-purchase agreement—Possession of goods under—Sale by hirer—Conviction of hirer for larceny as bailee—Revesting of property in owner—Factors Act 1889 (52 *&* 53 *Vict. c.* 45), *s.* 9—*Sale of Goods Act* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 24.

The judgment of the Queen's Bench Division (72 *L. T. Rep.* 110) *reversed by consent in consequence of the decision of the House of Lords in* Helby *v.* Matthews (72 *L. T. Rep.* 841).

Appeal of the plaintiff against the judgment of the Divisional Court (Pollock B. and Grantham, J.) affirming the judgment of the County Court judge (72 L. T. Rep. 110).

The hirer of goods from the plaintiff, under a hire-purchase agreement in the same form as that in *Helby* v. *Matthews* (70 L. T. Rep. 837; (1894) 2 Q. B. 262), sold the goods to the defendant. On the prosecution of the plaintiff, the hirer was convicted of larceny as a bailee.

The plaintiff sued the defendant for conversion of the goods, and relied upon sect. 24 of the Factors Act 1889 (52 & 53 Vict. c. 45). The learned County Court judge gave judgment for the defendant, and his judgment was affirmed by the Queen's Bench Division (Pollock, B. and Grantham, J.).

The plaintiff appealed, with leave.

Before the appeal came on to be heard, the House of Lords had reversed the decision of the Court of Appeal in *Helby* v. *Matthews* (72 L. T. Rep. 841). When the appeal came on to be heard, counsel for the respondent intimated that, in consequence of the decision of the House of Lords, he could not dispute the right of the appellant to succeed on this appeal.

A. W. Groser for the appellant.

Jelf, Q.C. and *Herbert Smith* for the respondent.

Appeal allowed.

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

Solicitor for the appellant, *H. E. Tudor.*

Solicitors for the respondents, *Proudfoot* and *Chaplin.*

Monday, July 8.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Montgomery *v.* Foy, Morgan, and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Parties—Adding defendant—Deposit of cargo by master of ship with warehouseman—Action against consignees for sale—Declaration of lien—Claim by shipper for shortage—Addition of shipper as defendant—Order XVI., r. 11.

Order XVI., r. 11, *provides that the court may add as defendant in an action any party "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."*

Cargo was deposited by a shipowner with a warehouseman under sect. 493 *of the Merchant Shipping Act* 1894. *Subsequently the consignee for sale, acting for the shipper of the goods, received delivery from the warehouseman on depositing the freight with him. The shipowner brought an action against the consignee for sale, asking for a declaration of lien.*

Held, that the court had jurisdiction to add the shipper as a defendant in this action to enable him to counter-claim against the shipowner for breach of the contract of affreightment.

This was an appeal from an order of Mathew, J. at chambers, by which he directed that the British Saw Mills Company should be added as defendants in the action.

The British Saw Mills Company shipped a cargo of deals on board the plaintiff's ship for carriage from British Columbia to London.

On the arrival of the ship at London there was no one to take delivery of the cargo, and the master of the ship, acting under the provisions of sects. 493 and 494 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), landed the goods and placed them in the custody of the Surrey Commercial Dock Company, giving them at the same time notice in writing that the goods were to remain subject to a lien for freight.

The defendants, Messrs. Foy, Morgan, and Co., were agents, and consignees for sale as regards this cargo, for the British Saw Mills Company, and they received delivery of the goods from the dock company upon depositing with that company the sum of 276*l.* 9*s.* 7*d.*, being the amount claimed by the plaintiff for freight.

Thereupon the plaintiff, in accordance with the recent decision of the House of Lords in *White and Co.* v. *Furness, Withy, and Co.* (72 L. T. Rep. 157; (1895) A. C. 40) brought this action against Messrs. Foy, Morgan, and Co., claiming a declaration of lien on the sum of 276*l.* 9*s.* 7*d.* deposited by the defendants in the hands of the dock company, and an order that the said amount be paid over to him.

The British Saw Mills Company had a claim to make against the plaintiff in respect of short delivery and damage to the goods, and under these circumstance an application was made to

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

Mathew, J., that he should add them as defendants in the action, under Order XVI., r. 11, so that they might be enabled to counter-claim in the action in respect of their claim against the plaintiff.

Mathew, J. made the order asked for.

Order XVI., r. 11, provides that a court or judge may, at any stage of the proceedings, either upon or without the application of either party, order that the names of any parties, whether plaintiffs or defendants, "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

The plaintiff appealed.

H. F. Boyd for the plaintiff.—The learned judge had no jurisdiction to make the order which is now appealed against. The plaintiff cannot be forced to sue persons whom he does not want to sue:

Norris v. *Beazley*, 35 L. T. Rep. 845; 2 C. P. Div. 80.

This case is not within the words of Order XVI., r. 11. The "cause or matter" is the freight. Order XVI., r. 11, contemplates a cause of action by the plaintiff against the added defendant. The last paragraph of the rule, providing that the defendant shall be served with a writ of summons, shows that this is so. The British Saw Mills Company are not directly interested in the issue between the plaintiff and the defendants, but only indirectly, and the court has therefore no jurisdiction to add them as defendants:

Moser v. *Marsden*, 66 L. T. Rep. 570; (1892) 1 Ch. 487.

The word "involved" in rule 11 means necessarily arising from the issues that have been raised in the action.

Leck, for the defendants, was not called upon.

Lord ESHER, M.R.—In this case there has been only one contract, namely, the contract of affreightment contained in the bill of lading given by the plaintiff for the carriage of the goods of the British Saw Mills Company. That company was the shipper of the goods, and was the person who must eventually pay the freight. Now the defendants became liable to pay the freight as the company's consignee for sale, but, under the circumstances that have happened here, they cannot be sued for the freight. That has been so held by the House of Lords in the case of *White and Co.* v. *Furness, Withy, and Co.* (*ubi sup.*). They are only liable by reason of the captain's lien for it. When goods have been placed by the captain in the custody of a warehouseman under sect. 493 of the Merchant Shipping Act 1894, the only means that the shipowner has of obtaining his freight is by an action claiming a declaration of lien. If he succeeds in getting a declaration, he also gets an order that the warehouseman shall pay out to him the money deposited when the goods were taken away by the holder of the bill of lading. Now it is impossible that there can be a set-off against a claim for a declaration. Neither can the defendants here counter-claim in respect of anything which would have to be supported by proof of their ownership of the goods. A consignee for sale in such a case as the present can have no defence at all to the action, and the dock company will be compelled to pay over to the plaintiff the whole of the freight deposited with them. Now the Saw Mills Company must eventually be the payers of the freight, and they will have an action against the plaintiff for short delivery or damage to the cargo, if any. If these two actions, viz., the present one and the action by the shippers against the shipowner for damage to the cargo or short delivery, were tried, one immediately after the other, the court might well say that the two sums, if each party were successful in his action, should be set-off one against the other. The question now is, has the court jurisdiction, for the purpose of saving the cost of bringing two separate actions, to make an order that both the disputes be settled together in one action, with one writ, and one trial? Is it not possible, under the Judicature Act and the rules of the Supreme Court, to avoid the waste of time and money and argument that would result if two separate actions were brought and tried, by putting in the shippers, the British Saw Mills Company, as defendants in the present action? They would not be put in as co-defendants with the present defendants because they have, as the Judicature Act assumes that they may have, a different relation to the plaintiff from that which the present defendants have. Order XVI., r. 11, provides that the court may order that any parties may be added as defendants "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions"—not all the "issues"—"involved in the cause or matter." Here there is one matter, *i.e.*, one contract of affreightment under one bill of lading. All the disputes between the plaintiff and the defendants and the shippers arise out of, and concern, that one contract of affreightment. I know of no case that decides that in the present case one of the great objects of the Judicature Act cannot be carried into effect. The disputes can all be determined before one judge, under one writ, and at one trial, saving much expense and reiteration of argument. The words of the rule that I have read are quite large enough to give the court power to make the order that Mathew, J. has made, because the questions that will arise are all "questions involved" in the cause or matter. The plaintiff has a right to the freight, but that right is subject to a claim in respect of damage from an alleged breach of the contract of affreightment. If we affirm the order that has been made, and all the disputes are adjudicated on at one trial, there will be judgment for the plaintiff upon his claim as regards the original defendants, and judgment perhaps for the shippers on their counter-claim for breach of contract. Then when the judge is asked to make an order against the dock company for payment to the plaintiff of the money deposited with them, he may order them to pay over to the plaintiff, not the whole of that sum, but the difference between the amount of the freight and the sum adjudged to the British Saw Mills Company in respect of their counter-claim for short delivery or damage to the goods. The case comes within the words of the Judicature Act and the rules of court, and it is not governed at all by any of the cases cited in order to show that the judge had no jurisdiction to make the order appealed against. As to the case of *Norris* v. *Beazley* (*ubi sup.*), it is a

case decided soon after the passing of the Judicature Act, at an early stage of the discussions that have arisen as to its interpretation. In some of their expressions of opinion, I think that the court went too far, and at the present time those opinions should not all be followed. I think that this appeal must be dismissed.

KAY, L.J.—I agree, but I wish to guard myself against being thought to have held the opinion that every person who may be added as a defendant in an action under Order XVI. is thereby entitled to set up a counter-claim against the plaintiff. The facts of this case are, that when the ship arrived in London the captain deposited the goods with the Surrey Commercial Dock Company, under the provisions of the Merchant Shipping Act 1894. The goods were consigned for purposes of sale to certain agents of the shippers, and these agents deposited with the dock company a certain sum to cover freight, so that they might be enabled to take the goods away. The shipowner has now brought an action against the consignees for sale, claiming a declaration of lien on the sum deposited with the dock company, and an order that that sum shall be paid over to him. The question now is, whether the shippers of the goods, the British Saw Mills Company, can be added as defendants in that action. Now the amount payable as freight must eventually come out of the pockets of the shippers, but the plaintiff objects to having them added as defendants in the action which he has brought against their consignees for sale, because he fears that they will then set up a counter-claim against him. Now, what is the law as to adding defendants to an action? Order XVI., r. 11, provides that the court may add all persons as parties to an action "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." It is argued on behalf of the plaintiff that the question which will be raised by the shippers' counter-claim as to short delivery and damages to the goods is not a "question involved in the cause or matter." Now the amount of freight due to the plaintiff is certainly a question involved in his action. Supposing he had brought an action for freight against the shippers, then they would have a claim which would diminish the amount of freight due. This seems to me to show clearly that the amount of freight to which the plaintiff is entitled is a question involved in this action. I agree that a counter-claim is not quite the same thing as a set-off. But supposing that, when an action for a declaration of lien is pending, the shipper of the goods brought an action against the shipowner for short delivery, could not the court make an order that both the actions should be tried together, and refuse to give judgment in one action before the other one had been decided? The object of that would be merely to decide what was the actual amount of freight due to the shipowner. The defendants in the present action are only consignees for sale, and are not the persons who are ultimately liable for the freight. The shippers are ultimately liable, and they clearly have a cross-action against the shipowner. Why should not the court allow them to set up their cross-action in the present action, and hear all the disputes together? If in this action the question is the amount of freight due to the plaintiff, and the cross-claim by the shippers would diminish that amount, then the case comes within the provisions of Order XVI., r. 11, and Mathew, J. had jurisdiction to make the order appealed against, so that all questions involved in the consideration of the amount of freight due shall be tried in this action. The appeal must therefore be dismissed.

SMITH, L.J.—I agree. The plaintiff, a shipowner, brought to London a cargo of deals, shipped by the British Saw Mills Company. That company is liable to pay freight to the plaintiff. The defendants were the company's consignees for sale. They were not ready to accept delivery of the cargo when the ship arrived at London, and the captain, acting under the provisions of the Merchant Shipping Act 1894, deposited the cargo with the Surrey Commercial Dock Company. In order to get the goods from the dock company the defendants deposited with them the full amount of freight claimed by the shipowner, so that the money remained in the hands of the dock company in the place of the goods. Now the real parties who are interested in the payment of the freight are the plaintiff and the British Saw Mills Company, because the money deposited with the dock company was deposited by the agents of the Saw Mills Company, and must therefore eventually come out of their pockets. Now the plaintiff, the shipowner, has brought an action for a declaration of lien against the consignees for sale. The only object of that action is to obtain an order that the dock company shall pay out to him the money deposited with them by the British Saw Mills Company's agents for sale. An order has been made that the British Saw Mills Company shall be added as defendants in this action. The plaintiff has appealed against that order upon the ground that the judge had no jurisdiction to make it. If the order stands good, the British Saw Mills Company will counter-claim against the plaintiff in respect of an alleged short delivery and damage to the goods. What would happen supposing we reversed the order? The shippers would bring an action against the present plaintiff, and when his action came on for trial the judge would be informed that there was a substantial dispute between the plaintiff and shippers as to damage done to the cargo. Then an application would be made that both the actions might be tried together, or else that no order for payment over of the deposited money be made in the first action until the questions arising in the second action were decided. I think that in this case the order adding the shippers was rightly made. The whole dispute arises out of one contract of affreightment, and the real questions involved are not between the plaintiff and the original defendants, but between the plaintiff and the shippers of the goods as to the amount of freight to be paid for their carriage. It is not denied that 276*l.* is the amount due in respect of the freight alone, but the shippers have a claim against the owners in respect of damage done to the cargo, which would lessen the exact amount of freight due. The shippers must pay that amount when it has been settled. I agree that the order of my brother Mathew was right, and this appeal fails.

Appeal dismissed.

Solicitors for the plaintiff, *W. A. Crump* and *Son*.

Solicitors for the defendants, *Lowless* and *Co.*

Wednesday, July 10.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Robb *v.* Green. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Master and servant—Contract of service—Implied term—Faithful service—Surreptitious copying of master's books—Use of information obtained during service.

In the absence of any stipulation to the contrary, there is implied in a contract of service a term that the servant shall act with good faith towards his master.

The defendant entered into the service of the plaintiff as manager of the plaintiff's business. As manager he had access to the plaintiff's books, and he surreptitiously copied therefrom a list of the names and addresses of the persons dealing with the plaintiff, with the view of using the list for his own benefit, and to the detriment of the plaintiff after leaving his service. The defendant set up a business of his own and used the list he had copied from the plaintiff's books.

Held, that the defendant had committed a breach of his implied contract to act with good faith towards the plaintiff.

Judgment of Hawkins. J. (reported 72 L. T. Rep. 686) affirmed.

This was an appeal from the judgment of Hawkins, J. at the trial of the action without a jury.

The facts are fully set out in the report of the case (72 L. T. Rep. 686), but for the purposes of this report they may be shortly stated as follows:

The plaintiff was a dealer in live game and eggs, and in 1890 he engaged the defendant at a yearly salary as manager of a game farm. The contract of service was contained in three letters, in none of which was any reference made as to the names of the plaintiff's customers, nor about keeping their names secret or confidential. The defendant, as manager of the plaintiff's farm, had access to the books of the business, and he surreptitiously, without the knowledge of anyone, copied from these books a list of names and addresses of the plaintiff's customers and their keepers. In 1893 the defendant quitted the plaintiff's service, and set up a business of his own as a dealer in live game and eggs. He then used for the purposes of his business the list of names he had copied from the plaintiff's books.

At the trial of the action without a jury Hawkins, J. held that there was involved in the contract of service an implied obligation on the servant to serve his master honestly and faithfully. He therefore gave judgment for the plaintiff for 150*l.* damages in respect of the defendant's breach of his implied contract, ordered the defendant to deliver up to the plaintiff to be destroyed the list of names and addresses taken from the plaintiff's books, and he further granted an injunction restraining the defendant from making use of the information obtained by him by copying and extracting such names and addresses.

From this judgment the defendant appealed.

J. W. M'Carthy for the defendant.—The contract of service in this case is a written one. The defendant has broken no term contained in that written contract. No additional term can be implied in it:

Pearson v. *Pearson*, 51 L. T. Rep. 311; 27 Ch. Div. 145;

Irish v. *Irish*, 60 L. T. Rep. 224; 40 Ch. Div. 49;

Reuter's Telegram Company v. *Byron*, 43 L. J. 661, Ch.;

Trego v. *Hunt*, 72 L. T. Rep. 269; (1895) 1 Ch. 462.

The defendant has done nothing more than what was done by the defendant in

Nichol v. *Martyn*, 2 Esp. 732.

[Kay, L.J.—The defendant here has acted surreptitiously in copying out of the plaintiff's books. Is there not a distinction between copying out a thing, and carrying away a thing in one's head?] The distinction is too insignificant to act upon. The mere copying out of the names did not hinder the defendant from doing everything which he had actually promised to do for his master. If any term as to serving faithfully can be implied in the contract, it expired as soon as the contract of service expired. Here the ground of the action is really something done by the defendant since he left the service of the plaintiff.

R. M. Bray (with *Murphy*, Q.C.) for the plaintiff.—The judgments of Bowen, L.J., in two cases, show that in every contract of service there is an implied term that the servant shall act with good faith towards his master:

Helmore v. *Smith*, 56 L. T. Rep. 535; 35 Ch. Div. 449;

Lamb v. *Evans*, 68 L. T. Rep. 131; (1893) 1 Ch. 218.

It cannot be seriously contended that the defendant has acted with good faith towards the plaintiff. The defendant cannot use unfairly against the plaintiff any information acquired while in the plaintiff's service:

Louis v. *Smellie*, noted 99 L. T. 283.

[He was stopped.]

Lord Esher, M.R.—In this case the defendant had been a servant of the plaintiff, and had had access to an order-book of the plaintiff, which contained a long list of the names of his customers with their addresses. Then the defendant, whilst in the plaintiff's service, took a copy of that list surreptitiously, that is to say, at times when he thought he would not be observed, and he took the copy, not for the purpose of using it for the advantage of the master he was serving, but for the purpose of keeping it, unknown to his master, and using it after he had left his master's service. His object in making and using the copy of the list of customers was to induce them to give up dealing with the plaintiff and to get them as customers of his own. What view should be taken of that act of the defendant with regard to the plaintiff, done while he was in the plaintiff's service? Would not any person of ordinary honesty say that it was a dishonest act by a servant towards his master? Was it not a dereliction by the defendant of his duty to act with good faith to the plaintiff? It seems to me that Hawkins, J. was right in holding that the

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

defendant had committed a breach of the trust reposed in him as a servant of the plaintiff, because he had no right to copy things out of the business books belonging to the plaintiff for the purpose of using his copy against his master after leaving his service. It is impossible not to say it was a wrong thing to do and a breach of trust. But we must also decide whether it was a breach of contract. There was a contract in writing made between the plaintiff and defendant for the service of the plaintiff by the defendant, but there is nothing in the writing to show that a term that the servant shall act in good faith towards his master cannot be implied. Can the court imply such a term and add it to the contract? In my opinion a stipulation to that effect is to be implied in every contract of service where there ought to be such faithful service. That stipulation must have been in the minds of both parties when making the contract of service. A master would not take a servant into his employ if the servant refused to agree to act honestly, and a servant must know that his master, who is going to engage him, relies on the faithful performance by him of the duties arising out of the confidential relations between them. This stipulation must have been in the minds of both the plaintiff and the defendant when they entered into the contract of service, and it is therefore a part of that contract. Bowen, L.J., in *Helmore* v. *Smith* (*ubi sup.*) and in *Lamb* v. *Evans* (*ubi sup.*), was clearly of the same opinion. He says in the latter case: "The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile. Now, a contract of service is a transaction of confidence, and trust, and if a stipulation of faithful performance cannot be implied, the contract would be futile." The rule laid down by Bowen, L.J. seems to me to be an exceedingly good one, and the circumstances of the employment, that is to say, of the formation of the relations of master and servant made this stipulation a term in the contract. In certain matters a servant is always in a confidential position as regards his master. Hawkins, J. was therefore right in holding that the defendant has committed a breach of his contract with the plaintiff, and in awarding damages to the plaintiff. There was a breach of confidence, and a breach of contract which produced damage to the plaintiff. Besides the damages the plaintiff is also entitled to an injunction restraining the defendant from further breaches of his contract. Whether the form of the injunction which has been granted is right or not, it is unnecessary to say now. That is a question which will be decided should it hereafter become necessary to make any application to the court for the purpose of enforcing the injunction. The appeal must be dismissed.

KAY, L.J.—The defendant is here appealing against the three parts of the judgment of Hawkins, J., namely, against the judgment for 150*l.* damages, against the order for the delivery up of the list copied out by the defendant, and against the injunction restraining him from making use of the list. The learned judge found as a fact that the defendant whilst in the plaintiff's service surreptitiously copied out of the plaintiff's books a list of customers dealing with the plaintiff with their addresses, and that he did this intending to use it, after leaving the plaintiff's service, in a rival business which he was going to set up so that he might try to draw these customers from the plaintiff and get them himself. The judge has held that that was done surreptitiously and in breach of the defendant's duty towards the plaintiff. Now the granting of an injunction upon the ground of a breach of the confidential relations existing between the plaintiff and the defendant is a very old method of relief. The facts in *Yovatt* v. *Winyard* (1 Jac. & W. 394), which was decided in 1820, were as follows: The plaintiff, who was the proprietor of certain veterinary medicines, employed the defendant as a journeyman under an agreement according to which he was to be instructed in the general knowledge of the business, but was not to be taught the mode of composing the medicines. After the defendant had left the plaintiff's service it was discovered by the plaintiff that the defendant, while in his service, had surreptitiously got access to his books of recipes and copied them, and had afterwards begun to sell the medicines. Lord Eldon granted an injunction restraining the defendant from using the recipes, upon the ground of there having been a breach of trust and confidence. The ground upon which, in these matters, the court has granted an injunction is thus given by Turner, V.C., in *Morison* v. *Moat* (9 Hare, 241). He says: "The plaintiff's case was rested in argument upon the ground that the defendant had obtained this secret by breach of faith or of contract on the part of Thomas Moat . . . . The true question is whether, under the circumstances of this case, the court ought to interpose by injunction, upon the ground of breach of faith or of contract. That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." Afterwards, at p. 257, the Vice-Chancellor refers to the opinion expressed by Lord Cottenham in *Prince Albert* v. *Strange* (1 Mac. & G. 25), that a breach of trust, confidence, or contract would, of itself, entitle the plaintiff to an injunction. Then we come to the case of *Lamb* v. *Evans* (*ubi sup.*), where Bowen, L.J. distinctly puts it upon the ground that an implied contract arises from the confidential relations created between a master and his servant. Whatever be the true ground, whether breach of confidence or breach of contract, the injunction must go.

There was a clear breach of confidence here, since the defendant surreptitiously copied his master's books. As to any difficulty in the terms of the injunction, that will be set right when, if ever, any question arises about enforcing it. Then as to the order for the delivery up to the plaintiff of the copy of the list made by the defendant, there can be no difficulty, because the making of that copy was clearly a breach of confidence. Then there is the question about the damages. That depends upon whether there was any breach of contract, and it is clear from the judgments of Bowen, L.J., that have been referred to, that there was an implied contract of faithful service, which the defendant has undoubtedly broken. The plaintiff is therefore entitled to damages, and the appeal must be dismissed.

SMITH, L.J.—I am of the same opinion, and I think that the judgment of the learned judge in the court below must be supported on the ground that the defendant has committed a breach of contract. This is a case of a contract of service which created the relation of master and servant between the plaintiff and the defendant, and I agree that in that contract a term should be implied that the servant should act with fidelity towards his master. That implication seems to me to be a necessary one for the support of the contract. The law has been so laid down in *Lamb* v. *Evans* (*ubi sup.*) and in *Louis* v. *Smellie* (*ubi sup.*). That being a term implied in the contract, the question is whether the defendant has acted with good faith towards the plaintiff. The learned judge states in his judgment that the defendant admitted that the copy was written by him when nobody saw him, and that his object was to use the names, and he confessed that he had regarded what he did as unfair and dishonourable, and that probably his master would have turned him away had he known of his misconduct. I do not agree with the opinion which the defendant expressed about this contract, that he did not think his employment was confidential, or that he was bound to protect his master's interest, as it was not expressly so said. I think that the defendant has acted with the worst faith towards his master. The judgment for the plaintiff was therefore right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Rooper* and *Whately*.
Solicitors for the defendant, *Church, Rendell, Todd*, and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, May 17.

(Before NORTH, J.)

Re BENNETT; *Re* SKELTON; CAPES *v.* FERRAND. (*a*)

Married woman—Reversionary interest in personalty—Deed acknowledged—Malins' Act (20 & 21 *Vict. c.* 57) *— Change of reversionary interest—Date of creation.*

By the will of Ann Skelton, who died in 1850, *certain property was given to trustees upon trust to pay the income to S. P. for life, or until bankruptcy, and in case of bankruptcy upon trust to apply the income for the benefit of him or any one of his children, born or to be born, as the trustees should, in their absolute discretion, think fit. S. P. became bankrupt in* 1861, *having four children only. In* 1862, *the four children, who were all twenty-one and unmarried, executed a deed-poll directing the trustees to pay the income to S. P., or his wife, at their discretion, during their joint lives and the life of the survivor, and after the death of the survivor to hold the fund in trust for the four children. M. A. P., one of the daughters, married soon after the date of the deed, and afterwards executed a post-nuptial settlement, which purported to assign her interest under Ann Skelton's will, subject to the provisions of the deed-poll. This deed was duly acknowledged under Malins' Act, passed in* 1857, *which enables a married woman to assign her reversionary interest in personalty by deed acknowledged, but applies only to reversionary interests created after the passing of the Act. S. P. survived his wife, and died in* 1893. *This summons was taken out to raise the question whether M. A. P.'s interest under A. Skelton's will was bound by the settlement.*

Held, that, although the deed-poll of 1862 *could not put an end to the discretionary trust, so far as any after-born children were concerned, M. A. P. thereby put an end to her existing reversionary interest under the will, and created a new interest, which therefore passed by the settlement.*

BY her will, dated the 22nd June 1846, Christina Bennett gave a certain share in her residuary estate in trust for Samuel Shelton Priestley for life, but directed that, if he should sell, mortgage, incumber, alien, or dispose of the said annual income, or by reason of his bankruptcy, or by any other means whatsoever, the said annual income should no longer be enjoyed by him personally, the trusts thereinbefore expressed concerning the same should cease, and the said S. S. Priestley's portion should be applied for the use or benefit of his children who should attain the age of twenty-one years or marry under it, in equal shares.

Christina Bennett died on the 9th Nov. 1846.

Ann Skelton, by her will dated the 17th Jan. 1847, gave a share in her residuary estate to trustees upon trust to pay the income thereof to S. S. Priestley for life, or until he should charge or alien the same, or by bankruptcy or otherwise should lose the personal enjoyment thereof, and, after any such event, upon trust to apply the same income during his life for the benefit of him or any of his children born or to be born as the trustees should, in their absolute discretion, think fit; and after his death she gave the whole share to his children in equal shares.

Ann Skelton made a codicil to her will whereby she gave some further property upon the same trusts in favour of the said S. S. Skelton and her children.

Ann Skelton died in 1850.

S. S. Priestley took the benefit of the Insolvent Acts in the year 1861, at which date he had four children living, all of whom had attained twenty-one, of whom Mary Ann Priestley was one.

By deed-poll under their hands, dated the 16th Dec. 1862, the four children declared that the

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

surviving trustee of the two wills should hold all the undivided shares under both wills upon trust to pay the income to S. S. Priestley, or, at the discretion of the trustees, to his wife, Frances Priestley, for her separate use during their joint lives, and to the survivor during his or her life, and, after the death of the survivor, should hold the shares in trust for the four children.

Soon after the date of this deed-poll M. A. Priestley intermarried with T. E. Brayshaw.

By a post-nuptial settlement, dated the 13th Dec. 1866 and made between T. E. Brayshaw of the first part, Mary Ann Brayshaw of the second part, and three trustees of the third part, the interest of M. A. Brayshaw under the two wills above mentioned, and also certain copyhold property and a mortgage debt belonging to her, and her interest under a third will, were assigned and conveyed unto the trustees upon trust subject as to the property affected thereby to the provisions of the deed-poll above stated, to cause the same to be transferred to the trustees, and to pay the income thereof to M. A. Brayshaw and her husband T. E. Brayshaw successively for life, with remainder in trust for all the children of the said M. A. Brayshaw at twenty-one or marriage.

The settlement of the 13th Dec. 1866 was duly acknowledged by M. A. Brayshaw.

T. E. Brayshaw died in 1870. On the 16th Oct. 1878 M. A. Brayshaw, widow, intermarried with Christopher Walton. She died in Jan. 1881 leaving three daughters by her first marriage, and one by her second, but no sons. Her second husband survived her.

S. S. Priestley died on the 10th Sept. 1893, his wife Frances Priestley having predeceased him.

This was a summons taken out by the trustees of the post-nuptial settlement of the 13th Dec. 1866, for a declaration that they were entitled as such trustees to the share of M. A. Walton under the wills of C. Bennett and A. Skelton. The defendants were the legal personal representatives of C. Bennett and A. Skelton in whose names the funds in question were standing, and Christopher Walton the second husband.

The original settlement of the 13th Dec. 1866 had been lost, but its existence had been established in an action of *Gray* v. *MacTurk* (1888, G. 741), in which it was declared that the share of M. A. Walton, under the third will, was payable to the trustees thereof. The copyhold property comprised in the settlement had been sold, and the proceeds treated as subject to the same trusts.

The three daughters of M. A. Walton by her first marriage had attained twenty-one, and concurred in the application. Two of those daughters had been married in 1884 and 1894 respectively, but no settlements had been made on their marriages.

The daughter by the second marriage was an infant.

Swinfen Eady, Q.C. and *P. B. Lambert* for the applicants.—The whole question is, whether the reversionary interests to which Mary Ann Walton, then Brayshaw, was entitled under the wills of Miss Bennett and Miss Skelton, passed under the post-nuptial settlement of 1866. That deed, no doubt, passed all the reversionary interests which Mrs. Brayshaw could pass by virtue of Malins' Act. But that Act only enabled her to deal with reversionary interests created after it came into operation, that is, after 1857. The question therefore is, whether the reversionary interests in question were created by the deed-poll of 1862. We contend that, by that deed, the children of S. S. Priestley put an end to the interests given them by the will, and created new interests. [NORTH, J.—They could not interfere with the discretionary trust created by Miss Skelton's will.] They could deal with their reversionary interests subject to that trust, and subject to the interests of any children who might be born afterwards. Again, the settlement was confirmed by Mrs. Brayshaw receiving the income, and by the dealings with the copyhold estate:

Re Hodson; Williams v. *Knight*, 71 L. T. Rep. 77; (1894) 2 Ch. 421;

Greenhill v. *The North British and Mercantile Insurance Association*, 69 L. T. Rep. 526; (1893) 3 Ch. 474.

Cartmell for the legal personal representatives of C. Bennett and A. Skelton.

J. G. Butcher for Mr. Walton.—As to the property which passed under Miss Bennett's will, I cannot dispute that, on S. S. Priestley's insolvency, his children's reversionary interest practically fell into possession, and they gave it up and took a mere interest under the deed of 1862. But the interest under Miss Skelton's will is different. There was a subsisting trust, which the children could not alter, the class of children could not be ascertained until the death of S. S. Priestley, and there was a discretionary trust meanwhile. In this property, therefore, Mrs. Brayshaw's interest, at the date of the settlement of 1866, was still that created by Miss Skelton's will, and not a new one created by the deed of 1862. As to confirmation, the settlement dealt with property in possession as well as the reversionary interest. It was perfectly valid as to the property in possession, and was acted upon with regard to that property only.

Swinfen Eady, Q.C. in reply.

NORTH, J.—I think Mr. Swinfen Eady is right on the first point. As to the interest under Miss Bennett's will there is no difficulty. [His Lordship read the trusts of that will and continued:] When therefore Miss M. A. Priestley and her brothers and sisters executed the deed of 1862 she had an absolute interest, and by that deed she settled it in such a way as to give herself a new reversionary interest, which she was quite competent to deal with and did deal with by the deed of 1866. The other share is somewhat different. [His Lordship read the trusts of Miss Skelton's will and proceeded:] Now, under those trusts, M. A. Priestley had in 1862 an interest which was reversionary and expectant on the discretionary trust in favour of S. S. Priestley or his children during his life; and was subject to the contingency of being reduced in amount if S. S. Priestley had more children. But Miss M. A. Priestley was then *sui juris*, and could dispose of whatever interest she had. If she had sold her interest out and out there could be no question, and if she had then settled it the trustees of the settlement would have been entitled. She did not dispose of her interest so as to deprive herself of all title to it, but she dealt with it so as to enlarge the interest prior to her own and to give herself an altered reversionary interest. I am of opinion that, by that deed, she created for her-

self a new reversionary interest which she was in 1866 capable of dealing with by virtue of Malins' Act, because she had already by the deed of 1862 got rid of the reversionary interest she was originally entitled to under the will. She expressly assigned her interest by the settlement of 1866. In my opinion it passed under that deed to the trustees.

Solicitors: *Wm. Stubbs*; *Ullithorne, Curry*, and *Curry*; *Paterson, Snow*, and *Co.*, agents for *Mossman, Atkinson*, and *Blankley*, Bradford.

Friday, May 24.

(Before NORTH, J.)

NICHOLSON *v.* HARPER. (*a*)

Sale of goods — Goods left in possession of warehouseman — Charge by seller in favour of person in possession—Sale of Goods Act 1893 (56 & 57 *Vict. c.* 71), *s.* 25 (1)—*Delivery or transfer.*

In Sept. 1893 *A. hired from the defendants B. and Co. cellar room for* 4500 *dozen wine and deposited a large quantity of wine in their cellars. In Jan.* 1894 *A. sold to the plaintiffs* 250 *dozen of old port subject to an agreement that it should be left for a year in cellars to be provided by A. rent free. The plaintiffs were informed that the wine was in the cellars of B. and Co., but no delivery order was given to the plaintiffs, and no notice of the sale was given to B. and Co. The plaintiffs paid for the wine. By a letter dated the* 31*st May* 1894, *A. gave B. and Co. a lien on the wine in their cellars for* 1500*l. advanced by them, and by another letter dated the 7th Nov.* 1894 *he pledged the same wine as security for two bills accepted by B. and Co. for his accommodation and for any further bills they might so accept. A. became bankrupt in March* 1895, *there was then a balance due from him to B. and Co., charged upon the wine bought by the plaintiffs. The trustee in bankruptcy and B. and Co. put up this wine for sale by auction. The plaintiffs brought an action to restrain the sale. The defendants relied on sect.* 25 *of the Sale of Goods Act* 1893.

Held (*on motion treated as the trial*), *that there was no delivery or transfer of the goods or documents of title to B. and Co. within the meaning of this section, and, as A. had no property in the wine at the date of his letters, B. and Co. obtained no charge, and the wine must be delivered to the plaintiffs, without prejudice, however, to the common law lien of B. and Co. for warehouse charges.*

Semble, *the section should be construed to mean "delivery of goods or transfer of documents."*

IN Jan. 1894 the plaintiffs, J. W. Nicholson and Co., purchased of one W. Goldsmith 250 dozen of port wine subject to an agreement that it should be allowed to remain for a year in cellars to be provided by Goldsmith rent free. The wine was part of a quantity belonging to Goldsmith then lying in the cellars of Messrs. Gammage and Hollingum, from whom Goldsmith had in 1893 hired cellar room for not more than 4500 dozen wines and spirits for five years at a yearly rent of 120*l.*

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

The day after the sale Goldsmith wrote to the plaintiffs:

I beg to send invoice and delivery order for the port. If you wish to take delivery please arrange with Messrs. Gammage and Co. as this cellar is not always open.

The plaintiffs duly received the invoice and paid for the wine, but the delivery order was not inclosed. The plaintiffs never received any delivery order, and gave no notice of the sale to Messrs. Gammage and Co.

On the 31st May 1894 Goldsmith wrote to Messrs. Gammage and Hollingum:

In consideration of your having advanced to me this day the sum of fifteen hundred pounds (1500*l.*) as a loan for twelve months at 7 per cent. per annum interest, I hereby give you as collateral security a lien on all wines and spirits now lying in your cellars.

And on the 7th Nov. 1894:

In consideration of your accepting for my accommodation the two drafts inclosed, viz., 149*l.* 17*s.* due the 5th Feb. 1895; 200*l.* due the 11th Feb. 1895, I give you as security for these and any other similar drafts you may hereafter accept for me all my stock of wines and spirits held by you over and above those you retain as security for your loan to me of the 31st May last.

In March 1895 Goldsmith became bankrupt, and the defendant Harper was appointed his trustee. At the date of the bankruptcy there was due to Messrs. Gammage and Co., 2391*l.* of which 1900*l.* was secured upon wine other than that now in question. Messrs. Gammage and Co. claimed a charge upon the wine sold to the plaintiffs for the balance of 491*l.* By arrangement between that firm and the trustee in bankruptcy the wine was put up for sale. On the sale being advertised the plaintiffs brought this action to restrain it, and now moved for an interlocutory injunction.

The sections of the Sale of Goods Act 1893, on which the argument turned, are as follows:

The Sale of Goods Act 1893 (56 & 57 Vict. c. 71):

Sect. 17.—(1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such a time as the parties to the contract intend it to be transferred. (2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Sect. 18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Sect. 25.—(1.) Where a person, having sold goods, continues, or is in possession of, the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

The Factors Act 1889 (52 & 53 Vict. c. 45):

Sect. 1. For the purposes of this Act (4) the expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant

or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Swinfen Eady, Q.C. and *Eve* for the plaintiffs.—This was an unconditional contract for sale of the wine, *i.e.*, specific goods in a deliverable state, and the property therefore passed to the plaintiffs at the date of the contract. Nothing has passed to deprive them of that property.

Vernon Smith, Q.C. and *Rowden* for the defendants Gammage and Hollingum.—The case falls within sect. 25 (1) of the Sale of Goods Act 1893. The letters, combined with the fact that the goods were already in our cellars, amounted to a transfer or constructive delivery of the goods. They could not be physically delivered, but physical delivery is not necessary. The section was intended to protect *bonâ fide* dealings with the ostensible owner. Goldsmith was the ostensible owner. The plaintiffs, by their negligence in not giving notice, enabled Goldsmith to deal with the wine, and the defendants ought not to suffer for their negligence.

Swinfen Eady, Q.C. in reply.—In order to oust our title the defendants must show either a delivery of the goods or a transfer of the documents of title. Sect. 62 of the Sale of Goods Act 1893 incorporates the definition of documents of title given in the Factors Act 1889.

NORTH, J.—I think the plaintiff has made out his case. [His Lordship stated the facts of the case and continued:] On looking at sects. 17 and 18 of the Sale of Goods Act 1893 it seems clear that the purchasers were entitled to the property in the goods. At the date of the purchase they did not wish to have possession of the goods, which were accordingly left with the vendor. On the 16th Jan. 1894 the purchasers received a letter which informed them that the goods were in the possession of the defendants, Messrs. Gammage and Co., but it appears that they never received a delivery order which was said to have been sent them. In the spring of 1895 the plaintiffs became aware that the defendants were intending to sell the goods, and applied to the court to restrain the sale. The question to be decided is, whether the goods belong the plaintiffs free from any claim by the defendants, or whether the defendants have established their claim. The goods were left by Goldsmith in the defendants' warehouse, and it was agreed that Goldsmith was to have cellar room for five years for a certain payment. After this Goldsmith became bankrupt. The defendants say that they have a valid charge given then upon the wine by the two documents of the 31st May 1894 and the 7th Nov. 1894. [His Lordship read the documents and continued:] The question arises whether Goldsmith was in a position to give the defendants a valid charge by these two documents. It turns upon the construction of the Sale of Goods Act 1893. There were cases before that Act with which I need not deal now. It is clear that Goldsmith could not give any charge upon goods unless they were really his. [His Lordship read sect. 25 and continued:] What is necessary to establish title is that a person, in the position which Goldsmith is in here, should make an actual delivery of the goods or a transfer of the documents of title to some person without notice. Either a delivery or transfer is necessary. The defendants were in possession long before sale, and continued in possession. The words of the section mean a delivery of goods, or where the goods are not delivered a handing over of the documents of title, which are certain well-known mercantile documents. There has been no delivery of goods since sale, and no transfer of the documents of title. The defendants' counsel says something has taken place which is not a delivery of the goods or a transfer of the documents of title, but a transfer of some interest in the goods. But the requirements of the Act must be observed. The defendants have been in possession ever since sale. There has been no delivery or transfer of any kind. I think that the defendants have failed to show that they are entitled to keep these goods, and must hand them over to the plaintiffs. But the defendants' lien for their charges for warehousing the goods is not to be prejudiced by anything that has been said to-day; that is to say, the common law right of lien on the goods is not to be interfered with.

Solicitors: *Nash, Field*, and *Co.*; *Park, Nelson*, and *Co.*

May 7, 9, and 29.

(Before NORTH, J.)

HARLE *v.* JARMAN. (*a*)

Married woman—Reversionary interest in personalty—Divorce proceedings—Compromise.

By a marriage settlement, made in 1873, *certain personal property of H., the husband, was assigned to trustees upon trust to pay the income to him during the joint lives of himself and his wife, with remainder to the survivor for life, with remainder (in the events which happened) to the children of H. by a former marriage. H. was also entitled, under a prior settlement made by members of the wife's family, to the moiety of the income of certain other property if he survived his wife. In* 1874 *Mrs. H. commenced proceedings for a judicial separation. Terms of arrangement were filed on the* 12*th March* 1875, *providing for a deed of separation, H. to secure to Mrs. H. an annuity of* 220*l. during her mother's life, and of* 150*l. afterwards, Mrs. H. to release her interest under the marriage settlement, and H. to release his interest under the family settlement, the security, if not agreed upon by the solicitors, to be settled by the registrar, the cause to stand over for the arrangement to be carried out and then dismissed. On the* 30*th June* 1875 *H. executed a deed whereby he covenanted to pay the agreed annuities, and charged the same upon "all the beneficial estate, share, and interest of H. under the marriage settlement." On the same day a separation deed was executed containing a release by H. of his interest under the family deed, and a covenant by Mrs. H. that if she should survive H. she would execute a valid release of all her interest under the marriage settlement. H. became bankrupt in* 1880, *and died in* 1891. *His executors then called on Mrs. H. to release her interest. She contended that the life interest*

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

which she took on surviving her husband was on the true construction of the various deeds intended to be kept alive for the benefit of H.'s estate, and was therefore charged with the annuities. She was willing to execute a release on this footing, but refused to do so unless this construction was accepted.

Held, that Mrs. H.'s view of the construction of the deeds was mistaken, but that at the date of the separation deed she had no power to deal with her reversionary interest in personalty under the marriage settlement; that the court, in approving the compromise, had not made any order which could have the effect of binding Mrs. H.'s interest further than she could bind it herself, and that Mrs. H. was not therefore bound to execute the release.

BY the settlement dated the 6th May 1873, made on the marriage of Johnson Harle with his wife, then Louisa Patrick, spinster, the proceeds of sale of certain land and some shares in ships and policies of assurance on J. Harle's life, all being his property, were assigned to trustees upon trust to invest and pay the income to J. Harle during the joint lives of himself and his wife, and after the death of either to the survivor for his or her life, and after the determination of the trusts aforesaid upon trust for the children of the marriage and the children of J. Harle by a former marriage as he and his wife should appoint, and in default of such appointment for all such children who should attain twenty-one or marry, in equal shares.

By the same settlement certain furniture and chattels were settled to the separate use of Mrs. Harle for life, with remainder to the survivor of her and her husband.

By a family settlement made in October 1870 by members of Mrs. Harle's family, certain property had been settled upon trust after her mother's death for her for life, and after her death as to a moiety of the income for her husband for life, with remainder to her children.

The marriage took place immediately after the settlement, but differences soon arose between the parties, and on the 18th Aug. 1874 Mrs. Harle presented a petition for a judicial separation.

Before the hearing the parties came to terms, and the following terms of arrangement were filed on the 12th March 1875:—

Deed of Separation.—Mr. Harle to secure an annuity to his wife of 220*l.* until the death of her mother, and of 150*l.* for the remainder of Mrs. Harle's life. Mrs. Harle to release her interest under the marriage settlement. Mr. Harle to release his interest in the deed of family settlement made in Mrs. Harle's family previous to her marriage. Mr. Harle to release any interest in any property to which he may hereafter become entitled in the right of his wife, and Mrs. Harle to release any rights which she might have in Mr. Harle's property. The security if not agreed upon by the solicitors to be settled by the registrar. Mr. Harle to pay Mrs. Harle's costs of these proceedings and the deed as between solicitor and client. Cause to stand over for this arrangement to be carried out. Petition then to be dismissed. Terms to be filed.

In pursuance of these terms a deed of separation was executed on the 30th June 1875. It was made between Johnson Harle of the first part, Louisa Harle of the second part, and trustees of the third part, and after reciting the deed of family arrangement and the marriage settlement, the proceedings for separation, and the terms filed, it recited that the security referred to in the memorandum had been agreed upon by the solicitors—the same had been duly perfected by an indenture made between the same parties, and bearing the same date, but executed before the separation deed. It was witnessed that J. Harle released all the interest to which he was entitled under the deed of family arrangement to the intent that the same might be held upon the same trusts, and go and devolve in the same manner as if J. Harle had predeceased his wife, and Louisa Harle released the interest which she took in the furniture and chattels under the marriage settlement unto J. Harle for his absolute use. The deed also contained a covenant by J. Harle to pay his wife an annuity of 220*l.* during the joint lives of herself and her mother, and after her mother's death to pay her for the rest of her life an annuity of 150*l.*; and a covenant by Mrs. Harle in the following terms:

The said Louisa Harle shall and will upon the death of the said Johnson Harle, if she shall survive him, forthwith execute a valid release and assignment in such form as counsel on behalf of the executors and administrators of the said J. Harle shall require, and at the expense of the person or persons requiring the same, of all her interest of and in the premises comprised in or otherwise subject to the trusts of the hereinbefore recited indenture of settlement of the 6th May 1873, to the intent that her interest therein may become absolutely extinguished.

The deed referred to in the separation deed was made between the same parties, and after reciting the separation deed, and the covenant to pay the annuities, witnessed that

J. Harle doth hereby subject and charge all and singular the real and personal estate, the particulars whereof are specified in the schedule hereunder written, with the payment to the trustees of the said two annuities of 220*l.* and 150*l.*

The schedule was in these terms:

All the beneficial estate, share, and interest of the above-named Johnson Harle under the indenture of settlement dated the 6th May 1873.

On the 13th July 1875 the petition for judicial separation was dismissed by consent. The order being, "The Judge Ordinary having read the statement filed on behalf of the petitioner and heard counsel thereon on her behalf, dismissed the petition."

The annuity was regularly paid up to 1878, then Mr. Harle got into difficulties and he became bankrupt in 1880. Mrs. Harle's mother died in 1881. From that time till Mr. Harle's death the trustees paid to Mrs. Harle the income of the property comprised in the settlement, but it was insufficient to pay the annuity of 150*l.* a year in full.

Mr. Harle died in 1891, and his executors called on Mrs. Harle to execute a release of her interest under the settlement. She or her solicitors wrote that she was willing to carry out the terms of the arrangement made in 1875, but raised the contention that the interest given to her for her life in the settlement funds would become, when the arrangement was carried out, part of her husband's interest, and therefore subject to the charge for securing the annuities, and refused to execute a release, except in such a form as to preserve this charge. When this was declined by the executors she refused to execute any release at all, stating

that her reversionary interest in the personalty under the settlement was not bound by her covenant.

This was a summons taken out by the executors of Mr. Harle, and the children of his first marriage, for the determination of the question whether, having regard to the separation deed, Mrs. Harle was now entitled to any life or other interest in the property subject to the trusts of the settlement, and for a declaration that the plaintiffs were entitled in possession to the same property.

The defendants were Mrs. Harle and the present trustees of the settlement.

Gatey for the executors of Mr. Harle.—We contend that, by the covenant in the separation deed, Mrs. Harle's interest was intended to be absolutely extinguished. The contention which was raised on her behalf in the correspondence was, that her interest became part of her husband's estate, and was thus subject to the charge. That point concerns chiefly Mr. Harle's children, for whom Mr. Wheeler appears. In chambers a contention was raised for the first time that Mrs. Harle's interest under the settlement was a reversionary interest in personalty, which she had no power to bind. But the court had power to bind her interest, and did bind it by sanctioning the compromise (*Wall* v. *Rogers*, 21 L. T. Rep. 654; L. Rep. 9 Eq. 58), and she has elected to uphold the settlement, and is bound by her election.

Wheeler for the children of Mr. Harle.—I support the argument that the covenant is binding. On the question whether the released life interest forms part of Mr. Harle's estate our interests differ.

Archibald Brown for Mrs. Harle.—At the date of the separation deed the property was in the same state that it had been originally, and the intention was that Mr. Harle's annuity should be charged upon the whole of it. The husband agreed to secure the annuity for the life of the wife. Mr. Gatey's contention is, that she is to have no security except during the joint lives of husband and wife. The intention was that the wife's interest should be kept alive in order to support the charge; or, to put it another way, the husband's interest at the date of the separation deed consisted of his own original interest and the interest which his wife surrendered in his favour. If the deed does dot express this intention, the whole matter rests in contract, and the court has jurisdiction to rectify it, and order its specific performance in the same action:

Olley v. *Fisher*, 55 L. T. Rep. 807; 34 Ch. Div. 367.

If this is not conceded, then I say the covenant is bad altogether:

Buckmaster v. *Buckmaster*, 56 L. T. Rep. 795; 35 Ch. Div. 21 (affirmed in the House of Lords under the name of *Seaton* v. *Seaton*, 58 L. T. Rep. 565; 13 App. Cas. 61).

That case also shows that the approval of the court would not bind what the married woman could not bind herself. But, as a matter of fact, the court did not approve the separation deed; it left the parties to take their own course. *Stamper* v. *Barker* (5 Mad. 157) and *Cahill* v. *Cahill* (49 L. T. Rep. 605; 8 App. Cas. 420) are conclusive against Mrs. Harle having power to bind. No acts of acquiescence or confirmation would have any effect unless they amounted to an actual disposition of the property by Mrs. Harle while discovert:

Seaton v. *Seaton* (*ubi sup.*).

There was nothing approaching to that here.

Gatey in reply as to the validity of the covenant.—The cases cited by my friend are distinguishable. *Seaton* v. *Seaton* was an attempt to make the Infants' Settlement Act apply to a case which was outside it. In the others there was no sanction of the court to a compromise. The dismissal of the petition on terms in this case is equivalent to a sanction of the terms. Mrs. Harle has elected since her husband's death to confirm the settlement. It is clear that a married woman may so elect:

Barrow v. *Barrow*, 33 L. T. Rep. O. S. 42; 4 K. & J. 409;

Wilder v. *Piggott*, 48 L. T. Rep. 112; 22 Ch. Div. 263;

Re Hodson; *Williams* v. *Knight*, 71 L. T. Rep. 77; (1894) 2 Ch. 421.

And the receipt of the annuities by Mrs. Harle is sufficient so show that she did elect. *Greenhill* v. *North British and Mercantile Insurance Company* (69 L. T. Rep. 526; (1893) 3 Ch. 474) is the latest authority on the subject, and is distinctly in favour of election. As to the construction of the covenant, it is plain that there was no intention to give a charge on Mrs. Harle's life interest. If there had been it would have been expressed, not left to chance.

Wheeler for the children of Mr. Harle.—The effect of the release of Mrs. Harle's estate is to extinguish it altogether, and to accelerate the remainder given to the children. There is nothing to keep the life estate of Mrs. Harle in existence either for her benefit or that of her husband's estate:

Jull v. *Jacobs*, 35 L. T. Rep. 153; 3 Ch. Div. 703.

Archibald Brown in reply as to acceleration.

May 29.—NORTH, J. (after stating the facts of the case, and the provisions of the separation deed and the deed of security of even date therewith, proceeded): The first question between the parties is one of construction. What was the interest of the husband under the settlement which was charged by this deed? The only interest he had then was his own life estate in possession, and the ultimate reversion so far as related to his own property on there being no issue of the marriage, and on his own children by his first marriage failing to obtain a vested interest. The question is, whether the husband's estate is entitled to this reversionary interest during the remainder of the wife's life after the husband's death, and whether that reversionary interest is charged by this deed. I do not see how that life interest came within the terms of the deed. The husband did not take it under the settlement at all. If he got it at all it was by virtue of this transaction, by virtue of the execution of these deeds between the husband and wife. It was said that it was intended that this interest should be kept alive for the purpose of this charge. That seems to me not to be the true view. If it was intended that this life interest should continue, nothing would have been easier than to say so. But the deed says nothing of the kind, and the 6th clause

of the deed, which says that the life interest of the wife is to be absolutely extinguished, is entirely inconsistent with any intention to keep it alive. Then another question arose. Is the effect of what has been done to keep alive this life interest for the benefit of the husband's estate independently of the question of the widow having a charge on it; or is the effect to accelerate the estate limited after it? The settlement says that, "after the determination of the previous trusts," the trusts in favour of the children are to take effect; and it seems to me clear that, even as between the husband and the children of the first marriage, this life estate was not in any sense kept alive, but was absolutely extinguished, and on the husband's death the estates in remainder came into possession by the express words of the deed itself. The case of *Jull* v. *Jacobs* (*ubi sup.*) was cited as an authority on this point. Mr. Archibald Brown tried to distinguish that case on the ground that the life interest there was extinguished by the statute which makes bequests to a witness of the will void. I do not see that that makes any difference. In *Lainson* v. *Lainson* (24 L. T. Rep. O. S. 85; 5 De G. M. & G. 754) the limitations were very similar, and the life estate was revoked by a codicil. But the case which comes nearest to this of those I have seen is *Fuller* v. *Fuller* (Cro. Eliz. 422). The marginal note is this: "If a devise be made of lands in tail with divers remainders over, and the devisee (*i.e.*, the devisee in tail) dies leaving issue in the lifetime of the devisor, the next in remainder shall have the land, although the devisor had declared *vivâ voce* that the issue of the devisee should have it." Gawddy, J. dealt with that first point first, and then he says: "To the second point there is no doubt but that he in remainder shall have it presently, for the devise being void to the first it is as if it had never been made; so it is if the first devisee refuses, he in the remainder shall have it presently." Then he refers to two or three old cases, and on this point all the judges agreed with him. Now, those two points being disposed of, the next question is whether the wife could assign this reversionary interest in personalty. I have great difficulty in seeing how she could. Several cases were cited on that point which, subject to a question of election to be dealt with by-and-by, seem to me conclusive on the point. [His Lordship then referred at some length to the following cases: *Stamper* v. *Barker* (*ubi sup.*); *Wall* v. *Wall* (15 Sim. 513); *Robinson* v. *Wheelwright* (27 L. T. Rep. O. S. 73; 6 De G. M. & G. 535); *Cahill* v. *Cahill* (*ubi sup.*); *Buckmaster* v. *Buckmaster* (*ubi sup.*); and *Seaton* v. *Seaton* (*ubi sup.*), and proceeded:] The last case, with others, settles the question that the approval by the Divorce Court of this compromise would not help the matter; but there is this to be said in addition: I do not see that there was any approval by the court of the compromise such as could give a greater validity to the agreement of the parties, because, in point of fact, the court did not approve of the terms which were settled; it left those entirely to the parties, they were settled by the parties, and, the parties having settled them, the court merely stayed proceedings on the petition by consent. Then there is this to be said about the present case: There are many cases in which it has been stated that a married woman might be bound by reason of her having committed a fraud. It is not suggested that there was any fraud in this case. Everything here was perfectly clear and above board. The rights of the parties were correctly appreciated and set out in the two instruments of the 30th June to which I have referred, and it was quite clear to the parties at the time that the interest of the wife was a reversionary interest, and one with respect to which she was not competent to deal at the time. She does not assign her reversionary interest; there is only a covenant by her that after the coverture has come to an end by the death of the husband then, when the reversionary life interest has fallen into possession, she will assign. It is quite clear, therefore, that the parties had before them what the rights of the respective persons previous to the arrangement were, and they entered into the arrangement as actually made with their eyes open. Then it was suggested that there had been some confirmation by Mrs. Harle. This interest was reversionary until the husband's death, and if she could not bind it by the arrangement made on the separation, she had no more power to bind it at any later period during the time of her husband's life. It still was an interest in reversion, and the original incompetency to deal with it continued down to the time when the husband died. The husband died in 1891. There have been times since then, no doubt, when she might have confirmed it, but I do not find that there has been a confirmation by her since that time. She was quite willing to carry out the arrangement made according to the view taken by her and her legal advisers of what her rights in the matter were, but she never agreed to carry it out in any other shape than that which they insisted was her legal right. In my opinion they were mistaken in the view they took of what her legal right was; but that cannot make a consent to carry the deed out according to the view she took, a consent to carry it out or a confirmation of it according to a totally different construction which she and her advisers from the first repudiated. Then we come to the remaining point. It is alleged that she made an election by entering into the arrangement contained in those deeds at that time, and that is a part of the case that has given me more difficulty than anything else. In *Seaton* v. *Seaton* (*ubi sup.*) Lord Macnaghten pointed out in his judgment the fact that the case before him then was not a case of election at all. He says: "It must be borne in mind that there is no question here of election. The husband settled nothing of his own. The wife was entitled to repudiate the settlement which is said to be hers when she became discovert. By so doing she disappointed no one who had contributed to the settlement. She raised no question of election. To confirm the settlement (if that be the proper expression) it would have been necessary for her to have made a new gift. Until a gift is actually perfected the donor may always withdraw. Yet it was said that a married woman may elect to dispose of her reversionary interest in cases like this. That was said to be established by *Barrow* v. *Barrow, Wilder* v. *Pigott*, and particularly by the later case of *Greenhill* v. *The North British Mercantile Insurance Company* (*ubi sup.*) before Stirling, J., and which is a case I must refer to.

But first of all I will refer to *Barrow* v. *Barrow*, a leading case perhaps on a married woman's right and power to elect. There it is necessary to look at what the facts were. "By an ante-nuptial settlement the intended husband covenanted to settle lands, of which the intended wife, then an infant, was tenant in tail, upon trusts for her separate use for life, remainder for himself for life, remainder for the children of the marriage. The wife, having attained twenty-one, filed a bill by her next friend against her husband, and obtained a decree for specific performance of the covenant, with directions for raising the costs out of the estate; and, by virtue of the decree, she received during the husband's lifetime," certain rents, and so on. It was held, "that those acts on the part of the wife amounted to an election, and that she was bound by the decree, and she was ordered to settle the premises accordingly." The case of *Wilder* v. *Pigott* (*ubi sup.*) was a very similar case. That was a case in which, the wife being an infant, personal property derived under her father's marriage settlement was assigned by the husband and wife to trustees upon the usual trusts. There was a covenant by the husband that he and his wife would so soon as she should attain the age of twenty-one years convey and assign real and personal property to which she was entitled under the will of her father; and it was provided that, if the wife should refuse or neglect to do so, it should be lawful for the trustees to accumulate any part of the income payable to her for the other persons interested under the settlement. There was an agreement to settle the wife's after-acquired personal property. On the 13th April 1874, a week after the wife attained the age of twenty-one, she and her husband executed a deed, which she acknowledged, by which she assigned all the personal property expressed to be assigned by the settlement which had not become vested in possession, and conveyed property purported to be conveyed by the settlement upon the trusts thereof. At the date of the settlement she was contingently entitled to a reversionary interest in personal estate, but it was not actually assigned by the deed of confirmation because it did not come within the provisions of Sir Richard Malins' Act. It fell into possession, and it was by the direction of the wife and husband invested in the names of the trustees. The husband had died and the wife had become of unsound mind, but not so found by inquisition, and then it was held, "following *Barrow* v. *Barrow* (*ubi sup.*), and *Smith* v. *Lucas* (45 L. T. Rep. 460; 18 Ch. Div. 531), that the wife could during her coverture elect to confirm the settlement, and that she had by her acts elected." Kay, J. says: "The first question is, whether the wife could elect during her coverture to confirm the settlement. It seems clear from the decisions in many cases, of which *Barrow* v. *Barrow* (*ubi sup.*) and *Smith* v. *Lucas* (*ubi sup.*) are examples, that she could so elect. Then has she in fact elected? I cannot doubt that the acts to which I have referred, and which manifested a deliberate intention on her part to recognise the settlement, amounted to an election to confirm it. The effect of such a confirmation was to make the settlement as binding and as operative in equity as it would have been if she had been of full age at the time when she executed it. In that case it is not disputed that this contingent reversionary property would have been bound in equity by the settlement. It was more than a mere expectancy; it was property to which she was at the date of the settlement contingently entitled in reversion; and it seems to come within the very words of the first assignment as well as of the covenant. The covenant, as was remarked in *Smith* v. *Lucas*, was not void but only voidable, and when ratified was as binding as if it had been originally made by a person who was *sui juris*." Then come these very noticeable words in that view, "Of course no case of election arises." So, although he has been speaking all along of the wife electing, yet he was using the word "electing" in the general sense as meaning an election whether the wife would adopt a settlement or reject it, would approbate or reprobate—and he was not referring to election in the technical sense of the choice by a person who can take either of two things as to which of the two she elects to take. Then these words at the end are very remarkable in that view of the case, "no election arises." There Kay, J. was using the word "election" in the strict sense, and saying that the election of an infant when of age to confirm a deed executed by that infant during infancy, although you may call it election if you like, is not election in the sense in which the word is legally used. Therefore, those two cases were simply this: the infant executes a deed; the infant is not absolutely bound, because the deed, though not void, is voidable, and the infant may at any reasonable time after coming of age repudiate and reject it, but if the infant chooses, instead of rejecting, to confirm it, that is a thing a married woman is perfectly competent to do; and it has been held that she may do it, even by a deed not acknowledged; and that is, as he says, not an election. There is one other case which has given me more difficulty in dealing with it, that is the decision of Stirling, J. in *Greenhill* v. *The North British and Mercantile Insurance Company* (*ubi sup.*). There the facts were very different from this case; but I must say, on reading that case carefully, that the learned judge does seem to have come to the conclusion that there were sufficient acts done to enable a woman to bind the reversionary interest in personalty while she was covert. He says: "In the present case an agreement for a settlement was come to before the marriage of Mr. and Mrs. Greenhill, and but for the provisions of the Statute of Frauds that agreement would have been completely binding on all parties. That statute prevented any action being brought on the agreement against Mrs. Greenhill, though she might have brought an action to enforce it against Mr. Greenhill, because he signed it, and she did not. "She did not bring an action, but by her acts she recognised the agreement and elected to have the benefit of it. To such a state of things the principles laid down in *Barrow* v. *Barrow* (*ubi sup.*) and *Wilder* v. *Pigott* (*ubi sup.*) appear to me to be applicable;" and then he holds that, that being so, those cases were an authority for his arriving at the conclusion at which he did arrive. But those two cases do not seem to me to bear on it, for the reasons I have just mentioned; because those were cases where an infant was bound subject to avoiding the deed, and nothing could be chosen but to avoid the deed or to confirm it.

In the case before Stirling, J., Mrs. Greenhill was not an infant; but, on the other hand, she had never executed the deed or signed the agreement, and therefore she was not bound. However, in that case, Stirling, J. came to the conclusion that *Barrow* v. *Barrow* and *Wilder* v. *Pigott* were authorities that enabled him to come to the conclusion upon the facts to which he did come. I do not see that those cases really apply to that case or apply to this, although, no doubt, his decision may have been perfectly right, having regard to the different state of circumstances which was said to amount to confirmation in that case. Those are the cases which were relied on as to the question of election. In the present case I do not find that Mrs. Harle ever was in a position to elect, according to the strict legal view of what election is. She never did choose between two different things, doing one thing or doing another, she having the power to do both. She was clearly barred to the knowledge of all parties from dealing with her reversionary interest at that time, and therefore, in my opinion, the agreement made at that time does not bind the interest. The answer to the question raised on the summons will be that, having regard to the provisions of the separation deed, Mrs. Harle is still entitled to a life interest in the property comprised in the settlement.

Solicitors: *Close* and *Co*; *Creeke* and *Hornby Porter*, agents for *Patrick* and *Son*, Durham.

Tuesday, June 25.

PEGGE v. THE NEATH AND DISTRICT TRAMWAYS COMPANY. (a)

Tramways company—Debenture-holders' action—Appointment of receiver and manager—Penalty for non-repair of tramway rails—Tramways Act 1870 (33 *& 34 Vict. c.* 78), *ss.* 28, 56.

By an order made in a debenture-holders' action a receiver and manager was appointed of the undertaking, property, and business of a tramways company, which under the provisional order of the Board of Trade whereby it was formed, and sects. 28 *and* 56 *of the Tramways Act* 1870 *was liable to penalties in case of neglect to keep in good repair the rails and tramways. Subsequently, at the instance of the county council for the county, an order was made by the Petty Sessional Divisional Court against the tramways company for the payment of a certain sum, the amount of penalties incurred by not keeping in good repair the rails of the tramways, such sum in default of payment to be levied by distress and sale of the company's goods. On the application of the county council for leave to distrain on the company's goods for payment of the sum notwithstanding the appointment of the receiver and manager:*

Held, that the order appointing the receiver and manager would not have been made since the decision of the Court of Appeal in Marshall *v.* The South Staffordshire Tramways Company (72 *L. T. Rep.* 542; (1895) 2 *Ch.* 36); *that the county council were not affected by it except that it prevented them from touching the property of the company without the leave of the court; and that the county council were entitled to the leave they asked for.*

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

THIS was a summons by the county council for the county of Glamorgan, and David Morgan Davies, the district surveyor to the council, for an order that Matthew Whittington, the receiver appointed in the action of *Pegge* v. *The Neath and District Tramways Company Limited*, might be ordered to pay to the applicants the sum of 435*l.* 4*s.* 6*d.*, the amount of penalties incurred upon disobedience by the defendant company of an order of the Neath Petty Sessional Divisional Court to keep in good condition and repair the rails of their tramways, and further penalties of 1*l.* for every day on which the defendant company should continue to omit to keep such rails in good condition and repair; or that the sum of 435*l.* 4*s.* 6*d.* and further penalties might be a first charge on the property and assets of the defendant company; or that the applicants might be at liberty to forthwith distrain upon the goods, chattels, and effects of the defendant company for the sum of 435*l.* 11*s.* 6*d.* and further penalties as aforesaid. The defendants to the summons were the parties to the action.

The defendant company was formed in 1873 by a Provisional Order of the Board of Trade made under the provisions of the Tramways Act 1870, and confirmed by the Tramways Order Confirmation Act 1873.

Clause 8 of the Provisional Order provided:

The promoters shall at all times maintain and keep in good condition and repair the rails of which any of the tramways shall for the time being consist, and if the promoters at any time fail to comply with this provision, or with any of the requirements of the Tramways Act 1870, they shall be subject to a penalty not exceeding 5*l.* for every day on which such act of omission continues, and such penalty may be recovered as by clause 56 of the said Act is provided.

The Tramways Act 1870 provides by sect. 28:

The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway.

And by sect. 56:

All tolls, penalties, and charges under this Act, or under any bye-law made in pursuance of this Act, may be recovered and enforced as follows:—In England before two justices of the peace, in manner directed by the Act 11 & 12 Vict. c. 43, and any Act amending the same.

In the year 1873 the defendant company issued a series of mortgage debentures by which "the undertaking, lands, houses, stables, plant, property, and effects, both present and future," of the defendant company were expressly charged with the repayment of the money advanced to the debenture-holders.

By an order made on the 15th Dec. 1893 by the Neath Petty Sessional Divisional Court, the defendant company were convicted of not maintaining and keeping in good condition and repair the rails of their tramways, and were adjudged to forfeit and pay a sum of 5*l.*, and also a further sum of 5*l.* and 7*s.* for costs forthwith,

and in default of payment it was adjudged that the same be levied by distress and sale of the defendant company's goods; and it was thereby ordered that for each and every day that the defendant company failed to maintain and keep in good condition and repair the rails of their tramways, they should pay a penalty of 1*l.*

The action was commenced in Sept. 1894, by Charles Pegge and James Davies Llewellyn, on behalf of themselves and all other holders of mortgage debentures of the defendant company; and on the 3rd Oct. 1894, upon the application of the plaintiffs in the action, an order was made by the Vacation Judge, appointing Matthew Whittington receiver and manager of the undertaking, property, and business of the defendant company, against which the company did not appeal. On the 12th Jan. 1895 the ordinary judgment in a debenture-holders' action was obtained.

By an order of the Neath Petty Sessional Divisional Court, made on the 8th Feb. 1895, it was adjudged that David Morgan Davies, the district surveyor of the Glamorganshire County Council, should recover against the defendant company the sum of 420*l.* for penalties incurred by disobedience to an order to maintain and keep in good condition and repair the rails of their tramways, and 5*l.* 4*s.* 6*d.* for costs, amounting together to the sum of 425*l.* 4*s.* 6*d.*, and it was ordered that the defendant company should pay the same forthwith; and if the same should not be paid as ordered, it was further ordered that the same should be levied by distress and sale of the goods and chattels of the defendant company.

Vernon Smith, Q.C. and *J. G. Wood* for the summons.—We have a right to distrain on the goods of the defendant company for the amount of the penalties they have been ordered to pay. The liability of the defendant company to the payment of the penalties is a statutory liability enforceable by the statutory remedy of distress, and this liability is inherent in the undertaking of the defendant company. The receiver and manager has taken over the undertaking of the defendant company, and can only take it subject to the liabilities attaching to it. He is in no better position in this respect than the defendant company. They referred to

Gardner v. *London, Chatham, and Dover Railway Company*, 15 L. T. Rep. 494; L. Rep. 2 Ch. App. 201;

Marshall v. *South Staffordshire Tramway Company*, 72 L. T. Rep. 542; (1895) 2 Ch. 36;

Blaker v. *The Herts and Essex Waterworks Company*, 60 L. T. Rep. 776; 41 Ch. Div. 399.

Ashton Cross for the defendants to the summons.—The applicants have no right to distrain on the property of the defendant company in the hands of the receiver and manager appointed for the debenture-holders. The debenture-holders are not liable to pay the penalties. The liability affects only the promoters of the defendant company, and the debenture-holders have a prior title to the property of the company. A sale of the property of the defendant company at the instance of the applicants would cause inconvenience to the public quite as much as a sale by the debenture-holders. The applicants are not entitled to do anything to break up the undertaking:

Legg v. *Mathieson*, 2 Giff. 71.

NORTH, J. stated the facts set out above and proceeded:—The difficulty is to enforce the order of the magistrates by reason of the possession of the receiver and manager for the debenture-holders. It cannot be enforced without the leave of the court. This is an application on behalf of the County Council for the County of Glamorgan for leave to enforce their rights, notwithstanding the appointment of the receiver and manager. What is the position of the debenture-holders? In the case of *Gardner* v. *London, Chatham, and Dover Railway Company* (*ubi sup.*) Lord Cairns, in his judgment, says: "When the court appoints a manager of a business or undertaking it in effect assumes the management into its own hands; for the manager is the servant or officer of the court, and upon any question arising as to the character or details of the management, it is the court that must direct and decide. . . . Now, I apprehend that nothing is better settled than this, that the court does not assume the management of a business or undertaking except with a view to the winding-up and sale of the business or undertaking. The management is an interim management; its necessity and its jurisdiction spring out of the jurisdiction to liquidate and sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends. To the management of the undertakings of the London, Chatham, and Dover Railway Company, assumed by the Vice-Chancellor's orders of the 12th and 17th July 1886, no limits, short of repayment of the whole debenture debt, could be assigned, for it has not been and could not be contended that there would, at the hearing of the cause, be any power of selling the undertakings. But, in addition to the general principle that the Court of Chancery will not in any case assume the permanent management of a business or undertaking, there is that peculiarity in the undertaking of a railway which would in my opinion make it improper for the Court of Chancery to assume the management of it at all. When Parliament, acting for the public interest, authorises the construction and maintenance of a railway, both as a highway for the public and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred. The company will, of course, act by its servants, for a corporation cannot act otherwise; but the responsibility will be that of the company. The company could not by agreement hand over the management of the railway to the debenture-holders. It is impossible that the Court of Chancery can make itself, or its officer, without any Parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management. It is said that the railway company did not object to the order for a manager. This may well be so. But, in the view I take of the case, the order would be improper even if made on the express agreement and request of the company."

What was charged by the debentures in that case was the "undertaking" of the company, and what is charged by the debentures in the present case is the same thing in my opinion, although specific things are mentioned in the debentures as well as the undertaking of the company. That case relates to a railway company, and the court no doubt has made a distinction between railway and tramway companies, and has in some cases appointed receivers and managers of tramway companies at the instance of their debenture-holders. But, in the recent case of *Marshall* v. *South Staffordshire Tramways Company* (*ubi sup.*) the question was raised whether an order appointing a receiver and manager of a tramway company such as has been made in this case, following other orders, ought properly to be made, and the Court of Appeal decided that the rule laid down in *Gardner* v. *London, Chatham, and Dover Railway Company*, with respect to railway companies, applies equally to tramway companies. Therefore, in the case of such a company a receiver and manager cannot properly be appointed as was done here, and the order for such appointment, which has been made in the present case, would not be made now after the decision in *Marshall* v. *South Staffordshire Tramways Company* (*ubi sup.*). That order, however, has not been appealed from, and is binding on the parties to it. The Glamorganshire County Council, however, were not parties to, and are not bound by, the order, and it is open to them to say that they are not affected by the appointment of the receiver and manager except to this extent, that they must have the leave of the court to interfere with his possession. For that leave the applicants now ask. I must hold that the debenture-holders have acquired no right against the county council under the order for the appointment of a receiver and manager of the property of the defendant company, and I must give them leave to exercise their right of distress. But both parties have asked me to decide as to all their rights. It is said that if the distress is put in force inconvenience to the public will arise. If some of the defendant company's cars are seized and sold, the public will be affected by such sale equally whether the sale take place at the instance of the Glamorganshire County Council or at the instance of the debenture-holders. But the two cases do not stand in the same position. The power of distress to be exercised by the county council is an express statutory power. It is quite different from the power of sale given by the defendant company to the debenture-holders. In my opinion I cannot interfere with the exercise by the county council of the express statutory power. Moreover, the objection as to affecting the undertaking does not apply. The statutory power of distress has been conferred with the object of compelling the promoters of the undertaking to keep the tramways in repair. If this were not done the public would suffer inconvenience, and the object of the power is not to interfere with but to secure the public convenience. I must give leave to the Glamorganshire County Council to distrain, notwithstanding the appointment of a receiver and manager, and declare that they are entitled to enforce their statutory power of distress in order to levy the penalties under the orders of the Neath Petty Sessional Divisional Court, notwithstanding any rights or claims of the debenture-holders.

Solicitors: *Helder, Roberts, Son,* and *Walton,* for *Morgan* and *Davies,* Neath; *Charles Everett.*

June 15 *and* 19.

(Before STIRLING, J.)

Re DE HOGHTON; DE HOGHTON *v.* DE HOGHTON. (*a*)

*Revenue—Legacy duty—Annuity—Term of years—Trust for payment out of rents of real estate—Direction to accumulate surplus rents—Annuitant tenant for life subject to term—*45 *Geo.* 3, *c.* 28, *s.* 4—8 *&* 9 *Vict. c.* 76, *s.* 4.

A testator devised certain real estate to trustees for a term of 500 *years, and subject thereto he settled the same in strict settlement under the limitations whereof A. was tenant for life. The trusts of the term were* (inter alia) *to pay out of the rents and profits of the estate an annuity of* 3000*l. to the person who should for the time being* (*subject to the term*) *be entitled under the will to the possession or receipt of the rents and profits of the estate, and subject thereto to accumulate the rents and profits during a period of twenty-one years from the testator's death, and invest the same in the purchase of real estate to be settled to the same uses as the testator's real estate, and after the determination of the twenty-one years to pay the rents and profits to the person for the time being entitled to the real estate comprised in the term.*

Held, that during the continuance of the twenty-one years A.'s annuity was a mere charge on the estate of another person, and consequently that legacy and not succession duty was payable in respect of it under sect. 4 *of* 8 *&* 9 *Vict. c.* 76.

Attorney-General *v.* Jackson (2 *Cr. & J.* 101) *followed.*

Shirley *v.* Earl Ferrers (1 *Ph.* 167) *explained.*

PETITION.

Sir Henry de Hoghton, Bart., by his will dated the 9th Feb. 1875, after appointing Sir Charles de Hoghton, Richard de Hoghton, and Richard John Flowerdew trustees and executors thereof, devised all his freeholds to the use of his trustees for the term of 500 years to commence from his decease upon the trusts thereinafter declared concerning the same, and subject to that term and to the trusts thereof, to the use (in the events which happened) of Sir James de Hoghton for life, with remainder to the use of his first and other sons successively in tail male, with remainders over. And the testator declared that the premises were limited to the trustees for the term of 500 years upon trust by and out of the rents and profits of the hereditaments comprised therein to raise and pay, as therein mentioned, the annuities or annual sums for the time being payable under the will or any codicil thereto, and in particular to raise and pay to the person who for the time being should (subject to the term) be entitled under the will to the possession or receipt of the rents and profits of the devised estates, provided that such person, if a male, should be above the age of twenty-one years, or, if a female, should be above the age of twenty-one years or have

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

married, the annuity following according to the age of the recipient; that is to say, if and while the recipient was under the age of twenty-five years 1000*l.*, and if and while between the ages of twenty-five and thirty years 2000*l.*, and if and when above the age of thirty years 3000*l.* And the testator declared that, subject to the trust thereinafter declared and to the costs and expenses of the trustees as therein mentioned, the trustees should during the period of twenty-one years from his death accumulate the rents and profits arising from the hereditaments and premises comprised in the term as therein more particularly mentioned and apply the same, with the accumulations, upon the trusts and with and subject to the powers, provisoes, and declarations thereinafter contained of and concerning the moneys to arise from a sale in pursuance of the power of sale thereinafter contained as therein mentioned, and after the determination of the said period of twenty-one years, subject as aforesaid, should pay the rents and profits to the person or persons for the time being entitled to the hereditaments and premises comprised in the said term in reversion expectant upon the said term. And the testator empowered his trustees to make sales or exchanges and to join in partition of any part of the hereditaments from time to time subject to the limitations of the will as therein mentioned. And he declared that his trustees should invest all moneys which might become payable upon any such sale, exchange, or partition, as aforesaid, in the purchase, as therein mentioned, of any freehold, copyhold, or customary hereditaments in Great Britain for any estate of inheritance, to be conveyed or surrendered to and held by them to the uses and upon the trusts and with and subject to the powers, provisoes, and declarations of the will from time to time affecting the testator's real estates thereinbefore devised, or as near thereto as circumstances should then admit of as therein mentioned. The testator then devised and bequeathed all his copyhold, customary, and leasehold hereditaments to his trustees on trusts similar to those declared concerning his freeholds, and he also bequeathed the residue of his personal estate to his trustees upon trust (*inter alia*) to pay legacy duty in respect of all legacies and annuities given by his will free from legacy duty. And he directed that each of the annuities given by his will should be free from legacy duty.

The testator died on the 2nd Dec. 1876, and shortly after his death an action was commenced to administer his estate.

On the 12th April 1893, Sir J. de Hoghton succeeded to the baronetcy, and thereupon became entitled under the trusts of the will to an annuity of 3000*l.*

This was a petition presented by the present trustees of the will, which raised the question whether legacy or succession duty was payable in respect of the annuity.

Sect. 4 of 8 & 9 Vict. c. 76, provides that:

> Every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable or shall have effect or be satisfied out of the personal or movable estate or effects of such person, or out of any personal or movable estate or effects which such person hath had or shall have had power to dispose of, or which gift is or shall be payable or shall have effect or be satisfied out of or is or shall be charged or rendered a burden upon the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof, which such person hath had or shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate, or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a *donatio mortis causâ*, shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to the said duties accordingly. . . .

Hastings, Q.C. and *Ingle Joyce* for the petition.—The annuity given to Sir J. de Hoghton is a gift by way of annuity charged upon the real estate of the giver, viz., Sir H. de Hoghton, or on the profits thereof. It is, therefore, plainly within the language of sect. 4 of 8 & 9 Vict. c. 76:

Attorney-General v. *Jackson*, 2 Cr. & J. 101;
Stow v. *Davenport*, 5 B. & Ad. 359.

Those cases were decided upon 45 Geo. 3, c. 28, but the provisions there contained were similar to those in sect. 4. It is said, however, that this case is governed by the decision in *Shirley* v. *Earl Ferrers* (1 Ph. 167). That case, however, proceeded upon the ground that the annuitant was also entitled to the rents and profits of the estate out of which the annuity was payable. Here the annuity is payable out of rents and profits to which Sir J. de Hoghton can never be entitled. They also referred to 51 Vict. c. 8, sect. 21, sub-sect. 2.

Buckley, Q.C. and *Method*, and *Rowden*, for persons interested in remainder, took no part in the argument.

Vaughan Hawkins for the Commissioners of Inland Revenue.—According to the Act as interpreted by *Shirley* v. *Earl Ferrers* (*ubi sup.*), which has now for a period of fifty years been accepted as a decision governing the practice in cases like the present, succession and not legacy duty is clearly payable. The point to be determined is, who is the owner of the estate? For this purpose the matter must be looked at broadly. A tenant for life does not cease to be owner in substance merely because for a limited period his interest is qualified by a provision for increasing the bulk of the estate by accumulation of rents and profits. Here the effect of the will is to give Sir James de Hoghton a life estate in the property, subject to certain charges, of which the trust for accumulation for a limited period is one.

Hastings, Q.C. replied.

Cur. adv. vult.

June 19.—STIRLING, J. stated the facts and continued:—The statute on which the question depends is 8 & 9 Vict. c. 76, s. 4. which re-enacts (with some extensions) the provisions of a similar section contained in 45 Geo. 3, c. 28, which itself was a re-enactment with extensions of the provisions contained in 36 Geo. 3, c. 52. Reading sect. 4 of the Act now in force shortly it runs thus. [His Lordship referred to the section, and continued:] Now, the corresponding section in the Act of 45 Geo. 3, c. 28, was considered by the Court of Exchequer in the case of *Attorney-General* v. *Jackson* (*ubi sup.*). There the testator gave a life estate in his freehold

property to C. T., and after her decease, and in the event of her husband. J. T. surviving her, he gave him an "annuity or yearly rent-charge" of 500*l.* payable quarterly, "with such power and remedy of distress and entry and perception of rents, in case the annuity should be in arrear, as are reserved to lessors for the recovery of rents on leases for years;" and subject to that annuity, he gave his real estates in moieties to R. J. in fee and W. J. for life. It was held that legacy duty was payable upon the devise in favour of J. T. The judgment was delivered by Lord Lyndhurst, who was then Lord Chief Baron, and he said: "It appears to us that this clause comes precisely within the terms made use of by the Legislature—a gift by way of annuity out of or charged upon his or her real estate. We cannot, therefore, take upon ourselves to say, as this clause comes precisely within the terms made use of by the Legislature, that the Legislature did not intend that it should apply to a case of this description." On that ground the annuity was held subject to legacy duty. The same point was considered by the Court of King's Bench in *Stow* v. *Davenport* (*ubi sup.*) when the decision in *Attorney-General* v. *Jackson* (*ubi sup.*) was followed, and has never since been departed from. In the case of *Shirley* v. *Earl Ferrers* (*ubi sup.*) a decision was given which is said to qualify the rule laid down in *Attorney-General* v. *Jackson* (*ubi sup.*). There a testator devised certain estates to the use of trustees for the term of 500 years, and, subject thereto, to the use of other trustees to preserve contingent remainders, with remainder to the first and other sons of Caroline Shirley (then an infant), with divers remainders over, and he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estates as they should think fit (not exceeding in any one year a certain amount), in aid of another fund, to the maintenance and education of Caroline Shirley until she should attain twenty-one or marry, and that they should accumulate the surplus rents and profits for the benefit of Caroline Shirley when she should attain twenty-one or marry, and if she should die under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying, they should, during her lifetime, pay the surplus rents, after payment of the annuities, to her for her separate use. It was held that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of Caroline Shirley until her marriage were not liable to legacy duty. The decision was that of Lord Lyndhurst himself who was then Lord Chancellor, and the case of *Attorney-General* v. *Jackson* (*ubi sup.*) was cited. What his Lordship said in giving judgment is very short, and it is this: "The effect of the will is to give the petitioner a life estate subject to certain charges, and coupled with a direction to the trustees to apply a limited portion of the rents to her maintenance and education until she attain the age of twenty-one or marry. The direction merely does what this court would have done without it. The petitioner would have been entitled, at all events, to maintenance out of the rents and profits of the real estates. It is true the trustees have a discretion to allow a portion of the rents, not exceeding a certain amount, for that purpose; but still the estate out of which the allowance is to come is her estate. Nothing but what is a charge upon the estate of another person will come within the statute. It is very important that, as far as possible, we should avoid refinements in the construction of this Act. I am of opinion that no legacy duty is payable." Now that case is relied upon by the Crown in the present case. It is said, and I think truly said, that two principles are laid down or implied in the judgment of Lord Lyndhurst. First, that in considering the nature of the interests created by a will or other instrument for the purposes of this Act, the substance of the thing is to be looked at, and not the mere conveyancing form; and, secondly, that an annuity within the meaning of 8 & 9 Vict. c. 76, s. 4, must be a charge upon the estate of another person, and not merely a portion of the estate of the same person. I propose to apply these two principles to the present case, and to consider whether in substance what is given to Sir James de Hoghton during the period of twenty-one years from the death of the testator is or is not a charge upon the estate of another person. Now to proceed by steps. If the trust had been during the period of twenty-one years to pay Sir James de Hoghton say the sum of 3000*l.* a year for twenty-one years, and to pay the residue of the rents and profits to a person whom I will call A., and then subject to the term to a third person whom I will call B. for life with remainders over, then it seems to me the case would plainly fall within the decision in *Attorney-General* v. *Jackson* (*ubi sup.*). Does it make any difference that the person whom I have denominated A. is Sir James de Hoghton himself? I cannot see that it does. During the period of twenty-one years he does not take the income. He merely takes an apportioned part of the income, and the residue of the income is given away to another person A., and therefore during that period the annuity is charged upon the estate or interest of A. Then all that remains is to consider whether again it makes any difference that in this case the person whom I have designated A. is a trustee directed to lay out the surplus rents in the purchase of other lands to be settled to the same uses as the lands from which they were derived. Again I say I cannot see that that makes any difference in substance. The surplus rents do not belong to Sir James during the twenty-one years. It is possible that if he survives the period he may take an interest, but if he dies during that period he takes no interest whatever. It seems to me that during the twenty-one years Sir James de Hoghton has a mere charge on these rents that are given beneficially to other persons, and that consequently legacy duty, and not succession duty, is payable.

Solicitors: *Rowcliffes, Rawle,* and *Co.*; *Park-Nelson,* and *Co.*; *Solicitor of the Inland Revenue.*

QUEEN'S BENCH DIVISION.

May 27 and 29.

(Before MATHEW, J.)

ASFAR AND COMPANY v. BLUNDELL AND OTHERS. (a)

Marine insurance—Destruction of merchantable character of goods — Right of shipowner to freight—Insurance of "profit on charter"—Valued policy — Warranty, "free from all average," meaning of—Concealment of material facts.

To disentitle a shipowner to freight for the carriage of goods it is not necessary that they should be destroyed during the voyage. The destruction of their merchantable character is enough.

A ship was chartered by the plaintiffs for a certain voyage, and they anticipated a profit on the chartered freight by shipping goods for other parties at such freights as they could obtain. The plaintiffs insured their interest in a policy with the defendants, the interest insured being described as "2000l. on profit on charter . . . warranted free from all average." At the usual place for the valuation in a valued policy there was a blank, and at the time the policy was made the plaintiffs did not know the amount of the bill of lading freights, and the underwriters did not inquire and were not told that the charter was for a lump sum or the amount of such sum.

The excess of the bill of lading freights over the chartered freight was 790l. During the voyage, and by perils insured against, the goods shipped under bills of lading were so damaged that the whole of the profit, but not the whole of the freight, was lost.

Held, (1) *that the 790l. was the subject-matter insured; that the warranty "free from all average" applied to that specific sum and not to the whole freight, and that, as there was a total loss of this profit, the warranty protected the assured who were entitled to recover in respect of such loss*; (2) *that the policy was not a valued policy for 2000l., but a policy to cover the 790l., and that the assured were entitled to recover that amount only under the policy; and* (3) *that the assured were not bound to disclose to the underwriters matters (such as the fact that the charter was for a lump sum) as to which the underwriters waived all inquiry, and that the policy therefore was not void for concealment of material facts.*

ACTION to recover a total loss on a policy on "profit on charter."

The plaintiffs are merchants carrying on business at Bussorah in Turkey, and do a regular business in chartering vessels for the trade between the Persian Gulf and London, and in loading them on the berths at the various ports at such rates as they may be able to obtain. The defendants are underwriters.

The plaintiffs entered into a charter-party with the owners of the steamship *Govino*, for the hire of the ship for a voyage from Bussorah and certain other places (all in the Persian Gulf) to London, for a lump sum of 3900l., upon the terms (*inter alia*) that all freight earned by the ship should be for the account of the charterers as well as all passage-money, and the vessel was to go to ports of loading in the Persian Gulf there to take on board a general cargo and bring that general cargo to London. The plaintiffs placed the steamer on the berth in the usual way at ports in the Persian Gulf, and cargo was shipped at these ports by various parties at certain rates of freight under bills of lading issued by the plaintiffs. The total of such bill of lading freights amounted to 4690l., and the ship sailed with her cargo from the Persian Gulf for the port of London.

The charterers anticipated in the employment of the ship a profit upon the lump sum of 3900l., which they had agreed to pay the shipowner for the charter, and that anticipated profit they insured with the defendants.

The defendants accepted the risk on slip in the usual way, and when they did so they were not informed of, and did not inquire as to, and did not know of any of the terms or conditions of the charter-party, or of the bills of lading, or the amount of the chartered freight, or the bill of lading freights.

The policy of insurance was subsequently made out, and the plaintiffs were insured for 2000l., "at and from any port or ports, place or places, in the Persian Gulf to London, with liberty to transship and call at all or any ports and places, especially at Suez and Beyrout if required to load or discharge cargo, and with all clauses, liberties and exceptions as per bills of lading whether issued under the new form or the old or otherwise."

The interest insured was described by a clause at the foot of the policy as follows: "2000l. on profit on charter . . . warranted free from all average," but there was no valuation in the usual place as in the case of a valued policy.

During the voyage and by perils insured against, the vessel after her arrival within the port of London, but before she had reached her discharging dock, and while the cargo was still on board, was run into by another vessel.

A considerable portion of her cargo was thereby damaged, but it still existed, and as to the greater part, either was or could have been delivered in specie, though some portion of it was not capable of identification by marks. A large part of the cargo consisted of dates packed in boxes, as many as 700 tons. These dates were condemned by the port sanitary authorities as wholly unfit for human food, and were not allowed to be delivered to the consignees.

Owing to the damage to cargo a portion of the freight payable under the bills of lading was not received by the plaintiffs, the amount actually received by the plaintiffs thereunder being 2875l. 15s. 5d. only, instead of 4690l.

The plaintiffs claim 2000l., as upon a valued policy, or in the alternative 790l., made up as follows; Gross freight that should have been received in London from above ports, 4690l.; lump freight payable to owners, 3900l.: Amount of profit and loss claimed by the plaintiffs, 790l.

Joseph Walton, Q.C. for the plaintiffs.—The dates did not arrive in a merchantable condition, and were, in fact, unfit for food. They could not be described as dates, and they could not be offered to the consignees as dates. No freight, therefore, was payable in respect of them:

Dakin v. *Oxley*, 10 L. T. Rep. 268; 15 C. B. N. S. 646.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

In that case Willes, J., in delivering the considered judgment of the court, said: "In both classes of cases, whether of loss in quantity or change in quality, the proper course seems to be the same, namely, to ascertain from the terms of the contract, construed by mercantile usage, if any, what was the thing for the carriage of which freight was to be paid and by the aid of a jury to determine whether that thing or any, or how much of it, has substantially arrived. If it has arrived though damaged, the freight is payable by the ordinary terms of the charter-party." The case of *Duthie* v. *Hilton* (19 L. T. Rep. 285; L. Rep. 4 C. P. 138), is to the same effect. What was insured here was the "profit on charter," and as there was in fact a loss on the charter, the plaintiffs are entitled to recover in respect of this loss. Again, we say that this is a valued policy, although there is no specified or valued sum in the usual valuation clause; but at the end we have the words, "2000*l.* on profit on charter," and this clause renders the policy a valued policy, so that the plaintiffs are entitled to recover 2000*l.* The defendants say that the charter being for a lump sum, the amounts of the chartered freight and bill of lading freights ought to have been communicated to them: but the defendants knew that there was a charter, and they could have discovered, if they had so wished, the amounts of the chartered and bill of lading freights. That being so, they obviously waived all inquiry as to those points, and there is no duty imposed on the plaintiffs to disclose such matters to the underwriters:

The Bedouin, 69 L. T. Rep. 782; (1894) P. 1.

He also referred to

The Inman Steamship Company v. *Bischoff*, 47 L. T. Rep. 581; 7 App. Cas. 670.

T. G. Carver for the defendants.—The dates, though damaged, were nevertheless dates, and freight was payable on them. The test in such cases is whether the service in respect of which the freight was payable has been substantially performed:

Dakin v. *Oxley* (*ubi sup.*).

The present case satisfies that test, as the service was performed. Even if no freight is payable on the dates. the defendants are not liable; for although the plaintiffs in that case would make no profits on the charter, that is not sufficient to satisfy the warranty in the policy against average. The warranty must be taken with reference to the subject-matter; here the subject-matter was the bill of lading freight belonging to the plaintiffs, the charterers, part of which freight they insured. The words "profit on charter" means the excess of the bill of lading freight over the charter-party freight. What was insured was therefore part of the bill of lading freight, and the warranty against average would not be satisfied unless the whole bill of lading freight was lost. The contract of the underwriters was that they would be liable only in case of a total loss of the adventure:

Hodgson v. *Glover*, 6 East, 316.

Here there was not a total loss of the whole adventure. The mere difference between the two freights was not an insurable subject. What was at risk here was the right to the bill of lading freight; part of this was insured, but the portion insured was not a separable portion of that freight. It was an inseparable part of the whole, and was not like an insurance of the freight on a part of goods only. Thus an insurance of profit on cargo, that is the excess of the arrival value over the shipped value, is always considered as an insurance of goods, and if insured with a warranty against average the underwriter is not liable unless the whole of the goods are lost; it is not sufficient that so much has been lost that the profit on the cargo is nothing:

Phillips on Insurance, ss. 1209, 1503;
Hodgson v. *Glover* (*ubi sup.*).

If the defendants are wrong as to the effect of the warranty then it was most material to them whether the charter was for a lump sum or a tonnage rate. For if the charter freight had been at a tonnage rate, it would have been payable only on such goods as arrived, and if any of the goods had arrived the charterers would have gained a profit. In such case the loss of profit would have been partial only, and the warranty against average would not have been satisfied unless the whole bill of lading freight was lost. The charter being for a lump sum altered that position. That being so, it ought to have been disclosed. There was therefore a material concealment which renders the policy void.

Cur. adv. vult.

May 29.—MATHEW, J.—[After stating the facts:] The first important question of fact which was raised in the case was, whether any freight was payable in respect of the dates. If freight was payable, there was a profit on the charter freight, but if none was payable there was no profit, and the question whether or not freight was payable upon the dates depends upon the condition in which the dates were landed. With respect to that, there was evidence given on behalf of both parties. [His Lordship considered the evidence.] I am satisfied, upon the evidence, that the goods had not arrived in such a condition as to entitle the owner of the ship to be paid freight, and that the freight was lost upon that part of the cargo. The goods unquestionably were not in a merchantable condition as dates, and if the suggestion be that total destruction is absolutely necessary to disentitle the shipowner from recovering his freight, I can only say that that ancient view of the matter which was put forward in *Cocking* v. *Fraser* (1 Park on Ins. 181) cannot be treated as any longer the law. Total destruction is not necessary. Destruction of the merchantable character of the goods is sufficient; and in accordance with the rule recognised in *Roux* v. *Salvador* (3 Bingh. N. C. 266), *Dakin* v. *Oxley* (*ubi sup.*), and *Duthie* v. *Hilton* (*ubi sup.*), I pronounce that these goods are goods which have not arrived in a condition to entitle the owner of the ship to be paid freight. Therefore the freight was lost, and that first question of fact must be decided in favour of the plaintiffs. Then comes the next point, which was this. The policy was entered into "on profit on charter," and it contains this further clause, "warranted free from all average," and that led to a very ingenious argument on behalf of the defendants. That argument may be put in this way. Suppose, said the learned counsel, 50 per cent. of the goods to be lost, and 50 per cent. of the goods to arrive;

presumably there would be 50 per cent. of the profit on the goods that arrived, therefore there would be only the particular loss of profit upon this policy, and the warranty "free from average" would protect the underwriters. But unfortunately for this argument it would be exactly the same if 10 per cent. of the goods arrived, because it might be said in the same way that presumably there are 10 per cent. of the profits which would be payable to the charterers, and therefore there is only a particular average loss and the warranty protects the underwriters under the circumstances. If that were so the policy would protect the assured to a very limited extent indeed, because it would be construing it as a policy only to protect in the event of a total loss on all the freight. Now, although it was not known at the time the insurance was effected that the bills of lading freights amounted to 4690*l.*, and that, as against 3900*l.*—the lump sum payable on the charter—there was a profit of 790*l.*, yet that 790*l.*, under the circumstances, is to be treated as written in the policy as the subject-matter of insurance, so much profit on freights beyond the 3900*l.* on the charter; and I am satisfied that the subject-matter of insurance here—the profit on freight, namely, this 790*l.*—is as specific as if it were the insurance on the freight of any particular portion of the cargo, such as freight on sugar, if it were part of the cargo, passenger money, or freight on deck cargo. That being the special subject-matter of insurance the warranty "free from average" must apply to that specific sum, and would therefore, as intended by the policy of insurance, protect the assured in case of the total loss of that profit—not the total loss of the entire freight, but the total loss of that profit. From the events that have occurred it is quite clear the whole of the profit on the freight, which the assured had to pay, has been lost. There is a total loss of that 790*l.*, and therefore in that respect the plaintiffs are entitled to recover. Then the next question that was raised for the plaintiffs was that this was a valued policy. Now we know that the amount of the interest was really 790*l.*, but the insurance is upon "2000*l.* on profit on charter," and if it were a valued policy it was not disputed that the 2000*l.* would be recoverable in respect of this insurance upon 790*l.* But it is very remarkable that when we look at the policy, there is no valuation in the proper place; the valuation was a blank, and I can well understand why it should be so. The object of the valuation is to prevent troublesome inquiry into the amount of the interest; but there would be no difficulty about that inquiry here, because we have only to ascertain what the bill of lading freight was and compare that with the lump sum described in the charter, and the amount intended to be protected would be ascertained. I am clearly of opinion that this is not a valued policy. My attention was called to the sentence in writing at the end of the print "2000*l.* on profit on charter," and I was asked to transfer that clause from its position there, and put it where it ought to come if the valuation was intended to be inserted. I cannot treat the policy in that way. There is an adequate reason for that sentence "2000*l.* on profit on charter," because it is the only description in the policy of the subject-matter of the insurance. Upon that point the plaintiffs are wrong, and they are only entitled to recover upon the footing that 790*l.* is covered. A further point was made for the defendants that the policy did not attach because of a material concealment. It was said that the parties were not *ad idem* because the underwriters were not told that the charter was for a lump sum, and they might have assumed that it was at a tonnage rate, and then if that were so this policy did not cover the amount which is sought to be recovered. I cannot understand what the materiality of the concealment is, but supposing it to be material that the disclosure should be made to the underwriters, the case is determined by the well-understood principle that underwriters are not entitled to be told what they waive all inquiry about. They were told there was a charter, and if they wanted to see the charter or hear of its contents they had only to ask, but it is not usual for underwriters to make any such inquiries. They waive inquiry on the subject, and in accordance with the principles laid down in *Haywood* v. *Rodgers* (4 East. 590), and in the judgment of Lord Blackburn in the *Inman Steamship Company* v. *Bischoff* (*ubi sup.*). I hold that there is nothing in that point, and that the assured here were not bound to disclose that as to which the underwriters obviously waived all inquiry. Therefore there must be judgment (with costs) for the plaintiffs upon the footing that 790*l.* is covered by the policy, and no more.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Ince, Colt,* and *Ince.*

Solicitors for the defendants, *Waltons, Johnson, Bubb,* and *Whatton.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Wednesday, June 12.

(Before the PRESIDENT (Sir F. H. Jeune.)

HORNE v. FEATHERSTONE AND OTHERS. (*a*)

Will — Undue execution — Attesting witnesses.

The Wills Act, which permits acknowledgment of his signature by a testator, allows no such latitude in the case of an attesting witness.

Where the testator acknowledged his signature to his will in the presence of two attesting witnesses, and one of the latter, who had previously signed the will in the testator's presence, after seeing him sign before the arrival of the second witness, traced over his signature with a dry pen, and the second witness then attested the will, all three being present at the time:

Held, that the will was not duly executed.

PROBATE SUIT.

The plaintiff, as one of the executors appointed under the last will of William Featherstone, late of 41, Church-road, New Brompton, in the county of Kent, deceased, claimed probate of the said will in solemn form of law.

The testator died on the 30th Nov. 1894, and the will in question was dated the 10th June 1890.

The defendants, three of the next of kin of the said deceased, pleaded undue execution, and asked for a decree that the deceased died intestate.

One of the defendants was the heir-at-law of the testator, and was also one of the executors named in the will.

(*a*) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

One of the attesting witnesses was examined in court, and his evidence was to the following effect:

The testator, whom he had known for about twenty years, called upon him one evening and produced a document which he said was his will, and asked witness to attest his signature, saying that he intended to go to a Mr. Lines afterwards to get him to sign the will as the other attesting witness. He laid the document on the table, signed it, and told witness to write his name. Witness noticed the words in the attestation clause "in the presence of each other," and drew the testator's attention to the fact that both attesting witnesses ought to be present to see him sign. The testator said that, as far as his memory served him, it was not necessary for all three of them to be present at the same time, and added: "Mr. Lines knows your signature and knows my signature, and therefore it is not necessary for him to be present." Witness thereupon signed the document, which the testator took away, saying he was going to take it straight up to Mr. Lines. About a quarter of an hour afterwards he returned, accompanied by Mr. Lines, who said: "You should not have signed till I was present." Witness replied that it was Mr. Featherstone's fault, and that would have been the proper way to do it. It was then arranged that witness should run a dry pen over his own signature, which he accordingly did. Witness was unable to say whether Mr. Featherstone did so or not. Mr. Lines then wrote his name beneath witness' signature, and Mr. Featherstone took the document away.

The evidence of Mr. Lines, the other attesting witness, taken upon commission, was read to the court. The material parts of his evidence were as follows:

I did not see William Featherstone sign the will at first. When shown to me it was signed. I said to him that it required him and the two witnesses to be together. William Featherstone then took me to the residence of the other witness, William Thomas Hill, who had previously signed the will. William Featherstone then went over his signature with a dry pen, and William Thomas Hill went over his signature with a dry pen. I then signed the will as one of the witnesses. All this was done in the presence of the testator and of the other subscribing witness, and in my presence.

Barnard for the plaintiff.

Bargrave Deane, for the defendant, referred to

In the Goods of Maddock, 30 L. T. Rep. 696; L. Rep. 3 Prob. & Div. 169.

The PRESIDENT.—It is a common delusion that a witness by writing over a signature with a dry pen does the same as signing. Of course, this is not so. A testator may do it, because that is an acknowledgment within the terms of the statute; but the Wills Act does not provide that an attesting witness may acknowledge his signature. I must pronounce against the will; but, as the litigation has arisen entirely through the testator's own act, I direct that the costs of all parties come out of the estate.

Solicitor for the plaintiff, *T. H. Philpots.*

Solicitors for the defendants, *W. A. E. Headley*, agent for *A. B. Hearn*, Chatham.

Judicial Committee of the Privy Council.

May 7 and July 10.

(Present: The Right Hons. Lords HOBHOUSE, MORRIS, and DAVEY, and Sir R. COUCH.)

MCSWAINE AND OTHERS *v.* LASCELLES AND ADAIR. (*a*)

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Law of Queensland—Religious, Educational, and Charitable Institutions Act 1861 (25 *Vict. No.* 19)—*Will—Bequest to Presbyterian Church—Validity.*

The Religious, Educational, and Charitable Institutions Act 1861 *of Queensland empowers the Governor to incorporate any person or persons and their successors holding any religious or secular office or preferment in the institution or community to which they belong, and enables them to hold property in their corporate name for the uses and purposes of such institution or community. The Act further invalidates any testamentary disposition, not made in accordance with the Act, to or in favour of a body the office-bearers of which are incorporated under the Act.*

Held, that the community or institution is incorporated through its officers, and that any gift made for or in trust for any of its objects is made in favour of the corporation, although the donor may have selected other trustees, and though the gift is not directly or in terms to or in favour of the corporation.

Swan's case (4 *Queensland L. J.* 171) *approved.*

A gift to a congregation in union with the Presbyterian Church of Queensland is a gift to or in favour of that church, and is therefore within the Act.

Judgment of the Court below affirmed.

THIS was an appeal from a decision of the Supreme Court of Queensland (Harding, Cooper, and Real, JJ.), holding that a devise and bequest contained in the will, dated the 15th July 1890, and proved the 28th Sept. 1892, of Robert Adair, who died on the 23rd Aug. 1892, of the residue of his real and personal estate (subject to debts, funeral and testamentary expenses and legacies, and an annuity to his wife, who predeceased him) "To the Presbyterian Church at Spring Hill, Brisbane aforesaid called St. Pauls, now under the pastorate of the Rev. J. F. McSwaine," and with a direction to his executor and trustee, "to pay and apply the same to and for the use and benefit of the said church as in his sole discretion shall seem fit, or to pay the same to the church-wardens for the time being of such church, and whose receipt shall be good and sufficient discharges to my said executor and trustee for any moneys he may pay them to be applied for the use and benefit of the said church as aforesaid," was void under the provisions of the Queensland Religious, Educational, and Charitable Institutions Act of 1861.

This Act is entitled "An Act to facilitate the Incorporation of Religious, Educational, and Charitable Institutions," and enacts (sect. 1) that:

It shall be lawful for the Governor, with the advice of the Executive Council, from time to time to issue

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

letters patent under the seal of the colony, and therein to declare that any person or persons and their successors for ever holding any religious or secular office or preferment, or exercising any religious or secular functions to which he or they shall have been duly called or appointed in accordance with the rights, laws, rules, or usages of the community or institution to which such person or persons shall belong, shall be a body corporate by such name and style as may in and by the said letters patent be given to such corporation; and such person or persons shall by that name have perpetual succession and a common seal, and shall by the same name from time to time, and at all times thereafter be capable to receive, purchase, acquire, and possess to them and their successors so called or appointed, to and for the uses and purposes of the said corporation, and of the religious or secular institution by which such person or persons and their successors shall be so called or appointed, any messuages, lands, tenements, and hereditaments, of what nature, kind, or quality whatsoever, within the said colony, and also to receive, purchase, acquire, and possess to and for the same uses and purposes any goods, chattels, gifts, or benefactions whatsoever, and to dispose of the same as therein mentioned.

The same Act provides (sect. 3) that:

Every deed of grant, gift, benefaction, or testamentary disposition to or in favour of any such corporation shall be made in the presence of, and attested by three credible witnesses, and shall be executed and registered one month previous to the decease of the person making such deed of grant, gift, benefaction, or testamentary disposition.

The will in this case was attested by two witnesses, but was not made in the presence of or attested by three witnesses, and was not registered before the testator's death, as required by the Act, and did not therefore comply with the Act.

At a conference of delegates from Presbyterian congregations, held at Brisbane on the 25th Nov. 1863, certain articles of union were adopted for the purpose of associating the Presbyterians of Queensland together under the name of the Presbyterian Church of Queensland. The Congregation of Presbyterians who subsequently, and at the date of the testator's will, occupied the Presbyterian Church at Spring Hill, Brisbane, called St. Paul's, under the pastorate of the Rev. J. F. McSwaine, was at the date of the conference called the Congregation of the United Presbyterian Church at Brisbane, or the Creek-street Presbyterian Church, and was not represented at the said conference; but shortly after its date, and before the year 1874, they joined the said Presbyterian Church of Queensland, and thereupon became and they have ever since continued to be a congregation of that body. In the month of May 1874 the General Assembly of the said Presbyterian Church of Queensland adopted certain rules and forms of procedure.

By letters patent dated the 13th June 1876, and issued under the seal of the colony in pursuance of the Act, the Rev. William Lambie Nelson, the Rev. Charles Ogg, and James Bryden, respectively holding and exercising the offices of Moderator, Clerk, and Treasurer of the General Assembly of the Presbyterian Church of Queensland, and their successors for ever, were duly incorporated by the name and style of "The Presbyterian Church of Queensland."

In the year 1885 the land in Creek-street, Brisbane, which up to that time had been held under a declaration of trust, dated the 7th Sept. 1864, by trustees for the said congregation, was sold with the consent of the congregation. Partly out of the proceeds of such sale, and partly out of other funds belonging to them, the said congregation, at some time prior to the month of February 1887, purchased other land at Springhill and erected thereon the existing church called St. Paul's Presbyterian Church, Spring-hill, Brisbane. The congregation since the year 1876, and the church since its completion, have been under the pastorate of the appellant, J. F. McSwaine, as the Presbyterian minister thereof. The land on which the said church of St. Paul's is built was vested in the surviving trustees of a nomination of trustees dated the 31st Jan. 1887.

The action in which the order appealed from was made was commenced in the month of May 1893 by the respondent, Francis Molesworth Lascelles, the sole executor of the testator's will, as plaintiff, against the appellants and the respondent Adair as defendants, for administration of the testator's estate, the appellants being sued as members of St. Paul's Presbyterian Church Session, and Adair as one of the next of kin of the testator.

A special case was stated under the provisions of Order XXXIV., r. 1, of the Supreme Court at Brisbane, stating the following questions for the opinion of the court:—(1) "Does the said testamentary disposition take effect or does the same fail?" (2) "If the court shall be of opinion that the said testamentary disposition takes effect, from whom can the plaintiff obtain good and sufficient discharges in respect of the property therein comprised, or by whom should such property be applied upon the trusts of the said will?" (3) "By whom and out of what funds ought the costs of this case to be paid?"

The case was heard before the full court on the 13th and 14th Dec. 1893, and by their order dated the 14th Dec. 1893 they ordered and declared:—(1) That the testamentary disposition to "the Presbyterian church at Spring-hill, Brisbane, aforesaid, called St. Paul's, now under the pastorate of the Rev. J. F. McSwaine, and the direction to the executor and trustee to pay and apply the same to and for the use and benefit of the said church as in his sole discretion shall seem fit, or to pay the same to the churchwardens for the time being of such church, and whose receipts shall be good and sufficient discharges to my said executor and trustee for any moneys he may pay them to be applied for the use and benefit of the said church as aforesaid," failed; and (2) That the costs of all the parties of and incidental to the action and special case, as between attorney and client, be paid out of the estate of the said Robert Adair, deceased.

By an order dated the 3rd Jan. 1894, made conditionally on the appellants giving security, and a subsequent order dated the 1st June 1894, made on security being given, the appellants obtained from the Supreme Court of Queensland leave to appeal to Her Majesty.

Cozens-Hardy, Q.C. and *J. G. Wood*, for the appellants, contended that the testamentary dispositions in question were not a gift to or in favour of a corporation created under the Act of 1861. The church at Spring-hill was a voluntary association, and not a corporation, or a part of a corporation within the meaning of the Act, and

had not obtained the benefits of incorporation under the Act. The bequest was not to the Presbyterian Church of Queensland, but to the particular congregation. The Act is analogous to the English Charitable Trustees Incorporation Act of 1872 (35 & 36 Vict. c. 24). It is an enabling Act, intended to enable testators to vest property in perpetual trustees, but it does not deprive a testator of the power to dispose of his property in a particular way in trust for any particular purpose. It is intended to incorporate trustees for the purpose of holding property, but the decision of the court below makes it a disabling Act. The court below thought that it was governed by *Swan's case* (4 Queensland L. J. 171), which, if properly understood, is an authority in favour of the appellants. This congregation might secede, or be expelled from the union, without affecting the latter in any way, or it might obtain a separate incorporation. The general incorporation does not invalidate the bequest.

Sir *W. Phillimore* and *C. T. Mitchell* for the respondent Adair, the next of kin, maintained that the point was the relation of this congregation to the whole body. It forms a part of the Presbyterian Church of Queensland, a body which has obtained the benefit of incorporation under the Act; and the bequest, though not "to," was "in favour of," that church, and, not being in the form required by the Act, is void. This congregation as a body could not secede, or be expelled, though the individual members, or officers, might do so. By the rules the Presbyterian Church has "supreme jurisdiction" over all ministers and all property of congregations connected with it. [Lord DAVEY referred to *Dobie* v. *The Temporalities Board* (46 L. T. Rep. 1; 7 App. Cas. 136), a case affecting the position of the Presbyterian Church in Canada.] *Presbytery of Edinburgh* v. *De la Condamine* (7 Ct. Sess. Cas., 3rd series, 213) is an analogous case, as to the Church of Scotland.

Rashleigh, for the executor, took no part in the argument, but asked for his costs.

Cozens-Hardy, Q.C. was heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

July 10.—Their Lordships' judgment was delivered by

Lord DAVEY.—The question is whether a charitable gift contained in the will of one Robert Adair is invalid by reason of the will not having been attested in the manner prescribed by the Religious, Educational, and Charitable Institutions Act 1861, or registered as required by that Act. The testator directed the sale and conversion of his real and personal estate, and the gift in question is, of the residue thereof, in these words: "To the Presbyterian Church at Springhill. Brisbane, aforesaid, called St. Paul's, now under the pastorate of the Rev. J. F. McSwaine, and I direct my said executor and trustee to pay and apply the same to and for the use and benefit of the said church as in his sole discretion shall seem fit, or to pay the same to the churchwardens for the time being of such church, and whose receipt shall be good and sufficient discharges to my said executor and trustee for any moneys he may pay them to be applied for the use and benefit of the said church as aforesaid." Prior to, and in 1863, a congregation of Presbyterians, calling themselves the congregation of United Presbyterians, owned a church and lands in Creek-street, Brisbane, which were vested in trustees, in trust only for the use and behoof of the congregation of the United Presbyterian Church at Brisbane, then under the pastoral charge of the Rev. Mathew McGavin, and under the inspection of the United Presbyterian Synod of Scotland. On Nov. 25, 1863, articles of union were adopted at an assembly of delegates from Presbyterian congregations (not including the Creek-street congregation), held at Brisbane for the purpose of associating the Presbyterians of Queensland together by voluntary compact as an ecclesiastical body, under the name of the Presbyterian Church of Queensland. In, or shortly after, 1864, the Creek-street congregation voluntarily joined that body, and the members for the time being of the congregation thereupon became, and have since continued to be, a congregation of the Presbyterian Church of Queensland. In May 1874 the General Assembly of the Presbyterian Church of Queensland adopted certain "rules and forms of procedure," which appear to their Lordships to have provided a regular ecclesiastical constitution for the church according to the Presbyterian polity. [His Lordship went through in detail the "Articles of Union" and the "Rules and Forms of Procedure," and continued as follows:] The schedule of trusts and the bond provide that the property affected thereby is to be held in trust for the particular congregation in connection with the Presbyterian Church of Queensland, and for the use of the congregation "subject to the authority and jurisdiction of the Presbyterian Church of Queensland." And the trustees bind themselves faithfully to obey the decisions and orders of the courts of the Church. In 1885 the church and lands in Creek-street were sold, and partly out of the proceeds, and partly out of other funds, lands in Spring-hill were purchased, on which was erected the church now known as St. Paul's. There is no dispute that this church and the congregation worshipping there are the objects of the bequest in question. The site of St. Paul's Church is vested in trustees, upon trust for the majority of the persons for the time being representing the congregation of that church, and upon certain further trusts mentioned. The Act of 1861, under which the present question arises is intituled "An Act to facilitate the Incorporation of Religious, Educational, and Charitable Institutions." After a preamble that "it is desirable to provide facilities for the transmission and management of estates, properties, and effects granted or dedicated to religious, educational, or charitable uses," by sect. 1 the Governor is empowered to incorporate any person or persons, and their successors for ever, holding any religious or secular office or preferment, or exercising any religious or secular functions to which he or they shall have been duly called or appointed in accordance with the rights, laws, rules, or usages of the community or institution to which such person or persons should belong, and such person or persons by their corporate name are empowered to hold to them and their successors, to and for the uses and purposes of the corporation and of the religious or secular

institution by which such person or persons were called or appointed, real and personal estate. The third section is in the following words: "Every deed of grant, gift, benefaction, or testamentary disposition to or in favour of any such corporation shall be made in the presence of, and attested by, three credible witnesses, and shall be executed and registered one month previous to the decease of the person making such deed of grant, gift, benefaction, or testamentary disposition." The office-bearers of the charitable community or institution are no doubt the corporators, but their Lordships think that they must consider them as incorporated only on behalf of the institution of which they are the officers; or (in other words) that the community or institution is incorporated through its officers. They also think that in construing the third section they must hold every gift made for or in trust for all or any of the charitable and other objects or purposes of the institution as made to or in favour of the corporation, within the meaning of that section, notwithstanding that the donor may have selected other trustees for the purpose of his bounty, and that the disposition is not directly or in terms to or in favour of the corporation. It appears to their Lordships that the section was so construed, and rightly construed, by the Supreme Court of Queensland in the case of *Swan's Will*. To hold otherwise would unduly narrow, and indeed render almost nugatory, the enactment in the third section of the Act. The effect of the Act, therefore, in their Lordships' opinion, is to invalidate any disposition not attested or registered in accordance with the Act in favour of the community the office-bearers of which are incorporated. But it was contended that the congregation of St. Paul's was not incorporated under and has not taken the benefit of the Act, and that the gift to that body is not in any sense a gift to or in favour of the corporation called the Presbyterian Church of Queensland, and was therefore not within the Act. Their Lordships think that that ground cannot be maintained consistently with the constitution established in May 1874. In their opinion the persons forming the congregation of St. Paul's became and were at the date of the bequest constituent members of the Presbyterian Church of Queensland, and as such were entitled to the benefit of the incorporation granted by the letters patent to that church and the facilities thereby acquired for the transmission of their property. It was argued that the members of the congregation might secede from the church, but it is another question whether property given to or held in trust for the congregation, being members of the organised ecclesiastical body called the Presbyterian Church of Queensland, could be diverted by the seceders to uses unconnected with that institution. It is unnecessary, however, to express any opinion upon that, because at the date of the bequest the congregation were still members of the church, and held their property subject to the provisions and conditions contained in the rules of that church. The property clauses of the Rules and Forms of Procedure of 1874 are such as to create common interests in property between the church and the congregation. Rule 29 (2), which provides that one of the duties of the deacons' court was "the management and charge of the whole property of the congregation," must clearly be taken with much qualification. As regards real property, the presbytery selects its trustees. It cannot be sold without the assent of the presbytery and the General Assembly; and the trustees are bound to hold it in trust for the congregation in connection with the church, and subject to the authority of the Church courts. Such provisions show that the union is not one of faith, sympathy, and co-operation alone, but of property also. As regards real property, the union is express and direct. A gift of land to the congregation is, by virtue of their contract, a gift in favour of the church. The Act makes no distinction between the two kinds of property; it applies to every gift to or in favour of the incorporated body. In the view of their Lordships every gift to the congregation tends to increase the resources of the church, and is in furtherance of the objects, uses, or purposes for which the office-bearers of the church are incorporated. Their Lordships are of opinion that the gift in question is one in favour of the incorporated body within the meaning of the Act. Their Lordships therefore agree with the judgment of the Supreme Court, and will humbly advise Her Majesty that the same be affirmed. They were informed at the bar that an arrangement was made in the colony that the costs of all parties of the appeal as between solicitor and client should in any event be paid out of the estate. Their Lordships will direct accordingly.

Solicitors for the appellants, *Flower*, *Nussey*, and *Fellowes*.

Solicitors for the respondent Adair, *Blyth*, *Dutton*, *Hartley*, and *Blyth*.

Solicitors for the respondent Lascelles, *Eastwood*, *Wigan*, and *Champernowne*.

Wednesday, July 10.

(Present: The Right Hons. Lords WATSON, HOBHOUSE, MACNAGHTEN, and DAVEY, and Sir R. COUCH.)

Re THE BOWER-BARFF PATENT. (*a*)

PETITION FOR PROLONGATION OF PATENT.

Patent—Prolongation—Assignment by inventor.

An extension of a patent will not be granted to assignees when the inventor has no legitimate interest in making the application himself.

THIS was a petition by the Bower-Barff Rustless Iron Company Limited, for the prolongation of letters patent granted to Frederick Settle Barff (since deceased), George Bower, and Anthony Spencer Bower, for an invention of "improvements in effecting the protection of iron and steel surfaces and in the furnaces employed therein," dated the 28th July 1881, and numbered 3304.

The invention for which the letters patent were granted related to certain processes by which iron and steel can be protected from rust, and especially to the employment of a furnace constructed and arranged in a particular manner for carrying out the processes. It was stated that the invention was of great utility and very beneficial to the public. The patent was subsequently purchased by the Bower-Barff Rustless Iron Company Limited. The inventors took out various foreign and colonial patents in respect

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

of the invention, but the petitioners had never had any transactions relating to those patents. It was contended by the petitioners that, owing to the difficulty experienced in inducing people to appreciate the advantages of the invention, they had incurred considerable expense, and they had lost large sums of money, and it was only now, when the letters patent were about to expire, that the real value of the invention was being understood and its use established and extending. The petitioners had no doubt that, if a prolongation of the letters patent were granted, they would be enabled to obtain a fair remuneration, if not commensurate with the great public value and importance of the invention, yet probably sufficient to save them from the loss they had up to now sustained. It appeared that the inventors sold their patents in Great Britain, in France, and in America for sums amounting together to 30,000*l.*

Moulton, Q.C. and *Lawson* appeared for the petitioners.

Sutton, for the Crown, opposed the prolongation.

At the conclusion of the argumeuts their Lordships' judgment was delivered by

Lord WATSON.—The petition in the present case appears to their Lordships to be defective in substance, inasmuch as it does not disclose the amount of the profits, if any, which have been made by the inventors and their assignees in the various countries in which they have secured an exclusive privilege. At the same time, their Lordships are not inclined to reject the petition upon that ground, because the accounts which have been lodged do give information with regard to profits derived from some of the foreign patents which their Lordships consider sufficient to enable them to dispose of this application. The accounts show that the original inventors have received substantial remuneration. They have sold their patent in Great Britain, in France, and in America for sums amounting in all to 30,000*l.*, and, even after allowing a reasonable deduction for those items which they have disbursed, there still remains to the good a very considerable sum of money; and it must be borne in mind that, if the patentees were here claiming an extension, they would be obliged to account for the profits that have been made in France and America by the use of the patent in those countries during the continuance of the American and French patents. But the more important question which arises in this case appears to their Lordships to be whether the petitioners, the Bower-Barff Rustless Iron Company Limited, who are the assignees of the British patent, are in a position to maintain this application for its extension. The cases of *Claridge's Patent* (7 Moo. P. C. 394) and of *Norton's Patent* (1 Moo. P. C. N. S. 339) appear to their Lordships to establish the principle that an assignee who has acquired a patent as the subject of a commercial adventure is not entitled to obtain a prolongation when the inventor himself could have no legitimate interest in making such an application. In one of those cases the judgment of this board went expressly upon the ground that the applicants were a commercial company, and that the original inventor was dead, and could have no further interest in the patent. In this case one of the original patentees is dead. The others are alive, but they are for all practical purposes, and for all the purposes of the present question, in the same position as if they were dead, because they can no longer have an interest to ask for a prolongation on their own account, seeing that they have been sufficiently remunerated at the expense of the public. There is no case in which this board has granted an extension of a patent to an assignee which did not, directly or indirectly, tend towards the benefit of an original inventor who would, had there been no assignment, have been in a position to claim an extension himself. In this case the inventors are not in that position, and, as their Lordships do not see any reason for departing from the principle already recognised by the board in similar applications, they will humbly advise Her Majesty to dismiss this petition.

Prolongation refused.

Solicitors for the petitioners, *J. H.* and *J. Y. Johnson.*

Solicitor for the Crown, *The Solicitor to the Treasury.*

May 28 *and July* 20.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords WATSON, MACNAGHTEN, DAVEY, and SHAND, and Sir R. COUCH.)

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* TSUNE KIJIMA AND OTHERS. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

Practice—Rules of Supreme Court for China and Japan—Joinder of distinct causes of action.

There is nothing in the Rules of Her Majesty's Supreme Court for China and Japan to warrant the joinder in one suit of different and distinct causes of action, not being causes of action by and against the same parties.

Judgment of the Court below reversed.

THIS was an appeal from a judgment of the Supreme Court for China and Japan (Hannen, C.J. and Jamieson, J.), who had reversed a judgment of Mowat, J., dismissing the petition in the suit.

The action was brought by the respondents, who were sixty-two separate and distinct persons, or groups of persons, representing sixty-two deceased persons who were serving on board the Imperial Japanese cruiser *Chishima* as part of her crew on the 30th Nov. 1892, and were drowned as the result of a collision between the *Chishima* and the appellants' ship *Ravenna* on that date, the plaintiffs being all Japanese subjects who submitted to the jurisdiction of the said court. The action was brought under Lord Campbell's Act (9 & 10 Vict. c. 93), and the appellants contended that this action could not be brought by a number of plaintiffs to recover damages from the appellants, as the cause of action was not the same for each of the plaintiffs.

The court below relied upon the decision of the Court of Appeal in *Hannay* v. *Smurthwaite* (69 L. T. Rep. 677; (1893) 2 Q. B. 412), but that decision has since been reversed in the House of Lords (71 L. T. Rep. 157; (1894) A. C. 494).

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

The respondents did not appear, and the appeal was consequently heard *ex parte*.

Finlay, Q.C. and *Pollard* (Sir *R. Webster*, Q.C. with them) appeared for the appellants, and contended that the decision of the House of Lords in *Smurthwaite* v. *Hannay* (*ubi sup.*) had cut away the whole foundation of the judgment in the court below. There is nothing in the Rules of Court, or in the English practice referred to in rule 339 to be followed in cases not otherwise provided for, to support it. They cited

Booth v. *Briscoe*, 2 Q. B. Div. 496;
Appleton v. *Chapeltown Paper Company*, 45 L. J. 276, Ch.;
Sandes v. *Wildsmith*, 69 L. T. Rep. 387; (1893) 1 Q. B. 771;
Burstall v. *Beyfus*, 50 L. T. Rep. 542; 26 Ch. Div. 35.

At the conclusion of the argument for the appellants their Lordships took time to consider their judgment.

July 20.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—On the 30th Nov. 1892 a collision occurred between the *Chishima*, an Imperial Japanese cruiser, and the *Ravenna*, a steamship belonging to the appellants. The *Chishima* sank immediately with great loss of life. On the 29th Nov. 1893, under the Act 9 & 10 Vict. c. 93 (Lord Campbell's Act), a suit was commenced against the appellants by petition in Her Majesty's Court for Japan on behalf of sixty-two different persons, or groups of persons, who were all joined as co-plaintiffs. The petition alleged that the disaster was caused solely by the negligence of the servants of the appellants, and each of the persons and groups of persons who together constituted the plaintiffs claimed to represent some one of the seamen who were drowned and to be entitled separately to damages for the injury resulting from his death. On being served with the petition the appellants applied that the suit should be dismissed with costs, on the ground that distinct causes of action were improperly joined in the petition. The application was granted by the court of first instance, but the order was discharged with costs by the Supreme Court of China and Japan. As the appeal to Her Majesty in Council from that decision was heard *ex parte* the respondents were not represented at the bar, but their case is very fully and ably stated in a written argument addressed to the Supreme Court, which leaves nothing more to be said on their behalf. The rules of Her Majesty's courts in China and Japan (framed under an Order in Council of the 9th March 1865) do not contain anything bearing upon the question beyond what may be gathered from the following provisions: Rule 39: "In case a petition states two or more distinct causes of suit, by and against the same parties, and the same rights, the court may either before or at the hearing, if it appears inexpedient to try the different causes of suit together, order that different records be made up, and make such order as to adjournment and costs as justice requires. In case a petition states two or more distinct causes of suit, but not by or against the same parties, or by and against the same parties but not in the same rights, the petition may, on the application of any defendant be dismissed. In case such application is made within the time for answer, the petition may be dismissed, with substantial costs to be paid by the plaintiff to the defendant making the application; but in case the application is not made within the time for answer, the petition, when the defect is brought to the notice of the court, may be dismissed without costs, or on payment of court fees only as to the court seems just." Rule 339: "In all matters not in these rules expressly provided for, the procedure of the Superior Courts and of justices of the peace in England in like cases shall, as far as possible, be followed, save that with respect to matters arising under the Admiralty or other special jurisdiction the procedure of the court having such jurisdiction in England shall, as far as possible, be followed." The view of the Supreme Court was that the language of rule 39 was permissive only, and that rule 339 had the effect of bringing in the procedure of the Superior Courts in England. Accordingly they held that the court had a discretion in the matter, and, founding their decision on the judgment of the Court of Appeal in England, in *Hannay* v. *Smurthwaite* (69 L. T. Rep. 677; (1893) 2 Q. B. 412), which was then unreversed, they came to the conclusion that, in all the circumstances, that discretion ought to be exercised in favour of the plaintiffs. The judgment of the Court of Appeal in *Hannay* v. *Smurthwaite* has since been reversed by the House of Lords (*Smurthwaite* v. *Hannay*, 71 L. T. Rep. 157; (1894) A. C. 494); and it is clear that such a suit as the present is not and never was maintainable in England. The result is that the arguments on which the respondents succeeded before the Supreme Court are now turned against them. They are compelled to fall back on the rules of the courts of China and Japan, and they are met with this difficulty, that nothing is to be found in those rules to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties. There is no authority there, express or implied, for so great a departure from settled practice. The language of rule 39 is no doubt, in form, permissive. The reason why that form was adopted is not perhaps quite clear. It may have been intended to leave room for the introduction of any change of procedure that might be sanctioned in England, or it may have been used merely to emphasise the point that a suit wrongly constituted by the joinder of distinct causes of action by different persons may be dismissed on the application of any defendant without regard to the nature of his interest in the litigation. Whatever the true explanation may be, it is in the opinion of their Lordships impossible to construe the language of the rule with regard to the dismissal of such suits as impliedly authorising their institution. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed with costs, and the suit dismissed with costs in the Supreme Court and the court of first instance.

Solicitors for the appellants, *Freshfields* and *Williams*.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, July 5.

(Before Lindley, Lopes, and Rigby, L.JJ.)

MacIver *v.* Burns. (*a*)

APPEAL FROM THE PALATINE COURT OF LANCASTER.

Practice—Writ—Service out of the jurisdiction—Domiciled Scotchman carrying on business in England under firm name—Service on manager in England — Motion to set aside—Order XLVIII.A, r. 11*—Order XI.*

Rule 11 *of Order XLVIII.A does not authorise the service of a writ upon a domiciled Scotchman who carries on business in England under a firm name, but any proceedings against him must be brought under Order XI. The object of rule* 11 *of Order XLVIII.A is to facilitate proceedings against a person who is concealing his own name, and not to enlarge the jurisdiction of the court against foreigners; and a person can only be sued under his trade name in connection with the business carried on under that name.*

Russell *v.* Cambefort (61 *L. T. Rep.* 751; 23 *Q. B. Div.* 526) *and* St. Gobain Chauny and Cirey Company *v.* Hoyermann's Agency (69 *L. T. Rep.* 329; (1893) 2 *Q. B.* 96) *discussed.*

Decision of the Vice-Chancellor of the Palatine Court of Lancaster reversed.

In Sept. 1856 articles of partnership were entered into between James Burns, George Burns, John Burns, and Charles MacIver, for the purpose of carrying on in partnership the business of steamship owners under the name of the Clyde Steam Navigation Company. Several changes subsequently took place in the constitution of the partnership firm, and ultimately, in April 1895, the partners therein were Sir John Burns, Bart., and the plaintiffs Charles MacIver, Henry MacIver, and William MacIver.

On the 15th April 1895 Sir John Burns gave notice to the plaintiffs, under a clause in the partnership articles, of his desire to withdraw from the partnership, and on the 13th June the plaintiffs gave Sir John Burns notice of their acceptance of his offer.

Sir John Burns, who was a domiciled Scotchman, was also carrying on business in Glasgow as a shipowner under the style of G. and J. Burns, and he had for the purposes of his business of G. and J. Burns an office in Liverpool, of which R. M. Deans was the manager.

On the 20th June 1895 the plaintiffs issued a writ in the Liverpool District of the Palatine Court against "G. and J. Burns," whereby they claimed (1) an account as between the plaintiffs and the defendants of the partnership lately subsisting between them, and that in taking such an account the defendants might be charged with or ordered to account for all benefits derived by them without the consent of the plaintiffs from any transaction concerning the late partnership, or from any use by them of the partnership property, name, or business connection, and also from all profits made by the defendants for carrying on during the existence of the partnership any business of the same nature as and competing with that of the firm. (2) Damages for breach by the defendants of their agreement or obligation to observe good faith towards the other partners, and not while partners to do any acts which would injure the business of the partnership. (3) That the plaintiffs, or any of them, might be appointed receivers or receiver of all debts due to the late partnership, and of all the assets thereof, and that the defendants might be ordered to deliver up to such receivers or receiver all books, documents, &c., relating to or connected with the vessels or business of the partnership.

The writ was served upon R. M. Deans, the manager of the Liverpool business of G. and J. Burns. It was accompanied by a notice as follows:

> We hereby give you notice that you are served with the writ in this action as a person having the control or management of the partnership business.

A notice of motion for a receiver was served with the writ.

On the 21st June 1895 the defendants gave notice of motion that the service of the writ in the action and all subsequent proceedings therein might be set aside on the ground that the business carried on under the name of G. and J. Burns belonged to and was carried on solely by Sir John Burns, who was domiciled and resident in Scotland outside the jurisdiction of the court.

By a rule of the Palatine Court, identical in its terms with Order XLVIII.A, r. 11, of the Rules of the Supreme Court, it is provided as follows:

> Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name, and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply.

On the 25th June 1895 the motion came on to be heard before the Vice-Chancellor of the Palatine Court, when the following judgment was delivered:

The Vice-Chancellor. — I think I really ought not to call upon you, Mr. Hughes. It seems to me that the reasoning of both the cases of *Russell* v. *Cambefort* (61 L. T. Rep. 751; 23 Q. B. Div. 526), and *St. Gobain Chauny and Cirey Company* v. *Hoyermann's Agency* (69 L. T. Rep. 329; (1893) 2 Q. B. 96), applies exclusively to a foreigner in consequence of the want of comity between this country and a foreign country to pass an Act of Parliament which would bind foreigners. Take the case of *Russell* v. *Cambefort* (*ubi sup.*), where Cotton, L.J. says: "Although the rule does authorise service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships, the members of which either by their nationality" —that is this very case—"or residence have become subject to English law and to the power of Parliament." That is the *ratio decidendi* of Cotton, L.J. in the case of *Russell* v. *Cambefort* (*ubi sup.*), in which he decides that, where partners are both of them subject to English law, it is competent for the judicature to make an order for service in such a way as would bind a Scotchman or bind anyone who is so subject to English law. Of course, that

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

would apply to a Scotchman. Again, Lord Esher, in the case of *St. Gobain, &c., Company* v. *Hoyermann's Agency* (*ubi sup.*), says: "The question is, ought the court to give an interpretation to the words which would include such a person?" It is clear that the words would include such a person as in the present case according to Lord Esher's judgment. The learned judge continues thus: "If the rule had contained words expressly in terms, including a foreigner resident abroad, then an English court would be bound to obey the directions of its own Legislature; but when the words used are capable of one or other construction, then the court ought to adopt the construction which will prevent an infringement upon the principles of international law by extending the jurisdiction of the English courts against foreigners resident abroad who have in no way submitted to that jurisdiction." With all due deference I agree with every word of that, and what I am doing to-day I do not think contravenes what Lord Esher or Cotton, L.J. said. It seems to me that we are dealing with a person who is amenable to English law, English statute law, and to any order which is duly passed under the authority of an Act of Parliament just as much as an Englishman is. A foreigner is not so amenable, but a Scotchman is. It seems to me there is the broadest possible distinction between the case before me to-day and the two cases which I have just referred to, and that the reasoning of the judges in those two cases rather points to this—that their judgments would not apply to a Scotchman. It has been pointed out by Mr. Lawrence that Lord Blackburn in *Ewing* v. *Orr-Ewing* (53 L. T. Rep. 826; 10 App. Cas. 453, 520) says: "I completely agree that, unless where some legislation (by the independent Legislature of Scotland before the Union, or by the Legislature of the United Kingdom since) may have made a difference, the judicatures of Scotland and England are as independent of each other as if they were the judicatures of two foreign states." That is in the *Orr-Ewing* case. But that is exactly this case. Here legislation has made a difference. It has enabled this order to be passed, and it appears to me that this motion is a mistaken one. It certainly would seem to be a most inconvenient result to come to, that a gentleman residing in Glasgow should have a business in Liverpool carried on by his agent here—and if it applies to this court it applies equally to the High Court—but that he cannot be sued by serving him in Liverpool, where his business is, by some technical difficulty of this kind. It would cause very great difficulty indeed in the way of enforcing contracts, and it seems to me that the real meaning of the rule is to give power to serve as in this case. I must therefore refuse the motion.

From that decision the defendants, by leave, now appealed.

Sir *Richard Webster*, Q.C. and *P. Ogden Lawrence* for the appellants.—The object of rule 11 of Order XLVIII.A was, that persons carrying on business under sham names, such as "Waukenphast," might be sued in those names. It was never intended to authorise the service of a writ in this country on a foreigner or domiciled Scotchman. The rule gives no justification or right to serve a Scotchman carrying on business in England. That is a matter for service out of the jurisdiction, in respect to which there is a whole code of rules. Whatever doubt there might otherwise be about the matter on principle is removed by the cases of

Russell v. *Cambefort*, 61 L. T. Rep. 751; 23 Q. B. Div. 526;

St. Gobain Chauny and Cirey Company v. *Hoyermann's Agency*, 69 L. T. Rep. 329; (1893) 2 Q. B. 96.

Those cases are conclusive on the subject, and they apply with even greater force to a Scotchman than to a foreigner. [They were stopped by the Court.]

Cozens-Hardy, Q.C. and *T. R. Hughes* for the respondents.—Rule 11 is expressed in very general terms, and *Russell* v. *Cambefort* (*ubi. sup.*) gives the only limitation that ought to be set upon it. Scotchmen are subjects of Parliament, and it is not unreasonable to suppose that Parliament may have considered them in authorising these rules:

Grant v. *Anderson and Co.*, 66 L. T. Rep. 79; (1892) 1 Q. B. 198.

The judgments of Lord Esher and Smith, L.J. in *St. Gobain Chauny and Cirey Company* v. *Hoyermann's Agency* (*ubi sup.*) seem to suggest this distinction. If the same principle applies to Scotchmen as to foreigners, we admit that that case is against our contention; but we say that the *ratio decidendi* there was allegiance, not local domicile. All Sir John Burns' dealings with the plaintiffs were carried on under the name of G. and J. Burns, and the plaintiffs are suing him in respect of something done by him under that name. Rule 11 of Order XLVIII.A applies to foreigners not subject to the jurisdiction of English courts, except so far as they are so subject under the order itself:

Worcester City and County Banking Company v. *Firbank, Pauling, and Co.*, 70 L. T. Rep. 102; (1894) 1 Q. B. 784.

No reply was called for.

LINDLEY, L.J.—This is an appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster, refusing to make an order in the terms of the notice of motion, which in substance was to set aside the writ and all subsequent proceedings in this action of *MacIver* v. *G. and J. Burns*. The action was brought by three gentlemen of the name of MacIver against Sir John Burns, sued as G. and J. Burns, and it appears from the indorsement on the writ that the action was a partnership action to take the accounts and wind-up the business of what is called the Clyde Steam Navigation Company. The Clyde Steam Navigation Company is a partnership between the plaintiffs and Sir John Burns, and the dealings and transactions of that partnership relate to the sailings of steamships from the Clyde. Now, Sir John Burns is sued simply as a member of that firm. He is a domiciled Scotchman, not residing here, and having nothing whatever to do in this country, so far as that cause of the action is concerned, but nevertheless he does carry on business, in Liverpool, under the name of G. and J. Burns. In consequence of that circumstance, he is sued under that firm name, as I will call it. The question is, whether that is right. Now, apart from all the rules of court let us consider the case on principle. Here is a partnership action between

certain partners. The proper parties for that partnership action are the individual partners. We have ascertained by inquiry that Sir John Burns is not described in that partnership article as a separate firm carrying on business under the name of G. and J. Burns. Whether it would have made any difference if he had been so described, I do not pause to inquire. Now, being sued in respect of that partnership business, and being a Scotchman domiciled in Scotland, and not being resident here, if he is to be sued at all in this country it ought to be under Order XI., which relates to the service on and suing of persons not resident in this country. That, *primâ facie*, is the proper order to sue under. But then it is said that, as he carries on business in Liverpool under the name of G. and J. Burns, he can be sued under rule 11 of Order XLVIII.A. Order XLVIII.A refers to actions by and against partnerships. The first ten rules of it relate to actions by and against partnerships only. But partnerships can now be sued in the name of the firm, which they could not before. Inasmuch as before they had to be sued in the names of the persons who composed the firm, it was necessary to frame some rules to carry out the procedure, and rules 1 to 10 of Order XLVIII.A are addressed to actions of that kind. Then comes rule 11, which has really nothing to do with the partnership rules, but which is tacked on to apply to the case of a single individual who carries on business either in the name of a firm or, as it is expressed in the rule, under some name other than his own. Under rule 11 it is expressed in this way: "Any person carrying on business within the jurisdiction"—there is no reference whatever to persons carrying on business without the jurisdiction—"in a name or style other than his own name may be sued in such name or style as if it were a firm name." Pausing there, that does not give the court any power to sue a person abroad in the firm name. Then the rule goes on: "And so far as the nature of the case will permit all rules relating to proceedings against firms shall apply." That throws us back upon what I may call the code of rules relating to firms—rules 1 to 10 of Order XLVIII.A. Unquestionably rules 1 to 10 have to a certain extent altered the law as it was laid down in *Russell* v. *Cambefort* (*ubi sup.*). The law is altered to this extent, that if two or more persons, being foreigners, carry on business in this country in partnership, you may sue them under the firm name and get judgment against the firm, which judgment can be executed against its assets in this country. But when you come to apply that to a particular man, you say directly that there are no joint assets and the thing will not work. Take the case of *St. Gobain Chauny &c. Company* v. *Hoyermann's Agency* (*ubi sup.*). Just consider the difference. If you have two or more partners and you get judgment against the firm, all you can do with it is to affect the joint assets. You cannot make that a foundation of a claim on the individual assets. What are you going to do? If you recover judgment against an individual who carries on business, your judgment is against him and him only, and you cannot get any other. Therefore the analogy is very difficult to work out. But it has been worked out now, and I think we understand it. If you are dealing with a single person, a foreigner or a Scotchman, the same rule applies. You must proceed under Order XI. You cannot get at him under Order XLVIII.A at all. That is the substance of the thing and the principle of the thing. Now let us consider what rule 11 is for. The object of that rule is to enable persons to sue persons in the name in which they carry on business—to facilitate the carrying on of actions against persons who conceal their names. For that purpose you must adopt so far as you can the rules relating to actions against firms—partners in firms. When you come to apply it to cases in which the reasoning must apply, it will not work at all. I will not repeat the case I put in the course of the argument, which strikes me as showing what the real object of that rule is. If a man contracts debts with his baker or butcher in his own name and carries on business under a name not his own, the baker or butcher cannot sue him under the name not his own. Why should he? The reasoning does not apply at all. Why should it? When you come to look at rule 11 you observe the words, "may be sued in such name or style as if it were a firm name." That is the key to the whole thing. I do not say that the language means it, but it involves this—that you can only sue him in respect of matters which are connected with the business which he does carry on under that name. Now supposing that Sir John Burns in this case had a partner and carried on business in Liverpool under the name of G. and J. Burns, you could not sue him in such an action as this in that firm name, because that would embrace somebody who had nothing whatever to do with the cause of action. When you look at rule 11 you observe that it says: "Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name." Just consider. Supposing this were a firm, would the action lie? Obviously not. It appears to me that there has been a confusion of thought in this case altogether, and a mistake which is to my mind palpable when you look at the reason of the thing. And I must say that, if we were to uphold this order, we should be sanctioning a course which would give rise to a great deal of disturbance and outcry, and very legitimate outcry too, on the part of Scotchmen and foreigners. The right course here is to sue Sir John Burns in his own name. If you can get leave to serve him under Order XI. well and good. I think therefore that the order ought to be reversed and the appeal allowed with costs.

LOPES, L.J.—I am entirely of the same opinion. I think that the learned Vice-Chancellor has misconceived the effect of this rule 11 of Order XLVIII.A. That rule was not intended to apply to a case like the present. It was intended to apply to the case of an individual who carries on business in an assumed name—such, for instance, as the man who carries on business under the name of "Waukenphast," or again under the name of "Madame Louise." The real name is an entirely different one—"Madame Louise" and "Waukenphast" being assumed names. The object of the rule was simply to apply to cases of that kind, and in that respect was to remedy a defect which existed before that rule came into operation. I entirely agree with what has been said by the Lord Justice. I think that, if we were to support the order that has been made, a greater

storm of indignation would arise than arose on a previous occasion when Scotchmen considered themselves aggrieved by a case which was decided in this court.

Rigby, L.J.—I am of the same opinion. First of all let us consider the literal meaning of the words of rule 11 of Order XLVIII.A—"May be sued in such name or style as if it were a firm name." That is to say, the person sued may be treated as though he were a member of a firm carrying on business in a firm name. It appears to me that those words necessarily limit the operation of rule 11 to cases arising out of that carrying on of a business. This is not a case of the kind at all, and it would appear to me to be altogether wresting the meaning of that rule into quite a different meaning to attribute the meaning to it which has been taken by the Vice-Chancellor. With regard to the argument that Scotchmen in a case of this kind are to be treated as in a different position from foreigners, I cannot accede to it at all. Of course Scotchmen are not foreigners; they are fellow-subjects of ours, and they are in the same position as any other fellow-subject, with the important exception that their system of jurisprudence differs in very important matters from ours. There are such differences between our system and theirs that, even if you find words which control the jurisdiction of, or confer a jurisdiction upon, our courts, you no more assume that those words apply to the case of Scotchmen than to the case of any other foreigners whatsoever. Parliament of course may legislate for Scotchmen as it may legislate for Frenchmen so far as they are concerned in matters of legislation for our courts. But mere general language will not be construed necessarily to apply either to foreigners or to Scotchmen. That is, I think, the meaning that is to be attributed to the reasoning in the judgments already cited, and, as I have already pointed out, to call a Scotchman an English subject in this connection is a perfect absurdity. No one can ever construe words which have express reference to English subjects—as was said in the case of *Grant* v. *Anderson and Co.* (*ubi sup.*) by the Master of the Rolls—as having reference to Scotchmen.

Appeal allowed.

Solicitors for the appellants, *Bircham* and *Co.*, agents for *Batesons*, *Warr*, and *Wimshurst*, Liverpool.

Solicitors for the respondents, *Rowcliffes*, *Rawle*, and *Co.*, agents for *Hill*, *Dickinson*, *Dickinson*, and *Hill*, Liverpool.

Wednesday, June 12.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Shelfer v The City of London Electric Lighting Company Limited.

Meux's Brewery Company Limited v. The same. (a)

Practice—Action for injunction—Refusal by court of first instance—Injunction granted on appeal—Suspension of injunction—Extension of time—Court to which application should be made.

Notwithstanding that an injunction refused by a judge of first instance has been granted by the Court of Appeal, and its operation suspended for a certain time, an application for its further suspension may properly be made to, and disposed of by, the judge of first instance.

Original motion.

The above-named electric lighting company, which carried on its undertaking under the provisions of certain Acts of Parliament and provisional orders made thereunder, caused a serious nuisance to the lessee of a house by the noise and vibration arising from the use of the machinery used for generating the electricity, the vibration being such as to cause cracks in the walls of the house.

These actions were accordingly commenced, claiming an injunction restraining the continuance of the nuisance, and damages. The injunction was refused by Kekewich, J., with costs, but an inquiry was directed as to damages occasioned by the nuisance.

On appeal from that decision, the Court of Appeal held that the nuisance was such that the plaintiffs were entitled to an injunction restraining its continuance; and that the actual and prospective permanent structural injury to the house entitled the reversioners to an injunction on the same terms. (See 72 L. T. Rep. 34; (1895) 1 Ch. 287.)

The Court of Appeal, however, suspended the operation of the injunction until the first motion day in Easter Sittings 1895.

In April 1895 the operation of the order was further suspended until the 12th June 1895, upon the defendants undertaking to expedite the appeal which they had then presented to the House of Lords.

The defendants afterwards abandoned their appeal to the House of Lords, and, being desirous of procuring a further suspension of the injunction, in order to make alterations in their works, so as to abate the nuisance complained of, an application for an extension of that time was made, in the first instance, to Kekewich, J., by whom the actions were originally tried. His Lordship thought that, as he had refused to grant an injunction which was afterwards granted on appeal, the application ought to be made to the Court of Appeal.

The defendants accordingly now renewed their application to the Court of Appeal.

Moulton, Q.C., *Renshaw*, Q.C., and *W. C. Braithwaite* for the applicants.

Warmington, Q.C. and *Waggett* for the plaintiffs in the first action; and *Warmington*, Q.C. and *Badcock* for the plaintiffs in the second action.

The Court (Lindley, Lopes, and Rigby, L.JJ) heard the present application, and granted a further suspension of the injunction; but expressed the opinion that the application had been properly made to Kekewich, J., and might have been disposed of by him.

Solicitors: *Ashurst*, *Morris*, *Crisp*, and *Co.*; *Parry* and *Gibson*; *Hunters* and *Haynes*.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law

June 24 *and* 25.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

SCOTT *v.* ALVAREZ. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Vendor and purchaser — Specific performance— Condition of sale against raising objection— Defect in title—Covenant for title.

The defendant agreed to buy certain leasehold property from the plaintiff under conditions of sale which provided that the purchaser should be furnished with a copy of the lease and an assignment dated the 11th Aug. 1891, *and the subsequent title, and should not "make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the said assignment, notwithstanding any recital or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the said term."*

Objections were taken by the defendant in respect of certain facts which raised suspicion as to the title prior to the assignment, and in respect of defects in the covenants for title in the assignment of 1891, *and otherwise.*

The Court of Appeal held (reversing the decision of Kekewich, J.), that the defendant's objections as to the prior title were precluded by the conditions of sale, and that a good title was shown.

Subsequently the defendant discovered that the title prior to the assignment of 1891 *depended on a forged deed of gift, and on a conveyance from a trustee purporting to convey as absolute owner. He accordingly refused to complete the purchase, and the plaintiff brought an action for specific performance. The defendant counter-claimed that, notwithstanding the judgment of the Court of Appeal, it might be declared that a good title was not shown to the property, and for a return of the deposit paid.*

Held (affirming the decision of Kekewich, J., 72 *L. T. Rep.* 455), *that the defendant was not precluded by the conditions of sale from raising the objections now put forward; and that specific performance could not be enforced against him.*

But Held (reversing the decision of Kekewich, J.), that the defendant was not entitled to a return of the deposit money.

Corrall *v.* Cattell (4 *M. & W.* 734) *considered and applied.*

APPEAL by the plaintiff from a decision of Kekewich, J. (72 L. T. Rep. 455).

Farwell, Q.C. and *Duka* for the appellant.—The purchaser is bound to complete, having regard to the declaration of the Court of Appeal that a good title has been shown, and the 6th condition of sale:

Hume v. *Bentley*, 5 De G. & Sm. 520;
Duke v. *Barnett*, 2 Coll. 337;
Best v. *Hamand*, 12 Ch. Div. 1;
Cattell v. *Corrall*, 3 Y. & C. Ex. 413;
Waddell v. *Wolfe*, L. Rep. 9 Q. B. 515.

The purchaser is not entitled to have his deposit returned, there being no breach shown by the vendor of his contract:

Corrall v. *Cattell*, 4 M. & W. 734;
Re National and Provincial Bank of England and Marsh, 71 L. T. Rep. 629; (1895) 1 Ch. 190.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Renshaw, Q.C. and *Byrne*, Q.C. (*Ingpen* with them) for the respondent.—The order of the Court of Appeal was, no doubt, right upon the facts then before the court, but it is clearly wrong now that the true facts have come to light. The respondent is only bound by the decision of the Court of Appeal so far as it rests upon the materials then before it, and no further. The court went upon Mrs. Banks having a title as owner in possession in her own right—a title which is entirely inconsistent with her real title as executrix; she was not in possession in the sense on which the court proceeded. In assigning the outstanding day vested in her as trustee and executrix she was clearly guilty of a breach of trust, and therefore the vendor cannot avail herself of the doctrine of

Bailey v. *Barnes*, 69 L. T. Rep. 542; (1894) 1 Ch. 25, 37.

As to the 6th condition, its language is not wide enough to prohibit the purchaser from showing, if he can, that the vendor has a bad title. All the Court of Appeal decided was, that the condition was a sufficient protection to the vendor when the title appeared to be nothing more than doubtful. They referred also to

Pegler v. *White*, 33 Beav. 403.

Farwell, in reply, referred to

Haywood v. *Cope*, 25 Beav. 140, 151;
Fry on Specific Performance, 2nd edit., p. 195.

LINDLEY, L.J.—This is an appeal by a plaintiff in a specific performance action against an order made by Kekewich, J., which dismisses the action without costs, and also goes on to direct the plaintiff to repay to the purchaser a deposit of 30*l.* with interest and certain costs of and incidental to the investigation of the plaintiff's title, and so on. The question arises under a very unfortunate litigation. It appears that a small leasehold property was put up for sale, and was described in attractive form as "A small safe investment arising from a certain dwelling-house," and so on, held for a term of ninety-nine years from the 25th March 1865, 70½ years unexpired, at a moderate ground rent of 5*l.* a year. The defendant has agreed to purchase this property for a sum of 300*l.* odd. Instead of finding that he has bought "a small safe investment," he is embarked in two lawsuits and two appeals and is threatened with more. So much for the small safe investment. Now, upon the question which we have to decide, some of the conditions of sale are important. The property itself was leasehold, and it was held under an underlease, and condition No. 4 says that: "The underlease under which the property is held and the counterpart of the underlease or agreement with the tenant, or copies thereof, will be produced at the sale, and may be inspected," and the purchaser shall be deemed to have full notice at the time of the sale of the contents thereof. There is no doubt that the property sold was an underlease. There is no attempt here to describe this "small safe investment" as a lease, and to compel the purchaser to take an underlease. It is described as an underlease. Then condition 6 is the most important of all. It provides that: "The purchaser shall be furnished with an abstract of the underlease, dated the 25th June 1867, and made between Mark Bean of the one part and Mary Ann King

widow (since deceased) of the other part, under which the property is held, and of an assignment of such underlease, dated the 11th day of August 1891, and made between John Burden Batchelor of the one part, and Harry Banks and Sarah Jane Banks, his wife, of the other part, and the subsequent title." It is to be observed that there is clearly something like twenty-four years between the date of the underlease—25th June 1867—and the assignment of the 11th August 1891. With respect to that interval of twenty-four years the condition says that the purchaser "shall not make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the said assignment, notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the said term." I pass on to the 9th condition, the last part of which is important; that is to say, it provides that: "The vendor being a mortgagee selling under a power shall not be required to enter into any covenant or undertaking, except the usual express or statutory implied covenant that she has not incumbered, and the mortgagors shall not be required to join in any assurance for any purpose." Now it appears that the purchaser took objections to this title, objections applying to the dealings with this property between the 25th June 1867 and the 11th Aug. 1891, and, in consequence of what the purchaser discovered, he refused to complete the purchase. Then a summons was taken out under the Vendor and Purchaser Act 1874 in order to have the objections adjudicated upon. That summons came first before Kekewich, J. and afterwards before the Court of Appeal, and it will be found reported in the Law Reports for 1895, 1 Ch. 596. It appeared at the time to the Court of Appeal that the purchaser could not establish that the title was a bad one. So far as appeared from the materials before the court at that stage, the court came to the conclusion that, although there were objections to the title so serious that a title could not be forced on the purchaser but for this condition, yet that, having regard to this condition, a good title was made. The court was very careful to point out that which I have just referred to, that it did not appear that the title was a bad one. On the contrary, the court came to the conclusion that the title appeared to be what is called a good holding title. One would have hoped that there would have been an end of the matter. But the purchaser appears after that to have found out something more, and now unquestionably the purchaser has found out that the title is positively bad, and that the vendor cannot make a good title. I do not think it necessary to go into the details of that. We have had this reason given to us: There has been a fraudulent concealment of a will and a gross breach of trust which have since come to light, and the consequence is that it is apparent that the vendor cannot make a title. Under those circumstances the vendor still seeks to rely on the 6th condition and to compel the purchaser to complete. He has brought an action for specific performance, which it is a pity was not done before. The purchaser, notwithstanding the decision of the Court of Appeal, obtained leave to re-open the case, and has availed himself of that. He says that, notwithstanding the decision of the Court of Appeal, these facts, which are new and could not have been discovered with reasonable diligence when the case was previously before the court, entitle him to re-open the case. The case has proceeded on that principle, and the purchaser by his counter-claim asks to have his deposit returned. We have to decide what is the real legal consequence of this new discovery. Kekewich, J. has held that the new discovery is so important that the plaintiff is not entitled to a decree for specific performance, and, as a result, is not entitled to retain the deposit, and the learned judge has ordered the deposit to be returned. From that decision the plaintiff now appeals. The first question we have to consider is, what is the true construction of the 6th condition which I have read. Is it to receive a narrow construction, or is it to receive that construction which Mr. Farwell says is the natural one having regard to the language in which it is couched? Kekewich, J. has construed it rather narrowly. He leans to the view that the provision that "the purchaser shall not make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the said assignment" is rather controlled and cut down by what follows, "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignee a good title for the residue of the said term." I confess that my own impression is that the learned judge has put rather too narrow a construction upon that condition. I should read it in this way: "Notwithstanding the recital of or reference to such title, although we tell you there are difficulties there, you are not to make any objection in respect of the intermediate title between the 26th June 1867 and the 11th Aug. 1891, but you are to assume for all purposes that that assignment vested in the assignees a good title." I think that that is the true view of that condition; and that being the true view it becomes rather an important condition. Now, if that is the true view of the condition, the first question is, whether, under those circumstances, an action at law could be maintained by the purchaser to get back his deposit. There is no question of discretion in such a case as that; and I dissent entirely from the proposition contended for by Mr. Byrne that, since the Vendor and Purchaser Act 1874, or since the Judicature Acts, there is any difference now between the law on that point and the law before. We know perfectly well that when two persons enter into contracts there are or may be—I may say there are—two remedies open. One is an action at law for damages, and the other is the extraordinary remedy of an action for specific performance. I am now addressing myself to the legal aspect of the case; and, addressing myself to the legal aspect of the case, if once we construe the 6th condition in the sense in which I construe it, it appears to me that the purchaser would fail if he brought an action at law to recover his deposit. I must say that I think the case Mr. Farwell has referred to of *Corrall* v. *Cattell* (4 M. & W. 734) is decisive on that point. The legal answer is this: "There is no breach of contract at all; you have taken

your chance with respect to your deposit, and, unless you show a breach by the vendor of his bargain, you are not entitled to have that deposit back." That is the answer in that view to the action at law. Therefore, it appears to me that the appeal must succeed, so far as the counter-claim is concerned. But, when we come to the remedy by specific performance, we get into an entirely different region of law. The extraordinary remedy by specific performance is always more or less open to discretion, and I am not aware of any case in which, unless the condition has been extremely clear, a court of equity has ever forced a purchaser to take a title which is obviously bad, and which will expose the purchaser if he does to an immediate lawsuit, against which he will have no defence. That is what we are asked to do under the stringency of this condition. Mr. Farwell referred us to several cases, which I have looked at since yesterday; and among them to *Hume* v. *Bentley* (5 De G. & Sm. 520), *Duke* v. *Barnett* (2 Coll. 337), and *Cattell* v. *Corrall* (3 Y. & C. Exch. 413). But, on considering them, I am not satisfied that in any one the court thought the title which it did force the purchaser to take would be a bad title in the sense in which this title is bad. When you say a title is bad, the expression is ambiguous, and must be contrasted with what is called a good title. I understand a good title to be one which an unwilling purchaser can be compelled to take. Contrasted with that, any title which an unwilling purchaser cannot be forced to take is a bad one. But there are bad titles and bad titles. Bad titles which are good holding titles, although they may be open to objections which are not serious, are bad titles from a conveyancer's point of view, but good from a business man's point of view. I do not know of any case in which a court of equity has decreed specific performance of, and compelled the purchaser to pay his money for, nothing at all when he shows the court that the title he is asked to have forced on him is bad in that sense that he can be turned out of possession to-morrow. I do not say that a condition might not be so clear and explicit as to remove the difficulty; but I am not aware of any case of the kind. And, so far as those cases referred to by Mr. Farwell are concerned, I am convinced that they are cases in which the title was bad from a technical conveyancing point of view, but not from a business point of view, and did not expose the purchaser to immediate eviction as it does here. When, therefore, we are asked to decree specific performance of this contract we are asked to do that which the court does not do as a matter of course, but the court considers whether it is right to adopt such a course. In a case like this it appears to me the true rule is to leave the parties to their legal remedies. If they have a contract let them fight it out at law. There are remedies open which we are all familiar with. But the vendor must not come and invoke the extraordinary jurisdiction of the Court of Chancery to do what would be a manifest injustice. It therefore appears to me that Kekewich, J.'s view was right, so far as he refused to grant specific performance, but wrong as to the return of the deposit. I confess that such a result is not satisfactory. It arises from the double jurisdiction in courts of law and equity and the extraordinary jurisdiction which is exercised by courts of equity. The result is, that the part of the order must be reversed which relates to the counter-claim. The appeal succeeds therefore in part and fails in part. As regards the costs, a great deal of the expense has been incurred in defending the specific performance action. All these new facts are part of the defence to that. We are consequently satisfied that there should be no costs of the counter-claim. We reverse the decision as to that, but without costs. We will make no order for the return of the deposit to the purchaser.

LOPES, L.J.—This is an action for specific performance, and I need not say that, having been brought up in the courts of common law, I approach it with respectful diffidence, and I shall not venture to differ from the judgment that has already been delivered by Lindley, L.J., and the one which I know will presently be delivered by Rigby, L.J. But I should like to say this, that it does seem strange to me that, while we hold that there has been no breach of contract by the vendor, and the purchaser cannot therefore recover his deposit, yet at the same time we hold that the vendor is not entitled to have that contract specifically performed, but must have recourse to his remedy at law. It is said that specific performance is discretionary, and that a court of equity will not decree it where the title is obviously a bad title as distinguished from a doubtful or holding title. No doubt there is authority for that proposition. I bow to that authority, and to the better judgment of my learned brothers, though it does seem to me to be most anomalous and unfortunate. I venture to think that there might be a condition so framed as to preclude a purchaser from objecting to an obviously bad title and specific performance of the contract granted. And I would add that, in the present case, if I had been left to my own unaided judgment, I should have thought that the 6th condition was sufficiently stringent to cover even a bad title—an intermediate bad title, I mean—having regard to the terms so specifically and carefully mentioned in that condition.

RIGBY, L.J.—In this case, after consideration of the conditions of sale, especially clause 6, I am unable to say that there is not a contract binding at law. As to the construction of that contract a court of equity must of course take the same view that a court of law would take. I think that that is enough to show that in this case there can be no recovery of the sum which has been paid under the legal contract But when we come to the qustion of specific performance, I think that it is a question which cannot be decided by any such process as saying that if there is a contract good in law a court of equity ought to apply its own remedy. From the very first when the doctrine of specific performance was introduced it has been treated as a question of discretion—whether it is better to interfere and give a remedy which the law knows nothing at all about, or to leave the parties to their rights in a court of law. Now, the foundation of the doctrine of specific performance was this: Land as a matter of fact has quite a character of its own, and the real meaning between the parties who contract with reference to it is not that there shall be a contract with legal remedies only, but that the purchaser shall get the land, and he cannot be put off in an ordinary case by

offering him damages. The main feature of the doctrine of specific performance is therefore that the purchaser is actually to get the land; and, if a case arises in which he cannot get the land in any substantial sense, it seems to me that the doctrine of specific performance is not applicable. After all, the question to what extent a court of equity will go is very largely one of authority as to what has been done before. And if I found that there were cases in which, although the purchaser was not to get the land which he offered to buy, a something having a semblance of a title was forced on him, I should have to consider those cases very carefully and see whether we were not bound by them. But, so far as the authorities that have been cited to us are concerned, I do not think that a single case has been referred to in which a purchaser was held to be bound to take a mere semblance of a title, or where he did not practically get the land with such a title as the judge directing specific performance looked upon as a holding title—as a title, in all probability, which he could at any rate set up so as to enable him to retain the possession actually given to him. I will not go through the cases in detail, but I find that there are some which appear at first sight to be rather startling. For instance, the case in which an owner for life was entitled to force a title upon the purchaser of the fee appears to go a long way. But when you examine that case you find that it was by no means certain that the vendor was not the owner in fee. The vendor claimed under a will of very considerable antiquity at the time. Under the will the vendor took certain properties for life and certain other properties in fee. But the description in the will (I think it was about thirty years old) founded, as the properties were, upon occupation for a long time, was such that no one could tell—the vendor could not tell, and I gather from the facts of the case that no one else could tell—at that time which were the fee simple properties and which were the properties to which the vendor was entitled for life only. There was a very stringent condition that the purchaser should accept the title, and, under those circumstances, it appearing reasonably plain that the purchaser would get a good holding title, specific performance was decreed. In the case of *Hume* v. *Bentley* (*ubi sup.*), which was also cited by Mr. Farwell, there were leases granted by a canal company, and it was argued that the canal company had no right to make the leases. I observe that the learned judge who decided that case says distinctly (on p. 527) that the objections raised to the title were such as did not interfere with the safety of the purchaser. That that was the foundation for his decree for specific performance I think tolerably plain. Without attempting to go through the other cases, I may say that I have not found a single case in which a court of equity has ever been so far led astray from the original doctrine as to say that in cases where the real intention was that the purchaser should get the land, he should be treated as though he were going to get the land, though the court knows he was not. In the present case, it is unquestionably plain, upon the evidence as it now stands, that Sarah Jane King, afterwards Sarah Jane Banks, could not make a title to this property, and that it would be a mere delusion to say to the purchaser, "You have got what you bargained for." He will not get it—that is certain—and he will not get, so far as I can see, a single sixpence in value out of it. Mrs. Banks would be entitled to a third, but she has mortgaged the whole for her own purposes, and her one-third would have to be subject to the whole of the mortgages in addition to the costs which would plainly swallow up the whole of her one-third. The court is asked to go through what would be the idle form of making over to the purchaser property in which he will not take the slightest beneficial interest, but which, if he were imprudent enough to accept it, would involve him in litigation quite beyond any value he can possibly get. I do not think that the original idea of specific performance covered such a case as this, and I am, I repeat, not aware of any authority in which the court knowing that it cannot give the subject-matter of the contract in any substantial sense to the purchaser, has yet said, "We will give it when we know we cannot give it." I think it is quite enough that the parties should be left in such a case to their remedies at law; and I am persuaded that the judges who have recently gone into the question of specific performance have taken a similar view, and that there has been no alteration in this respect.

Order varied.

Solicitor for the appellant, *C. Etherington.*
Solicitors for the respondent, *Rodgers* and *Co.*

Tuesday, July 2.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

Re THE COALPORT CHINA COMPANY (JOHN ROSE AND CO.) LIMITED. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Transfer of share—Directors' power to refuse to register transfer—Rectification of register of members—Companies Act 1862 (25 *&* 26 *Vict. c.* 89), *s.* 35.

Although the court has ample jurisdiction to control the refusal by the directors of a company to register a transfer of shares, or the exercise by them of their power to refuse, provided that there is any evidence which justifies the court in coming to the conclusion that the directors have not done their duty, yet, in the absence of such evidence, the court is bound to presume that they have acted rightly, whether their power to refuse is absolute or limited to particular grounds.

Where, therefore, the articles of association of a "private" limited company—the shares in which (all fully paid up) were mostly held by one person and his family or connections—provided that the directors might refuse to register any transfer where they were of opinion that the proposed transferee was not a desirable person to admit to membership, it was Held (reversing the decision of Kekewich, J.), that it was for those who alleged that the directors had not properly exercised the powers conferred upon them to give evidence to that effect; and that in the absence of such evidence the court could not interfere.

THE above-named company was a limited company registered under the Companies Act 1862. The founder and governing director of the com-

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

pany and his family and connections were the holders of 183 out of the 200 100*l.* shares, of which the capital consisted, all of which shares were fully paid up.

The articles of association of the company provided as follows:

Art. 29. No share shall, save as provided by clause 32 hereof, be transferred to a person who is not a member so long as the founder or, failing him, any member is willing to purchase the same at a fair value. In order to ascertain whether the founder or, failing him, any member is willing to purchase such share, notice in writing shall be given to the company stating the desire of the holder thereof to transfer the same. Such notice shall specify the number of shares to be sold, the registered numbers thereof respectively, and the sum fixed as the fair value, and shall constitute the company the agent for such sale.

Art. 30. Every such share shall be offered in the first place to the founder, and if he decline to purchase then to the members in such order as shall be determined by lots drawn in regard thereto, and the lots shall be drawn in such manner as the directors shall think fit. The company shall within the space of twenty-eight days after service of the notice intimate in writing whether the founder or, failing him, any member is willing to purchase the share at the fair value, and in case any differences arise as to the fair value the same shall be referred to the decision of two arbitrators. . . .

Art. 31 provided that, after the fair value had been ascertained, the member selling should be bound to transfer the share to the founder or member purchasing; but that, if the company should fail to intimate in writing that the founder or any member was willing to purchase the share, the holder should be at liberty, subject to clause 33, to sell and transfer the same to any person at any price.

Art. 33. The directors may refuse to register any transfer (*a*) where the company has a lien on the shares; (*b*) where it is not proved to their satisfaction that the proposed transferee is a responsible person; (*c*) where the directors are of opinion that the proposed transferee is not a desirable person to admit to membership. But paragraphs (*b*) and (*c*) of this clause shall not apply where the proposed transferee is already a member.

T. A. Middleton was one of the original subscribers to the articles of association of the company, and was the holder of one share, No. 198, therein. Being desirous of retiring from the company, he agreed to sell his share to W. Bell for 160*l.* He accordingly forwarded notice to the company on the 5th Dec. 1894, in pursuance of art. 29, of his desire to sell the share, and of the price at which he valued it, which he placed at 250*l.*

On the 13th Dec. 1894 the secretary of the company wrote in reply, objecting that the notice was not in order, as, under the articles of association of the company, the directors were entitled to be informed as to the eligibility of the proposed transferee before consenting to the transfer; and that the directors, moreover, could not agree to the value set upon the share by Middleton, as it was much too high, and that Middleton was indebted to the governing director.

No steps, however, were taken by the company to ascertain the true value of the share, and, after the expiration of twenty-eight days, no notice having been given that the founder or any other member was willing to take the share, Middleton, on the 15th Jan. 1895, forwarded to the secretary a transfer of the share, duly executed by himself and by Bell, at the price of 165*l.*

On the 15th Feb. 1895 the secretary informed Middleton that the directors were unable to agree to the proposed transfer of the share from him to Bell, but gave no reasons for their refusal.

Owing to the illness of the governing director, no formal meeting of the directors was held until the 18th April 1895, when a meeting was summoned, having for its object, among other things, to consider the propriety of registering the transfer. At this meeting a resolution was passed:

That the registration of the recent transfer by Mr. Middleton to Mr. Bell of share No. 198 in the company be refused.

The secretary gave notice of this refusal to Middleton's solicitor in a letter of the 24th April 1895, in which he said:

I am instructed by my directors to inform you that at their board meeting, held on the 18th inst., the question of the propriety of the desired registration of the transfer to Mr. W. Bell of the share No. 198 in the company, of your client, Mr. T. A. Middleton, was considered, and that the directors, upon such consideration, resolved that the registration of such transfer should be refused.

A motion was accordingly made on behalf of Middleton and Bell, under sect. 35 of the Companies Act 1862, asking that the register of members of the company might be rectified by erasing therefrom the name of Middleton as the holder of one share in the company, and by substituting the name of Bell as the holder of such share.

On the 3rd May 1895 the motion came on to be heard before Kekewich, J.

No evidence except what appeared from the correspondence was offered as to the motives of the directors in refusing to register the transfer, nor of the desirability of Bell as a member of the company. But evidence was adduced, showing that the company had no lien on the share, and that Bell was a responsible person, and this was not denied by the directors.

Kekewich, J.—In my opinion the applicants are entitled to succeed on the ground that the directors have not brought themselves within the provision of the 33rd clause of the articles of association. They have not told me whether they considered that there is a lien on the shares, or whether it is proved to their satisfaction that the proposed transferee is a responsible person or not. But, as a matter of fact, they do not rely on either of the sub-clauses (*a*) and (*b*), and therefore I need not consider them. The directors are therefore thrown on one sub-clause, viz., sub-clause (*c*). They may refuse to register any transfer where they are of opinion that the proposed transferee is not a desirable person to admit to membership. If the directors had said that, in their opinion, the proposed transferee was not a desirable person to admit to membership, then, according to the cases, unless they could have been proved to be wanting in *bona fides*, the applicants would have been bound by the contract in the articles of association. They would have been precluded from asking for any reasons for the directors' opinion, however ill-founded an opinion, which they were entitled to give honestly. But the directors do not say so. They simply say that they do not consider that it is a proper transfer; they simply reject it as being wanting in propriety. I really do not know whether they

have considered at all whether the proposed transferee is a desirable person or not. There is not a trace of any consideration of that matter. I think I am bound by common sense and by the authorities to say that it is their duty to tell me whether they have considered it or not. I do not say that they are bound to state the grounds for their conclusion, nor any reasons by which they arrive at it in any way, nor even what has been laid before them. But it is their duty to say whether they do consider that he is a desirable person or not—whether they consider him undesirable, or not a desirable person. That might have been a somewhat arbitrary conclusion to arrive at, but they do not tell me that they have arrived at it, and I must conclude that they have not. Perhaps I might be told that the directors have not stated that, out of tenderness to the transferor or transferee, that they did not wish to brand him as not a desirable person to join a company of this kind. That may or may not be so; but they have a discretion vested in them on a particular ground, and they must exercise it on that ground, however disagreeable it may be to them, however personal the conclusion may be. All the decided cases deal with entirely different clauses, clauses giving a wider discretion, or at any rate a different discretion. And they seem to me to go straight to this point in this way, as showing that the discretion is to be exercised, not some other discretion; and that when that discretion is exercised then the court will not interfere. I, of course, accept the authorities, and all of them; they all go in the same direction. But I hold that the directors have not exercised the discretion in this particular case which they were bound to do. I do not inquire, and I do not think I ought to inquire further, why they have failed to do it; but they have failed. And I think that now they have had their fair opportunity, and more than their fair opportunity, I think that I must conclude judicially that the directors have not got any reason such as they can properly state against this transferee as distinguished from the transfer. Therefore the order must be made as asked, and the company must pay the costs.

From that decision the company now appealed.

Bramwell Davis, Q.C. (*G. Broke Freeman* with him) for the appellants.—As the articles of association of this company conferred upon the directors power to refuse to register any transfer if they considered that the proposed transferee was not a desirable person to admit to membership, it is to be assumed that they refused to register the transfer from Middleton to Bell on that ground, no evidence being adduced that they did not act *bonâ fide*, or did not consider the question at all. They are under no obligation to state the reasons for which they refused to register the transfer. He relied upon

Re Gresham Life Assurance Company; Ex parte Penney, 28 L. T. Rep. 150; L. Rep. 8 Ch. App. 446.

[He was stopped by the Court.]

Warrington, Q.C. and *George Cave* for the respondents.—In three reported cases directors have been held bound to register a transfer of shares:

Re Stranton Iron and Steel Company, L. Rep. 16 Eq. 559;

Moffatt v. *Farquhar*, 38 L. T. Rep. 18; 7 Ch. Div. 591; *Re Bell Brothers Limited; Ex parte Hodgson*, 65 L. T. Rep. 245.

The present case is entirely distinguishable from the authority relied upon by the appellants, because there the power of the directors to refuse to register any transfer was absolute, whereas here it is limited to particular grounds. If the power had not been so limited it would have sufficed had the directors shown that they had considered the matter, no *mala fides* being proved. But as the power of the directors is limited, and they can only refuse to register a transfer on one or more of three specified grounds, their duty was to state why they refused to register Bell as transferee of Middleton's share. The transferor and transferee are entitled to know on which of the specified grounds the directors refused to register that transfer. Their refusal may have been for some totally irrelevant reason. It appears from the correspondence that it was on account of the high price at which the share was offered to the old members that they refused the transfer.

No reply was called for.

LINDLEY, L.J.—It appears to me that this appeal must succeed. Before I read the articles of association I will state shortly the principle which I think is applicable to the question raised. Under the articles the directors have a power to refuse a transfer. I will not say at present for what reasons. I will allude to them presently. They do refuse a transfer; they do not say why. The argument is, and the view taken by the learned judge in the court below is, that it is for them to justify their conduct. Now that appears to me to be wrong. It appears to me that it is for those to say that they (directors) having the power, have exercised it improperly, to give some evidence to that effect. Here there is absolutely none. Therefore, in common fairness, as a matter of justice between man and man, it strikes me that this decision is based upon an erroneous principle. Now let us look and see whether there is anything in the articles of association which renders that line of reasoning open to observation or excludes it. That was precisely the ground upon which the Court of Appeal in *Ex parte Penney* (28 L. T. Rep. 150; L. Rep. 8 Ch. App. 446) differed from the then Master of the Rolls. I am aware that the articles were not quite the same, but the Master of the Rolls there had held that the directors were bound not only to act *bonâ fide* (which, of course, they are), but that directors are bound to preserve some kind of evidence that they act *bonâ fide*, so that the court may see it. The Court of Appeal said: "No, that is not part of their business. Show us that they have not acted properly, give us any evidence of that kind, and we have ample power to interfere." Now, we must bear in mind that the power of the court invoked in this case rests on the 35th section of the Companies Act 1862, which enables the court to rectify the register of members if the name of any person is, without sufficient cause, entered in or omitted from the register, or, if default is made, or unnecessary delay, and so on, takes place. Now, who is to prove that? Surely it is for the person invoking the assistance of the court to prove that the name of some person is without sufficient cause entered in, or omitted from, the register. When all he can say is that

the directors have the power to refuse and they have refused, he has not discharged the burden which is imposed upon him. Now, Mr. Warrington and Mr. Cave have argued that, although that may be true under ordinary articles, it is not applicable to the present case, for this reason, that these articles are framed upon the theory that the shares shall not be transferred by any shareholder until he has offered them—substantially—to the other shareholders. That is the short point. After he has offered the shares, and the other shareholders have not elected to buy them, then he has a right to transfer them, subject to clause 33. That clause provides that "The directors may refuse to register any transfer (*a*) where the company has a lien on the shares." The applicants here exclude that because there was no lien. "(*b*) Where it is not proved to their satisfaction that the proposed transferee is a responsible person." There, again, the applicants have brought forward evidence to show that the transferee is a responsible person, and nobody says that he is not. Then "(*c*) Where the directors are of opinion that the proposed transferee is not a desirable person to admit to membership." Now (*a*) and (*b*) being excluded, the directors must have acted, if they have acted at all properly, under (*c*). There is no evidence to show that they have not acted under (*c*), and no evidence to show that they have acted improperly. Now the contention is, that, although they have considered whether they will pass this transfer or not—whether they will approve of the transfer and of the transferee—and have refused to do it, yet because they have not said, or because the minutes do not show, that they came to the conclusion that they are of opinion that the proposed transferee is not a desirable person, therefore it is to be assumed that they have improperly exercised this power. I do not assume anything of the kind; nor do I think it is necessary in point of law for the minutes to show, or for the directors to show, or for them to state in the absence of evidence calling upon them to make any statement, that they came to a resolution in those terms. It it is said that unless they do the court cannot hold that they have considered the question. Now, what is the question? The question for them to consider is, whether they will or will not refuse to register the transferee. That is the question. These are only reasons or grounds for it. They have considered that question, and, after the evidence given by the applicant, I cannot help feeling, inferring, and believing that they have considered the other question whether he is or is not a desirable person. There is no evidence whatever to show that they have acted in the slightest degree improperly or exceeded their powers. Now I wish to be cautious in this matter, because I have not the slightest doubt that the court has ample jurisdiction to control the refusal by directors or the exercise by them of their power to refuse, provided that there is any evidence whatever which justifies the court in coming to the conclusion that they have not done their duty. But in the absence of all such evidence the court has no right to presume—it is contrary to all ordinary principles of justice—that they have done wrong, but it must be presumed that they have done right. I consequently think that the appeal should be allowed with costs here and below.

LOPES, L.J.—I am of the same opinion, and have nothing to add.

RIGBY, L.J.—I have only to add, in consequence of Mr. Warrington's argument that where the power is absolute a different rule applies from where the power is limited, that I do not think that that proposition can be maintained. Even although in terms the power is absolute, it is a fiduciary power; it is to be exercised for the benefit of the company and with due regard to the rights of the transferee. So that no power is absolute in that sense. The courts have held that the directors are not bound to say, "We threw aside all external considerations and applied ourselves to the exercise of the power in the proper manner." If they do not do it in that case I do not see why they should do it when the power itself arises only in certain events. The fact that they have resolved must be taken, in the absence of positive evidence sufficient to satisfy the court to the contrary, that they have resolved within their jurisdiction and for right reasons.

Appeal allowed.

Solicitors for the appellants, *Hepworth* and *Co.*
Solicitors for the respondents, *Powell* and *Rogers.*

June 28 *and* 29.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE CHARLTON. (*a*)

ON APPEAL FROM BRUCE, J.

Collision—Compulsory pilotage—Area of licence—Area of compulsion—Bristol Channel pilotage district—Port of Bristol—Pilotage Order Confirmation (No. 1) Act 1891 (54 *&* 55 *Vict. c.* 160)—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *s.* 388.

A vessel lying at anchor about a mile to the north-west of the English and Welsh Grounds Light-ship, in the Bristol Channel, was run into by a steamship proceeding from Bristol to Cardiff, which was in charge of a pilot licensed by the Bristol Corporation for the port of Bristol, within which port pilotage is compulsory, and the Bristol Channel pilotage district. One rate is payable for the pilotage of a vessel from Bristol to any part of the Bristol Channel, eastward of the Holms.

In the Pilotage Order Confirmation (No. 1) Act 1891 (54 *&* 55 *Vict. c.* 160), *the boundary of the port of Bristol between the Holms and Aust, is stated to be "from the westwardmost part of the Flat and Steep Holms, up the course of the Bristol Channel eastward to Aust, in the county of Gloucester."*

Held, assuming the collision to have been at a spot not within the port of Bristol, that, as it was within the Bristol Channel pilotage district, within a part of which (namely, the port of Bristol) the employment of a pilot was compulsory, and as the pilot was still in charge as pilot within a district for which he was licensed, though he had passed the limits of the port in which he was a compulsory pilot, the relationship of master and servant did not exist between him and the defendants at the time of the

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

collision, and hence the defendants were exonerated from liability for his negligence.

The General Steam Navigation Company *v.* The British and Colonial Steam Navigation Company Limited (20 *L. T. Rep.* 581; *L. Rep.* 4 *Ex.* 238; 3 *Mar. Law Cas. O. S.* 237) *approved.*

Semble, *the boundary of the port of Bristol between the Holms and Aust is not, as held in the court below, a straight line between those two places, but follows the course of the navigable channel.*

This was an appeal by the plaintiffs in a collision action from a decision of Bruce, J. (*ante*, p. 198; 7 Asp. Mar. Law Cas. 569), where the facts are fully set out.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) provides:

Sect. 388. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law.

Sir *Walter Phillimore* and *Batten*, for the appellants, substantially repeated the arguments adduced in the court below, and, in addition to the authorities there cited, referred to

The Lion, 21 L. T. Rep. 41; L. Rep. 2 P. C. 525; 3 Mar. Law Cas. O. S. 266.

Aspinall, Q.C. and *Scrutton* for the respondents.

Lord Esher, M.R.—In this case the plaintiffs' ship was a ship at anchor in the Bristol Channel, and she was run into by the vessel of the defendants. Therefore there was no defence unless the defendants could show that the collision was caused solely by a person who cannot be treated as their servant; in other words, that it was caused solely by the act, in this case, of the pilot, who was in command of their ship at the time of the collision, and who is to be treated as a pilot who was at that time not a servant of the defendants. This doctrine of compulsory pilotage is an enacted doctrine no doubt. It was not enacted for the protection only of ships; it was enacted for the protection of ports; of commercial ports, and also of naval ports; of commercial ports in particular, because, if a vessel is wrecked and lost and sunk near to the entrance, or within the entrance of a commercial port, she is not only lost herself, but she is a great danger and obstruction to the port and to other vessels, and would interfere with the commercial business of the port. Therefore, when you call it compulsory pilotage, you must look at the reasons for the compulsion. Now there was a time when Bristol, I daresay, was the only considerable port in the Bristol Channel. The other ports were very small places, and therefore at the time of this first statute, which is called the Bristol Wharfage Act of 1807, the control of the pilots of the Bristol Channel was given to the Bristol Board. The Bristol Board, with reference to the navigation of the British Channel, was the board which was to license the pilots. Now the licensing of pilots is only a means of obtaining skilled pilots—pilots who may be trusted; but, when the power is given to a board, even to the Trinity House, to license pilots, they cannot and do not—any one board has never been allowed to—license pilots for the whole navigation all round England, or all round Great Britain. They license them for certain districts. Why is that? Because, if you license for too large a district, you license a man who cannot learn his trade. He cannot learn all the ins and outs, and all the shoals of too large a district. It would be impossible for him to learn it, and impossible for him to practise it. Therefore these districts have been made with reference to the power of appointing pilots in those districts, and each would have a board with a capacity to deal with those districts. A board is entitled and empowered to license pilots for its own particular district, and for that district only. If you license a pilot for that district, he is not a licensed pilot anywhere else, for the first element of his being a compulsory licensed pilot would be gone, because he is not a licensed pilot when he is out of the district for which he is licensed. He is then only an ordinary seaman. The Bristol authority had power to license pilots for the whole of the Bristol Channel. Then, when the other ports became important ports, they desired to have pilots of their own. What they wanted was to have pilots who were capable of navigating ships in and out of their own ports. To navigate ships in and out of their own ports necessarily required that they should be able to navigate in the Bristol Channel, because, if you are to take a ship out of Cardiff into the Bristol Channel, you must have a pilot who knows how to take her into the Bristol Channel for a considerable distance. Therefore, we have these other Acts of Parliament which constituted other boards. Only one we need deal with to-day, viz., that relating to the Cardiff Board. That statute has not power to deal with Bristol or ships going into or out of Bristol, but it deals with ships going into or out of Cardiff, and in respect of ships going into or out of Cardiff it says they are not to be navigated by pilots who are licensed to take ships into and out of Bristol, or by pilots who are engaged only to conduct ships in the Bristol Channel, but any ship going into or out of Cardiff is to be piloted by a pilot licensed by the Cardiff Board. It is obvious that that does not in any way affect a ship which is going into or out of Bristol. Whether the Cardiff Board can license a pilot to act in the Bristol Channel in respect of any ship which is not going into or out of Cardiff is immaterial in this case, because if they have made a Cardiff pilot they have made a licensed pilot for parts of the Bristol Channel. What is the result of that? If that is so, then you have Cardiff pilots who are pilots licensed to act for the district in the Bristol Channel, at the same time that Bristol pilots are also licensed to act in the same part of the Bristol Channel. What does that signify? That you have two sets of pilots. For a ship going into Cardiff you have a Cardiff pilot, and for a ship going into Bristol you have a Bristol pilot. Bristol pilots are licensed to go beyond the port of Bristol, in the Bristol Channel, down to Lundy, as I understand it, or places to the eastward of Lundy. But then you have the order of 1891, made in pursuance of an Act, 54 & 55 Vict. c. 160. That deals not with the licences of the pilots, but with the geographical part of the water over which a Bristol pilot is a compulsory pilot, and with regard to that it says that the master and owners of all vessels navigating or passing up and down the Bristol Channel to or from the port of Bristol shall be and are by this order exempted from the obligation to be piloted or navigated by pilots authorised by the

authorities of the city of Bristol, except when within the limits of that port. That is this, that although the British authorities can and do license a pilot to go beyond the limits of the port, and he is a licensed pilot beyond the limits of the port, he is only a compulsory pilot within the limits. Then you come to what are the limits of the port. If we had to determine necessarily here what are the limits of the port of Bristol, I should say it is from the westernmost part of the Flat and Steep Holms to a place called Aust, in the county of Gloucester. The learned judge has said that there is a mathematically straight line. I do not and cannot agree with that, because, if that were true, and if there were a shoal which no vessel could get over on this mathematical line, they would have to go over this shoal and be irretrievably stranded. It must mean a line following the ordinary course of the Bristol Channel—the navigable course for ships, and that is not at all necessarily a straight line. If it had been, therefore, absolutely necessary to determine what is to be taken as the limit, I should have thought that evidence would have to be given of what was the course of the Bristol Channel. It is not a ship's course sailing up the Bristol Channel, it is the course of the Bristol Channel. The Trinity Masters could, after looking at the chart, have told the learned judge what is the navigable course of the Bristol Channel. But for the purposes of our decision to-day it seems to me to be immaterial whether the place of the collision, that is, where the negligence of this pilot caused mischief, was within or without the port. I shall, for the purposes of my judgment, assume, as the learned judge has done, but not for the same reason, that it was outside, although I desire to be taken to express no opinion whether it was within or without the port. If it had been necessary to decide whether it was within or without we should have had to consult Trinity Masters. You have this case: It is a ship going from Bristol to Cardiff—going to Cardiff, no doubt, but going out of Bristol, and going through the port of Bristol. I have no doubt that as long as she was within the port of Bristol it was compulsory upon the captain to have a Bristol pilot on board. When, therefore, he took this pilot on board he must have taken him in the ordinary way by giving notice at the pilotage station at Bristol that his ship was going out from Bristol, and would require a pilot. He does not select a pilot; he is not allowed to; he is obliged to take the pilot whom he does not select, and that, in itself, makes that pilot compulsory. If he had only wanted to be piloted up and down the Avon he would have said so, but he wanted a pilot to take him through the port, and out of the port of Bristol. It is true he wanted to go to Cardiff, but a Cardiff pilot could not have taken charge of the ship when going out of the port of Bristol. A Bristol pilot was compulsory where he took him. Then, looking at this statute, and the order of 1891, when the vessel had passed out of the port of Bristol, when she had gone through the port and was outside the port, I have no doubt myself that he was no longer a compulsory pilot. Therefore when the accident happened he no longer was a compulsory pilot. But when he was taken on board this ship and put in charge he was a compulsory pilot, and although he had passed out of the limits where he was a compulsory pilot, he still was in charge as pilot, and in charge without any alteration of the relations between himself and the master of the ship. He was still the pilot. He was in charge of the ship, for they had not gone to such a place as that he was no longer a licensed pilot. He was in the district where he was a licensed pilot, and although he had gone beyond the port where he was a compulsory pilot, it is under such circumstances that the master could not properly be called upon to determine whether the compulsion had ceased or not. Then the necessities of the case require that you should not make him a servant of the owners when they had no real opportunity of determining whether he was or was not their servant. They were compelled to take him without his being their servant, and they had no real opportunity of seeing that that relation which had been put upon them had ceased. I have no doubt that it was upon that ground—that to decide that the master of a ship was to take charge of the ship in such circumstances would put upon him a most dangerous liability and responsibility—that the decision of the Exchequer Chamber (*General Steam Navigation Company* v. *British Colonial Steam Navigation Company*, 20 L. T. Rep. 581; L. Rep. 4 Ex. 238; 3 Mar. Law Cas. O. S. 237) was come to. It does not signify whether the spot is one where the compulsion has ceased. The mode of treating him by the master as a compulsory pilot has not ceased, and therefore we are to treat the master and owners of the ship as still having their ship in charge of the pilot whom they took by compulsion. If so, he was not a servant of the owners, and if so the owners were not liable for negligence which was solely his negligence. I cannot help thinking that that is the decision of the Court of Exchequer. I absolutely and entirely agree with the ground upon which I believe that opinion was founded, and think that to have found otherwise would have put masters of ships in English ports into dangers and difficulties into which it was never intended they should be put. That case, I think, governs us, and I also venture to say the decision in that case was right. Therefore the appeal must be dismissed.

Kay, L.J. — In this case the *Beechdene*, a ship belonging to the plaintiffs, was run down at anchor in the Bristol Channel, and was run down by a steamship which belonged to the defendants. One question raised was, whether the place at which the *Beechdene* was at anchor when she was run down was within the limits of the port of Bristol. The learned judge has decided that it was not, and I do not think there is before us sufficient evidence to enable us to say whether the learned judge was right on that point or not. I confess I have some difficulty about the way in which he fixes the limit by drawing a straight line. It seems to me to involve a question of some nicety. However, I shall treat it in all I have to say as though the decision of the learned judge was right; at any rate as though this collision took place outside the northern limit of the port of Bristol. Three points, in fact, have been argued. The first is, that this ship, going from Bristol to Cardiff, when she got into the Bristol Channel did not require a compulsory pilot at all; and the second is as to whether, supposing she was compelled to have a compulsory pilot within the port of Bristol, that pilot did not cease to be compulsory the moment the ship

passed the northern limit of the port of Bristol into the Bristol Channel. The third question is whether, if that be so, this case is governed by the case to which the Master of the Rolls has referred —the case in the Court of Exchequer, of the *General Steam Navigation Company* v. *The British Colonial Steam Navigation Company* (*ubi sup.*) ? Dealing with those questions briefly in their order, I find that the action here was an action brought by the owners of the ship run down against the owners of the *Charlton*, and the defence is that the *Charlton* at the time of the collision was under the management of a compulsory pilot. Reliance is placed upon sect. 388 of the Merchant Shipping Act 1854, which says that no owner or master of any ship shall be answerable to any person whatever for any loss or damage sustained through the action of their pilot within any district where the employment of such pilot is compulsory by law. Taking the first question, was this a case in which, as the ship was going to Cardiff, she need not be, and was not in fact, under any compulsory pilotage within the Bristol Channel; that is, that when coming from Bristol she had got out of the Avon into the Bristol Channel, the pilotage ceased to be compulsory? That depends upon several Acts of Parliament which I will briefly refer to. The Act 47 of Geo. 3, c. 33, enacts that after a certain date after the passing of the Act all vessels sailing, navigating, or passing up and down the Bristol Channel to the eastward of Lundy Island, except coasting vessels and Irish traders, shall be conducted, piloted, and navigated by pilots duly authorised and licensed by the corporation of the city of Bristol. There followed after that Act another statute, 11 & 12 Vict. c. 43, which by sect. 66 provided that the Corporation of Bristol may from time to time appoint and license any persons duly qualified as pilots in the port of Bristol, and that any person not being so appointed and licensed who should take or hold charge of, or attempt to pilot any vessel within such port, shall forfeit 10*l*. Then there followed a third Act, the 24 & 25 Vict. which repeals so much of sect. 9 of the first statute I have read (47 Geo. 3) as relates to vessels navigating or passing up or down the Bristol Channel, and bound to or from either of the ports of Cardiff, Newport, or Gloucester. The question is, what is the meaning of these three statutes? Observe that this statute does not repeal 11 & 12 Vict., or refer to it at all, but only repeals so much of sect. 9 of the Act of Geo. 3 as refers to vessels bound to Cardiff, Newport, and Gloucester. The true meaning of those statutes, taking them together, is this, that if a vessel be bound up or down—for this purpose down—the Bristol Channel to Cardiff, and is going to or from any other place than Bristol, it need not have a compulsory pilot, although in going to Cardiff it may pass over some part of the Bristol Channel which is within the port of Bristol. That seems to me to be the meaning of those statutes, taking them altogether. But if a vessel goes from Bristol to Cardiff, the obligation of compulsory pilotage within the port of Bristol exists as to that vessel, and it must take a pilot who will certainly be a compulsory pilot within the limits of the port of Bristol. That, I think, to be the true meaning of those statutes. This ship, the *Charlton*, was going from Bristol to Cardiff. She was bound to have a compulsory pilot all the time she was within the limits of the port of Bristol, not only in the Avon, but so far as those limits comprise any part of the Bristol Channel. She started with a pilot taken at Bristol, and she was going to Cardiff. The pilot was not to take her all the way to Cardiff: he was only to take her within the Bristol Channel, and within the limits of his licence in the Bristol Channel. I assume for the purpose of this case that he passed beyond the limits of the port of Bristol, but was within the limits of his licence when the collision actually took place. I assume that. The question then is, what is the meaning of sect. 388 of the Merchant Shipping Act? I find that in the case which came before the Court of Exchequer first, and afterwards before the Court of Exchequer Chamber, it is held that sect. 388 does not require that the pilot should be compulsorily employed where the accident happened. This pilot was not compulsorily employed where the accident happened, but the accident happened within the district for which he was licensed, and within the limits to which he was going to take the ship. When he took charge of the ship at Bristol he was undoubtedly a compulsory pilot, and continued to be so to the limit of the port. But this collision, I assume, took place outside the limit of the port of Bristol, though within the district for which he was licensed. The whole of the district for which this pilot was employed was within the limits of his licence. He was duly licensed by the authority at Bristol up to and beyond the spot where this collision took place, and as I read this judgment I can put no other meaning to it than that the words "within the district" of that section mean not merely within the district for which the pilotage is compulsory, but within the district for which he was employed. Therefore I think that we are bound by this decision. This case seems to me completely within that decision, and therefore this pilot must be taken as though he were, though in fact he was not, a compulsory pilot on the spot where this collision took place. I feel strongly what the Master of the Rolls has expressed already, that if it were not so the master of the ship would be placed in great difficulty. At any rate, he may not have been able himself to draw the line in the water of the Bristol Channel which was in fact the northern limit of the port of Bristol, and he was put in this danger, that the moment the ship passed over that line the compulsory pilotage would cease, and he would be bound to take the ship out of the charge of the pilot and navigate her himself, though he was in a channel of which he knew nothing about the navigation. I cannot think that would be the convenient or proper construction to put upon this section of the Merchant Shipping Act 1854, and it seems to me that it is reasonable to say that where a pilot has been taken under compulsion to take a ship to a point in the Bristol Channel within the limits of his licence, that although that point is somewhat beyond the limits of the port of Bristol, yet if the pilot goes on taking the ship beyond that limit and the collision happens he should be treated for this purpose as a compulsory pilot, and that the master and owners of the ship should not be made liable for a collision which happens by his fault. Therefore, I think, this decision ought to be upheld.

SMITH, L.J.—The plaintiffs' ship in this case was run down solely by the negligence of the pilot

on board the defendants' ship, and the question is whether, considering where the collision took place, sect. 388 of the Merchant Shipping Act applies. As far as I can make out—and I say as far as I can make out because I have not been able to have all the statutes—the case is this: that at the beginning of this century, as indeed now, there was a Bristol district—a Bristol port and a Bristol district—running from Lundy Island eastward up to Bristol and it may be further; and that district comprises in it the port of Bristol. In the olden times, say at the beginning of this century, compulsory pilotage by Bristol pilots was necessary for all that district. Leaving out the Act of 1861, after the year 1891 what happened was this, that the Bristol district remained as it had been before, with certain reservations. This ship was a ship which had started from the port of Bristol, intending to go to Cardiff, but she started in the Bristol port, and therefore necessarily and by compulsion of law had a Bristol pilot on board. I take it that the collision happened outside the limit of the port of Bristol. My brother Bruce has found that by drawing a straight line eastward. For myself I do not think that was the right way of doing it, and having Trinity Masters with him, I should have thought he would have construed with their help what was the Bristol Channel course. Be that as it may, I will take it that this accident happened at a place outside, that is to the north of, the Bristol Channel course, and the question arises whether in these circumstances, the ship having been under compulsion to take a Bristol pilot when she left the port, and the accident having happened outside the port but within the district, the owners of the *Charlton* can defend themselves under sect. 388. It seems to me that we are guided by the authority of the case in the Exchequer Chamber, which is on all-fours with this case. Sir Walter Phillimore, in his able argument, tried to escape that decision by saying that the second branch of that judgment was only a dictum, but I wish to point out that it is not a dictum at all. but one of the bases of that decision. The Exchequer Chamber expressly held that, if a ship has to take a pilot by compulsion on board, and then an accident occurs in the district he is licensed for, though not in a place where compulsion is necessary, the shipowner is exempt from responsibility for the act of that pilot on the ground that the relationship of master and servant did not exist, and that sect. 388 applies. I think that case is on all-fours with the present, and it also seems to me that the case of *The Lion* (*ubi sup.*) has nothing to do with this case, because in the case of *The Lion* the ship had not to take a pilot on board at all. Therefore I think we are to be guided by the decision in the case in the Exchequer Chamber, and I am of opinion that the appeal fails.

Solicitors for the appellants, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitors for the respondents, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, June 20.

(Before North, J.)

Re Chifferiel; Chifferiel *v.* Watson.

Will—Codicil—Construction—Revocation—Direction in codicil to sell real estate specifically devised by will.

C. by will devised his estate at Worcester Park to F. C. for life, and after his death to his eldest son, and if F. C. should die under twenty-seven intestate and without issue, he directed that the said estate should be sold by his executors, and the proceeds should form part of his residuary estate. And he appointed A., B., and D. executors. By a codicil the testator appointed the said A. and D. executors, revoked previous appointments, and directed his executors to sell and dispose of his estate at Worcester Park.

Held, that the codicil did not deprive F. C. and his son of the beneficial interest given them by the will.

By his will, dated the 2nd Aug. 1882, Frederick Chifferiel made the following gift:

I give and bequeath to Frederick Chifferiel, of Upton, Essex, all that my freehold estate (including the iron church and church plot) at Worcester Park in the county of Surrey (except the freehold house and land called Grafton House and the Bungalow estate, which I have otherwise disposed of), situate in the parishes of Long Ditton, Ewell, and Cuddington, for his life, with power for the said Frederick Chifferiel, or my said executors and trustees on his behalf, to grant building leases of all or any part of the said land, but without power for him the said Frederick Chifferiel to charge and incumber the same, and after the decease of the said Frederick Chifferiel then the said freehold estate to go to the eldest son of the said Frederick Chifferiel, and in case the said Frederick Chifferiel shall die before attaining twenty-seven years intestate or leaving no lawful issue, then the said estate shall be sold by my said executors and trustees, and the proceeds shall fall into and form part of my residuary estate and be dealt with accordingly.

And he appointed Robert Watson, William Coppard Beaumont, and Benjamin Warner executors and trustees of that his will.

The testator made a first codicil to his will, not affecting the above devise, and made a second codicil, dated 11th April 1883, in the following terms:

I give, devise, and bequeath unto you the said Benjamin Warner, of Upton, in the county of Essex, silk manufacturer, and Mr. Miller Hooper, of Barnes, in the county of Surrey, barrister-at-law, the sum of 300*l.* each, provided you take upon yourselves the execution and trust of this my will, and I nominate, constitute, and appoint you the said Benjamin Warner and Miller Hooper to be executors of this my will, and I hereby revoke all previous appointments of the said Benjamin Warner and Miller Hooper. I the said Frederick Chifferiel hereby declare that all bequests and devises are to be waived both as to moneys and legacies to Robert Watson, of Highgate, gentleman, and I desire that the legacy of 300*l.* be withdrawn from his son Robert Bodkin Watson or any other legacies that I may have bequeathed to him or his family, and I direct my said executors to sell and dispose of all that my estate at Worcester Park in the county of Surrey.

(a) Reported by J. R. Brooke, Esq., Barrister-at-Law.

The testator died on the same day on which he executed this codicil.

An action was brought for the administration of his estate, and the usual administration order was made on the 2nd Aug. 1883.

The case now came on for further consideration. The only point in dispute was the effect of the second codicil upon the devise of the Worcester Park estate contained in the will.

Method for the residuary legatees.—The direction to sell is a complete alteration of the property; it is inconsistent with the devise in the will, and therefore revokes it just as much as a sale by the testator would have done:

Watts v. *Watts*, 29 L. T. Rep. 671; L. Rep. 17 Eq. 217;

Borthwick, for Frederick Chifferiel.—The direction to sell does not necessarily imply that the proceeds are to fall into the residuary estate. When the testator meant the proceeds to fall into residue he has said so. The codicil makes no alteration in the gift, it only alters the mode of enjoyment. A revocation by codicil of a gift contained in a will must be as clear and definite as the gift itself:

Maddison v. *Chapman*, 4 K. & J. 709.

Newman v. *Lade* (1 Y. & C. C. C. 680) is a clear authority that a direction in a codicil which necessarily varies the mode of enjoyment cannot revoke the gift of a beneficial interest. *Watts* v. *Watts* (*ubi sup.*) was a case of ademption.

Method in reply. — The direction to sell prevents the devisee taking the property as it was intended; and as the sale is to be made by the executors they take the proceeds as part of the general estate.

E. Beaumont, *O. L. Clare*, and *Martelli* appeared for other parties.

NORTH, J. — It is impossible to tell exactly what the testator meant in this case, but I must deal with the facts as well as I can. [His Lordship read the devise in the will.] Then very shortly before his death he made a codicil in the following terms: [His Lordship read the codicil.] There is an obvious confusion in the earlier part as to the revocation of the appointment of executors, and then there is this direction to sell the Worcester Park estate, which if it stood alone would be clear enough, but when it is read together with the will it is difficult to see what the testator meant by it. I cannot believe that he intended to revoke the settlement of the property which he had made by the clear and sufficient gift made by the will. He may have meant only that the executors appointed by the codicil were to exercise the power of sale which in certain events was given to the executors appointed by the will. On the whole I think he did mean that the property was to be sold at once instead of waiting, but I do not think that could alter the gift of the beneficial interest. Mr. Method argued that the direction to sell was wholly inconsistent with that gift. It is inconsistent as regards the land itself, but in my opinion it cannot alter the gift, but only changes the method of enjoyment.

Solicitors: *Beaumont* and *Son*; *T. C. Matthews.*

May 22 *and June* 29.

(Before NORTH, J.)

EAST STONEHOUSE LOCAL BOARD *v.* THE VICTORIA BREWERY COMPANY LIMITED. (*a*)

Practice—Costs—Taxation—Allowance to witnesses—Hotel expenses—Taxing master's discretion—Order LXV., r. 27 (9), (29), (37), (38).

This was an action for damages for polluting the water in the plaintiffs' reservoir. At the hearing the defendants were ordered to pay 83*l. damages and the costs of the action, except the costs of a motion for injunction. The costs were taxed, and the defendants took in objections* (1) *to the allowance by the taxing master of eleven witnesses, though only three were called;* (2) *the allowance of the costs of a photographer, who was brought up to prove certain photographs, but not called; the allowance to each professional witness of* 1*l.* 1*s. a day for hotel expenses, in addition to a daily sum for attendance as witness, which was, in each case, nearly the maximum allowed by the scale issued by the common law judges in* 1853. *The master replied that he had exercised his discretion in every case.*

Held, on a summons to vary the taxing master's certificate, that (1) *and* (2) *were matters within the taxing master's discretion, and the court would not interfere.*

Semble, *if the court had been exercising its own discretion, it would not have allowed the costs of the photographer, called merely to prove the taking of the photographs, unless the other side had been previously asked to admit them.*

As to (3), *Held, that the scale of* 1853 *is not binding on the taxing masters, but they have a full discretion under Order LXV., r.* 27 (9), (37), (38), *to allow witnesses their hotel expenses, in addition to, or as part of, a reasonable allowance for their time.*

THIS was an action for damages against the defendants for fouling the water in a reservoir belonging to the plaintiffs, as the local sanitary authority. It was heard before Romer, J. After hearing a part only of the plaintiffs' evidence the judge suggested a compromise, and ultimately made an order that the defendants should pay 83*l.* damages and the costs of the action, except the costs of a motion for injunction.

The taxing master allowed the plaintiffs, on taxation, the costs of eleven witnesses, though only three were called, and to these he allowed the following sums: To a public analyst, 31*l.* 10*s.* for seven days' attendance; to other professional witnesses, viz., two doctors and an engineer, 22*l.* 2*s.* for eight days; and to a solicitor, 25*l.* 5*s.* for nine days. The amount claimed was for the analyst, 42*l.*; and for each of the others, 25*l.* 5*s.*

To six other witnesses, viz., the chairman of the board, a contractor, photographer, sanitary inspector, brewer, and master mariner be allowed a guinea a day.

And in addition to these allowances he allowed to each of the eleven witnesses a guinea a day for hotel expenses, besides the travelling expenses actually incurred.

The defendants took in objections to the certificate, complaining that none of the witnesses who were not called were necessary, and especially

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

that the photographer, who was called only to prove some photographs produced, was wholly unnecessary, and that their expenses ought not to have been allowed. And that the allowances to the witnesses ought to include everything but travelling expenses; that the taxing master was bound by the scale of allowances issued by the judges in 1853 under the Common Law Procedure Act, and had no power to allow hotel expenses in addition.

The taxing master answered that, in his opinion, all the witnesses were necessary, that all the allowances were within his discretion, and he had carefully considered them in every case.

The defendants took out a summons to vary the taxing master's certificate.

The scale referred to gives

Professional men inclusive of all except travelling expenses per diem, 2*l.* 2*s.* to 3*l.* 3*s.*

Engineers and surveyors per diem, 1*l.* 1*s.* to 3*l.* 3*s.*

Gentlemen, esquires, bankers, merchants, per diem, 1*l.* 1*s.*

The rules referred to in the argument were the following:

Order LXV., r. 27 (9). As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.

(29.) As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

(37.) The rules, orders, and practice of any court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the principal Act, shall, in so far as they are not inconsistent with the principal Act and these rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court, and the taxation of costs in the High Court of Justice and Court of Appeal.

38. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances; and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment.

Swinfen Eady, Q.C. and *Manley* for the summons.—We object to the number of witnesses allowed. Only three were called, and to have eleven in court was an extreme instance of over-caution on the plaintiffs' part for which the defendants ought not to be made to pay:

Order LX., r. 27 (29);
Smith v. *Buller*, 31 L. T. Rep. 873; L. Rep. 19 Eq. 473.

We also object specially to the allowance of the costs of the photographer. He was called simply to prove the taking of the photographs. The plaintiffs ought to have submitted the photographs to us for admission under Order XXXII., rr. 2 and 3, and apart from this the photographs were not necessary at all. Our third objection is, that the allowance to the witnesses for hotel expenses is wrong. The scale of allowance to witnesses put out by the taxing masters in 1853 in pursuance of the Common Law Procedure Act 1852 (which is printed at p. 204 of the Supplement to the Annual Practice for 1895) expressly provides that the scale thereby allowed is to include everything but travelling expenses. In terms that scale applied only to the common law courts, but it has been acted on in Chancery. Order LXV., r. 27 (37) provides that the old practice is to be continued. *Clark* v. *Gill* (1 K. & J. 19); and *Brocas* v. *Lloyd* (27 L. T. Rep. O. S. 131; 23 Beav. 129) show that the Rules of 1852 were followed as a guide in the Courts of Chancery under the old practice, and that whatever allowance was made included everything except travelling expenses. The present practice is not uniform. But most taxing masters in the Chancery Division do not allow hotel expenses, and they are never allowed in the Queen's Bench Division.

Younger for the plaintiffs.—[NORTH, J.—I only want to hear you as to the costs of bringing the photographer to court and of the witnesses' hotel expenses.] It is the common practice to have the photographer to prove the accuracy of his photographs when they are put in. They have never been regarded as documents within Order XXXII., r. 2, and the form of notice to admit (Appendix B. No. 11) is not applicable to photographs, even if they are within the words of the order. In this case the defendants' solicitor disputed the accuracy of the photographs before the taxing master. As to the allowance to witnesses, the whole question is whether the rule of 1853 gives a maximum which is binding on the taxing master. The plaintiffs' contention is that the rule has no application. The only rules which apply are Order LXV., r. 27 (9) and (37), and they show that the master has an absolute discretion as to amount, subject to any rules or practice of the Court of Chancery before the Act. The rules of 1853 were never binding in Chancery, and even in the common law courts it has been held since the Judicature Act that the taxing masters have a discretion to go beyond those rules:

Turnbull v. *Janson*, 3 C. P. Div. 264.

Swinfen Eady, Q.C., in reply. *Cur. adv. vult.*

June 29.—NORTH, J.—The first question raised by this summons to review taxation is, as to the allowance of the costs of the witnesses who were brought to court but not called. It is not, and could not, be contended that the mere fact of the witnesses not being called makes it improper for the taxing master to allow their expenses, and, therefore, the matter is plainly within the taxing master's discretion. He says that he has carefully considered the matter, and the court will not interfere with his discretion. But I may say that, if the matter was one for my discretion instead of that of the taxing master, I think I should not have allowed the attendance of the photographer unless the other side had been asked, and refused, to admit the facts which he was to be called to prove. The second question is one which, in my

opinion, I not only have the power to decide but am bound to decide. The taxing master has allowed the witnesses for attendance sums about equal to the maximum allowance fixed by the scale put forward by the judges of the common law courts in 1853, and has allowed them a sum for hotel expenses in addition. It is objected that the scale is binding, and does not mention hotel expenses, and therefore a question of principle is clearly raised. The question is, whether the scale is binding. It was settled by the judges of the common law courts for a class of cases in which professional and expert witnesses were not so often called as they are in this division. Still, it was, to a certain extent, adopted by the old Court of Chancery; and it might have been binding if it were not that the whole practice is now governed by rules in which that scale has not been repeated. These rules appear to me to be clear. [His Lordship read Order LXV., r. 27 (9), (29), (37), and (38), and continued:] The scale is nowhere referred to. It is said that it is implied by sub-rule 37. But it seems to me that the decision of the Divisional Court in *Turnbull* v. *Janson* (*ubi sup.*) is conclusive that the scale of 1853 is not binding since the new rules were made. That case was decided under the Rules of 1875. But the rules relied on (rr. 8 and 28 of the Special Allowance 1875) are the same as sub-rules 9 and 37 of the present rules. There the taxing master had considered himself bound by the scale, and allowed only a guinea a day for witnesses. Lindley, J. says (p. 270): "As to the former of these points (*i.e.*, the allowance for the witnesses' attendance at the trial), the master admits that he did not exercise any discretion, but that he taxed the charges upon the notion that he was bound by the scale of allowances of 1853, and allowed the scientific witnesses at the rate of one guinea a day only. I think that is a matter of principle. To hold that the scale allowance of one guinea is to be adhered to is to ignore the 8th rule of the Special Allowance 1875 altogether; the bill must go back to the taxing master to exercise his discretion in that respect." And Lopes, J. says (p. 271): "The master appears to have considered himself bound by the scale of 1853 as a hard and fast rule. In that, having regard to rule 8, I think he was wrong. On the part of the plaintiff reliance was placed upon rule 28. The 8th rule, however, appears to me to be inconsistent with that. The matter must therefore go back to the master for reconsideration. It will be open to him to increase the allowance or not at his discretion." That decides most clearly that the scale is not binding on the taxing master The taxing master is therefore right in principle. That being established, I have nothing to do with the particular way in which he has exercised his discretion. The summons must be dismissed with costs.

Solicitors: *Wedlake, Letts,* and *Wedlake*, agents for *Batchelor* and *Geake*, Plymouth; *Crowders* and *Vizard*, agents for *R. R. Rodd*, jun., East Stonehouse.

Friday, June 21.

(Before NORTH, J.)

Re FEREDAY (a Solicitor). (*a*)

Attachment—Contempt by nonpayment—Acceptance of money on account—Waiver.

On the 26th April 1895 *an order was made giving leave to issue a writ of attachment against F., a solicitor, for contempt in not complying with an order to pay to the G. Company 78l. 3s. 3d., the balance certified to be due from him on taxation of his bill of costs. The writ was issued on the 4th May. On the 7th May the company, at the earnest request of F., agreed that on payment of 25l. on account they would take no further proceedings for fourteen days. The money was paid on the 9th May. On the 23rd the company gave F. four days more time. Nothing further was paid, and F. was arrested under the writ of attachment on the 14th June. He now moved that he might be discharged and the order for attachment set aside, on the ground that at the time of his arrest he was not in contempt for the sum named in the order.*

Held, that the company had not, by accepting the 25l. and giving time, waived their right to enforce the writ of attachment, and the motion must be refused with costs.

ON the 12th Feb. 1895 the applicants, the Glynde Creameries Limited, obtained the usual order for taxation of the bill of costs delivered by their solicitor, Henshall Fereday, he giving credit for any moneys received by him. On the 15th March 1895 the taxing master certified that there was a sum of 78*l.* 3*s.* 3*d.* due from the solicitor.

On the 26th April 1895 an order was made giving leave to issue a writ of attachment against Fereday for contempt in not paying the said sum. The writ of attachment was issued on the 4th May.

On the 7th May A. G. Brand, the managing director of the applicants' company, agreed, at the earnest request of Fereday and his wife, to delay proceedings on the attachment for fourteen days on Fereday's paying 25*l.* on account. This money was paid on the 9th May, and A. G. Brand then handed to Fereday a letter stating that he had instructed the company's solicitor not to take any further proceedings for a period of fourteen days.

On the 23rd May Brand verbally agreed to give four days further time. On the 27th May Fereday wrote to the company's solicitor that the contempt had been waived by the delay, and an arrest would be illegal. No further payment was made or offered.

On the 14th June Fereday was arrested on the writ of attachment. He now moved that the writ of attachment might be set aside, and that he might be discharged, on the ground that, at the time he was arrested, he was not in contempt for the sum named, and that the costs might be paid by the company and the sheriff.

Vernon Smith, Q.C. and *Cannot* for the motion. —The company have waived their right to enforce the writ of attachment by accepting 25*l.* on account and giving time:

Harvey v. *Hall*, 28 L. T. Rep. 734; L. Rep. 16 Eq. 324.

The writ was issued in respect of a debt of 78*l.*; it cannot be enforced now that such a debt no

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

longer exists. The order in such a case as this is made to enforce payment for the benefit of the creditor. It is not a punishment.

Swinfen Eady, Q.C. and *W. A. Peck* for the company.—The arrest was perfectly regular, and there is no reason for discharging it. The debtor is arrested as a punishment for his contempt in not obeying an order of court, not to make him pay a certain sum of money. The debtor's release would not be a matter of course, even if he paid the whole amount.

Stewart Smith for the sheriff.—The sheriff only performed his duty, and there is no possible ground for making him pay the costs:

Greaves v. *Keene*, 40 L. T. Rep. 216; 4 Ex. Div. 73.

Vernon Smith, Q.C. in reply.

NORTH, J.—In my opinion this motion is entirely misconceived. [His Lordship stated the facts, and continued:] The motion is against the company and the sheriff, and it asks that the writ of attachment may be set aside, and the debtor discharged from custody, on the ground that he was not in contempt at the time of his arrest. That is not a ground for setting aside the writ, which was perfectly regular at the time when it was issued. It is said that, because the company chose to make an agreement with the debtor that, upon his paying 25*l.* as an earnest of the truth of his representation that he would probably soon pay the whole, a further period of fourteen days should be given to him, they were incapacitated from afterwards enforcing the writ of attachment, and *Harvey* v. *Hall* (*ubi sup.*) is relied on as an authority for this proposition. But that was an entirely different case from the present. There a solicitor had been ordered to pay a sum of money by a certain day, and afterwards an arrangement was made that he should pay the debt by monthly instalments. He made default in payment of the instalments, and it was held by Bacon, V.C. that an order for an attachment could not then be made against the solicitor for his non-compliance with the original order. In the present case, after default had been made in complying with the order for payment, and after hearing the debtor, the court did direct the issue of the writ of attachment, and it was issued accordingly. Nothing then remained to be done but to arrest the debtor under the writ, unless the court should make some fresh order. It is suggested that the sheriff ought to have abstained from executing the writ because the person who was to be arrested gave him notice that the arrest would be illegal. The writ was perfectly regular, and the sheriff was bound to execute it. He did, in fact, at his own risk abstain for a time from doing so. The risk was perhaps not very great, as he acted upon the request of the creditors. But, if the sheriff was bound to execute the writ, nothing which the creditors did could relieve him from the obligation to do so. The company made a concession to the debtor, at the urgent entreaty of his wife, and the use which he made of their leniency was, not to pay the money, but to raise a technical objection to his arrest. In my opinion everything has been regularly done, the writ was properly issued, and the debtor was properly arrested and lodged in prison, and no good ground has been shown for his discharge.

Solicitors: *Prince* and *Plumbridge*; *N. C. Barraclough*; *Palmer* and *Bull*.

Friday, June 28.

(Before NORTH, J.)

WHITWHAM *v.* MOSS. (*a*)

Practice — Interlocutory motion — Order for delivery of documents—Whole subject of action.

The defendant was in the employment of the plaintiffs, the executors of P., who were carrying out certain contracts with a railway company on behalf of P.'s estate, for some time previous to 1895. *While in their employment he measured up and entered the work done by the plaintiffs for the railway company. During a part of the time he also acted in some capacity on behalf of the railway company, and received a part of his salary from them. In April* 1895 *the defendant of his own accord left the plaintiffs' service, and took with him the books or documents in which he had entered the said measurements. The plaintiffs brought this action for the recovery of the documents, and now moved for an interlocutory order for their delivery.*

Held, on the evidence, that the papers had never been in the defendant's possession in any capacity but that of clerk to the plaintiffs; that his taking them away was wholly improper, and that he ought to be ordered to give them up in four days, notwithstanding that their recovery was the sole object of the action.

Whittaker *v.* Howe (3 *Beav.* 383) *followed.*

Republic of Costa Rica *v.* Strousberg (40 *L. T. Rep.* 401; 11 *Ch. Div.* 323) *distinguished.*

THE plaintiffs in this action were the trustees of the will of Benjamin Piercy, a contractor, who died in 1888. As such trustees they had, under the directions of the court in an administration action, proceeded to carry out certain contracts entered into by their testator, and among others a contract with the Wrexham, Mold, and Connah's Quay Railway Company for the construction of a line of railway known as the Hawarden Loop Line. For the purpose of this contract the plaintiffs had maintained the testator's engineering office at Wrexham.

The defendant, Wm. Moss, was employed as an assistant engineer in this office. On the 11th April 1895 he gave a week's notice to leave, and on the 18th April 1895 he left, taking with him certain papers containing extracts from the particulars of the measurements of the work done in connection with the said Hawarden Loop Line, which showed the particulars of a claim for extras made by the plaintiffs against the said company.

The plaintiffs' solicitor, to whom the defendant had applied for a small sum due to him for wages, requested the return of these papers before payment. The defendant answered, "As to the Hawarden Loop measurements I am perfectly willing to give all the information and render all the assistance in my power on this and any other matters if proper and reasonable terms are arranged."

To a further demand he answered:

Will you give me your authority for the statement that the Hawarden Loop measurements are in my possession.

The solicitors then wrote declining to make any

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law

payment till the papers were returned, and Moss answered:

I have yours of the 13th inst., and I can only say that the attitude you have taken up will not assist the trustees in getting any information or assistance from me in regard to any of the claims which they may set up.

I will not enter into any argument with you on this matter, but will content myself with saying that, if the trustees do not see their way to fulfil their obligations, I will make them a present of what they owe me.

The plaintiffs then brought this action, claiming "Delivery up of all books or memoranda in writing containing the particulars of all measurements made by the defendant and other persons in the employ of the plaintiffs in relation to the Hawarden loop line of railway and of all other books or memoranda and documents in the possession or power of the deponent belonging to the plaintiffs or the estate of Piercy," and moved for an interlocutory order, in the terms of their claim, for delivery within four days.

The defendant in his evidence set up a claim that the measurements in question were made on behalf of the railway company, and claimed that they were the property of the plaintiffs. He did not, however, allege that they were the property of the railway company, and that company made no claim to them. It appeared that the defendant had for some time acted as assistant engineer for the company, but was at the same time employed in the plaintiffs' office. It was shown that Piercy held nearly all the shares in the railway company and controlled the board.

F. Thompson for the motion.—The defendant obtained possession of these documents while in the plaintiffs' employment, and in the discharge of his duties to them his removing them was wholly improper. There is no question really in dispute. The defendant makes a sort of suggestion that the railway company have some interest, but they do not claim the documents, and the defendant does not allege that he prepared them on behalf of the company. [NORTH, J.—Are you not asking an interlocutory motion for all the relief you would be entitled to at the hearing?] The order was made under similar circumstances in *Whittaker* v. *Howe* (3 Beav. 383, Seton on Decrees, 5th edit. vol. 1, p. 384) and in *Taylor* v. *Davis*, reported in a note to that case, 3 Beav. p. 388.

Swinfen Eady, Q.C. and *Rawlins* for the defendant.—There is a real question to be tried as to the right to these documents, and it is the whole point in dispute. When that is the case it is not the practice to give relief on an interlocutory motion:

Republic of Costa Rica v. *Strousberg*, 40 L. T. Rep. 401; 11 Ch. Div. 323.

F. Thompson in reply.—In that case the documents had come into the possession of Strousberg properly, as the agent of the Republic. There was no wrongful removal, as there was in this case and in *Whittaker* v. *Howe* (*ubi sup.*).

NORTH, J.—I think I can make the order asked for in this case. [His Lordship stated the facts of the case and proceeded:] I am quite satisfied from the plaintiffs' evidence and from the defendant's own letters that he took these documents away with him when he left the plaintiffs' employment. According to his own evidence they had been in the plaintiffs' office from 1890 to 1895 and had been used in the plaintiffs' business. The defendant takes them away without consulting anybody; and then tries to make capital out of them by inducing the plaintiffs to pay for them. That is the only meaning I can put on his letters. The defendant suggests, but he dare not swear, that these documents were the property of the railway company; but this is inconsistent with his conduct in offering to sell them to the plaintiffs, and even if they were the property of the company they were in the plaintiffs' possession, and the defendant, who was their servant, had no possible right to remove them out of his masters' possession. I think therefore that they ought to be given up, and I think the court has power to make the order. The only point made against such power was, that the court cannot do it on an interlocutory application. It would, in my opinion, be lamentable if that were the case, but I do not think it is. In any case I could order the documents to be brought into court, but I do not think that is necessary. The order to deliver up the documents to the owners of them was made in the two cases Mr. Thompson quoted. Mr Swinfen Eady relied on *The Republic of Costa Rica* v. *Strousberg* (*ubi sup.*), but there are, I think, two grounds on which that case can be distinguished from the present one. There the defendant had no opportunity of making his defence, he had not even appeared. Here I have heard a full statement of what the defendant calls his case. And, secondly, in that case the documents had come properly into the possession of the defendant during his employment as agent for the Republic. His employment had ceased, and then the Republic tried to get the documents back from him, but his possession was originally lawful and proper. In this case it is not even alleged that the documents were ever in the defendant's possession at all, except in the sense that he was a clerk in the office in which they were, and produced them to persons having a right to see them. The order must be made as asked.

Solicitors: *Field*, *Roscoe*, and *Co.*, agents for *Evan Morris*, Denbigh; *Busk* and *Miller*, agents for *Bevon*, Wrexham.

May 2 and 3.

(Before KEKEWICH, J.)

Re SOMERS-COCKS; WEGG-PROSSER *v.* WEGG-PROSSER. (*a*)

Will—Construction—Charity—Pure and impure personalty—Marshalling.

A testatrix gave her estate, consisting of pure and impure personalty, to trustees upon trust for sale and out of the proceeds first to pay her testamentary expenses and debts, and then to pay a legacy to her niece. She then gave her residuary personal estate "save and except such parts thereof as cannot by law be appropriated by will to charitable purposes" to a charity.

Held, that full effect could be given to the residuary gift without the process of marshalling; that the testamentary expenses and debts and the legacy must be paid out of the pure and impure

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

personalty rateably; and that the residue as to pure personalty belonged to the charity, and, as to impure personalty, was undisposed of and passed to the next of kin.

ADJOURNED SUMMONS.

Lady Emily Maria Somers-Cocks, who died on the 5th Aug. 1879, by her will dated the 14th Nov. 1876, bequeathed to her trustees and executors all her personal estate and effects; and she directed them to stand possessed of all her personal estate and effects upon trust for sale and conversion of such parts thereof as should not consist of money, and with and out of the money produced by such sale and conversion, and with and out of such part of her personal estate as should consist of money to pay her testamentary expenses and debts; and, after payment of her testamentary expenses and debts, she directed her trustees to raise the sum of 14,000*l.*, and pay the same to her niece for her sole and separate use absolutely, subject to the payment of certain annuities, and she devised all real estate vested in her on trust or by way of mortgage to her trustees. And the testatrix then gave and bequeathed "all the rest and remainder of my personal estate whatsoever and wheresoever situate, save and except such parts thereof as cannot by law be appropriated by will to charitable purposes, to the Society of St. Margaret's, East Grinstead," and she directed her executors and trustees to pay and transfer the same to the Mother Superior for the time being of the said society for its use. The testatrix's personal estate at her death, consisting of pure personalty and money invested on mortgage of real estate, was amply sufficient to pay her testamentary expenses, debts, and the legacy of 14,000*l.*, and was, in 1894, further increased, upon the death of her sister, Lady Caroline Somers Courtenay, by the payment of certain sums invested partly in consols and partly on mortgage of real estate.

This was a summons taken out by the surviving trustee and executor of the testatrix to which the legal personal representatives of her three next of kin (all deceased) and the Mother Superior of the Society of St. Margaret's were made defendants, to determine whether the residuary bequest or any other part of the will operated as a direction to marshal the assets of the testatrix in favour of the charity of St. Margaret's, or whether the residue, after payment of the testamentary expenses, debts, and legacy out of the pure and impure personalty rateably, passed as to the pure personalty to the charity, and as to the impure to the next of kin as undisposed of.

George Lawrence for the plaintiff.

Marten, Q.C. and *George Lawrence* for the legal personal representatives of two of the next of kin.—No marshalling is directed by the will. After payment of the debts, &c., so much of the residue as consists of impure personalty is undisposed of and goes to the next of kin:

Edwards v. *Hall*, 11 Hare, 22.

T. H. Carson for the legal personal representative of a third next of kin.

Renshaw, Q.C. and *Hornell* for the Mother Superior.—The testatrix intended to marshal her estate in favour of the charity. We therefore claim that the debts, testamentary expenses, and the legacy should be paid primarily out of the impure personalty:

Wills v. *Bourne*, L. Rep. 16 Eq. 487;
Miles v. *Harrison*, 30 L. T. Rep. 190; L. Rep. 9 Ch. 316;
Re Arnold; Ravenscroft v. *Workman*, 58 L. T. Rep. 469; 37 Ch. Div. 637.

KEKEWICH, J.—The first thing of course to be done is to ascertain as precisely as one can what is the question to be decided. "Marshalling" is the application by the court of an equity, which the court finds in favour of a person entitled to be paid out of one fund only, as against a person who is entitled to be paid out of two funds. The court holds that where you have that state of facts it is not fair—not according to conscience—that the person who is entitled to be paid out of two funds should come first upon the one fund out of which the other person only is entitled to be paid. Whether it is applied to marshalling securities or to marshalling in any other way, that is the principle of that application of the equity. When you find a gift to a charity in a will (of course we are now dealing with wills before the recent legislation) you are not allowed to apply that equity in favour of the charity, because the result would be practically to give the charity what the law says the charity shall not have, for the law having said that a charity shall not take land, or that which is concerned with land, you would really be giving it to the charity in another form if you applied the principle of marshalling. Therefore the old rule always was, you may not marshal in favour of a charity. But marshalling is applied in the argument here, and is constantly, although inaccurately, applied to the giving effect to the directions of a testator. It is said that the testatrix has directed marshalling, and that the assets must be marshalled according to her directions. But the truth is that, when you are saying that, you are only construing the will. Whether the testatrix has or has not, so to speak, marshalled her assets in favour of the charity is a mere question of construction, though I am far from saying that this is one of those questions of construction in which other cases ought to be set aside. There are many such, but this is not one of them, for the reason that here we are dealing with the application of law, and not very easy law, to the construction of a will. Therefore, we may very fairly and properly look at authorities. We must, however, first consider the meaning of this will. [His Lordship, after considering the will, continued:] Therefore, on the question of construction, reading it literally and apart from authority, it seems to me that the testatrix has said, in words of her own choice, at any rate plainly: "I now come to divide what is left after paying my testamentary expenses and debts and after providing for the legacy, and that is to be given with one exception—except that which I cannot properly give to charity—to this particular society." Then, in order to arrive at the residue according to the proper and ordinary course of administration you must take all the items—practically put the pure personalty into one class and the impure into the other; and you must pay your testamentary expenses and debts in that way fairly and rateably out of them, and in the result therefore what is left will partly belong to the charity and partly not. In other words, taking

the values at the date of the death, the charity will lose what is left of the impure personalty and take what is left of the pure personalty. But there are some cases which must not be passed over. Mr. Marten relied on *Edwards* v. *Hall* (*ubi sup.*), decided by Wood, V.C., on which Mr. Renshaw has commented. It appears to me what the Vice-Chancellor said, where he deals with this point, is appropriate here. It seems to me to be almost on all-fours although not quite. These are the Vice-Chancellor's words: "She (the testatrix in that case) says, 'Let the one go to the charitable bequest, and the other to persons whom I may name.' In truth she did not name them." That seems to me exactly what this lady has done —"Let one part of my residue, that which is not the excepted part, go to the charity; and let the excepted part go somewhere else," and she does not specify where. Then, on the other hand, there are three cases. The first is *Wills* v. *Bourne* (*ubi sup.*), which is a decision of Lord Selborne. That case seems to me to be very different indeed from the case I have in hand, and very different from *Edwards* v. *Hall* (*ubi sup.*). The will there seems to me to give directions fer marshalling—using it in the sense in which I used it just now—tolerably clearly. The testator there declared "that only such part or parts of his estate should be comprised in the residue thereof, and be so divided, paid, or transferred as aforesaid as might by law be given or bequeathed for charitable purposes." One has seen a great many of these directions in a great many wills, and when they are clear they really run very much on that line, and now at any rate there is not much difficulty about them. I do not in fact know why that case is considered at all a strong case, or why it should be thought to touch the point here; but the application of it to the case before me rests upon what was said by Mellish, L.J., in *Miles* v. *Harrison* (*ubi sup.*), where he said that the will in that case, and the will in *Wills* v. *Bourne* (*ubi sup.*), were really the same if you cut out of the former the words, "and which shall be reserved by my trustees or trustee for the time being for that purpose." That gives no doubt a force to *Wills* v. *Bourne* (*ubi sup.*) which it would not otherwise have had, I mean with reference to the present case. But, even cutting out those words, you still have in *Miles* v. *Harrison* (*ubi sup.*) a direction that certain legacies "shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof:" and those words might very well be, as in fact they were, construed as giving a direction for marshalling. But here we have not got those words. Here, instead of there being a direction to marshal, there is only an exception of some part of the residue given to charity. I make the same remark with respect to *Re Arnold* (*ubi sup.*), where there is an entire difference of words, and where the words are perhaps even more according to common form than in either of the other cases, viz.: "I direct that the foregoing charitable legacies shall be paid exclusively out of such part of my pure personal estate as is legally applicable to that purpose." I take it that what the other two cases really decided was, on this point, that the language of the wills there under consideration was equivalent to the language used in this will of *Re Arnold* (*ubi sup.*). The court, as I understand the cases, finds words to which effect must be given. The court does not favour the charity, it does not favour anybody, but finding those words it says: "We cannot give full effect to them except by the process of marshalling, therefore you must marshal," not because the testator directed marshalling, but because it is the only way by which you can give effect to the direction which the testator has given. Here, I repeat, you can give full effect to what the testatrix has directed without any marshalling at all; nay, more, my own opinion is that you would not be giving effect to the direction in the will if you did marshal. I think in fact you would be doing just what the testatrix says is not to be done. The charity must therefore take the residue of the estate after payment of the debts and testamentary expenses, and after payment of the legacy, but with an exception which the testatrix specifies. That exception is undisposed of, and passes to the next of kin of the testatrix. I think all the costs ought to come out of the estate.

Solicitors: *Witham, Roskell,* and *Co.*; *Leefe* and *Leefe*; *Hulberts* and *Hussey*.

Thursday, May 30.

(Before KEKEWICH, J.)

CROSLAND *v.* WRIGLEY. (*a*)

Conflict of laws—Lex loci contractus—Lex loci solutionis—*Intention of parties—Policy of insurance.*

Policies of insurance on his life were effected by an Englishman domiciled in England, with an American insurance company through their English office, for the benefit of his wife and children.

Held, that the policies, in accordance with the intention of the parties, must be construed, so far as related to the distribution of the insurance moneys, in accordance with the lex loci solutionis, *the law of the place of domicile of the assured.*

ACTION.

Robert Skilbeck, an Englishman, domiciled in Yorkshire, effected three policies of assurance on his life with the Equitable Life Assurance Society of New York, U.S.A., through their branch office, in London, England. In the policies the moneys assured were, in consideration of annual payments to be made at the office of the society in London, expressed to be payable to E. J. Skilbeck, wife of Robert Skilbeck, for her sole use if living, in conformity with the statute, and if not living to the children of Robert Skilbeck, or their guardian for their use, or if there should be no such children surviving then to the executors, administrators, and assigns of Robert Skilbeck, at the office of the society in London, sixty days after notice and the proof required of the death of Robert Skilbeck at the society's office in New York. Robert Skilbeck died on the 14th Jan. 1894. At the time of the assurances being effected he had two children only, daughters, living, one of whom died in his lifetime, on the 12th Sept. 1892, intestate.

His wife, E. J. Skilbeck, also predeceased her husband on the 3rd Sept. 1892, intestate. The

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

moneys assured were, by consent, paid to the surviving daughter, Mrs. F. A. Wrigley. This was an action by John Pearson Crosland, the husband and administrator of the deceased daughter, against Mrs. F. A. Wrigley, by which he claimed one half of the moneys paid under the policies to F. A. Wrigley, the points at issue being (1) whether the provisions of the policies were to be construed according to the law of England, the domicile of the assured, or according to the law of the State of New York, the domicile of the society; (2) whether the children became entitled as joint tenants, or tenants in common, on the death of the wife; or (3) whether such children only were entitled as survived the assured.

Marten, Q.C. and *Vaughan Hawkins* for John Pearson Crosland.—The law applicable to this case is the law of the place where the contract was made; that is to say, the law of the State of New York, the domicile of the insurance society, under which law Mr. Crosland is entitled to half the moneys paid. They referred to

Ex parte Dever, 18 Q. B. Div. 660;
Hamlyn v. *Talisker Distillery*, 71 L. T. Rep. 1; (1894) A. C. 202;
Jacobs v. *The Crédit Lyonnais*, 50 L. T. Rep. 194; 12 Q. B. Div. 589;
Chatenay v. *The Brazilian Submarine Telegraph Company*, 63 L. T. Rep. 275; (1891) 1 Q. B. 79;
Re Missouri Steamship Company, 58 L. T. Rep. 377; 42 Ch. Div. 321;
Peninsula and Oriental Steam Navigation Company v. *Shand*, 12 L. T. Rep. 809; 3 Moore P. C., N. S. 272.

If English law is applicable, the two daughters became entitled on the death of their mother as tenants in common:

Howard v. *Collins*, L. Rep. 5 Eq. 349;
Re White's Trusts, John. 656.

Renshaw, Q.C. and *W. A. Peck* for Mrs. Wrigley.—We submit that this case is governed by the *lex loci solutionis*, that is, by English law. Mrs. Wrigley is alone entitled, for she only survived till the date of distribution, that is, the death of the assured. If our contention is wrong as regards that, we say the children became entitled as joint tenants, and therefore the share of the deceased daughter survived to Mrs. Wrigley. See *Re Davies' Policy Trusts* (66 L. T. Rep. 104; (1892) 1 Ch. 90), following *Re Seyton* (56 L. T. Rep. 479; 34 Ch. Div. 511), and not following the dictum in *Re Adam's Policy Trusts* (48 L. T. Rep. 727; 23 Ch. Div. 525).

Marten, Q.C. replied.

KEKEWICH, J.—So far as it is proper I desire to avoid the task which, if I may venture to say so, was properly avoided by the Court of Appeal in *Ex parte Dever* (*ubi sup.*), where Bowen, L.J. says, quoting from the judgment in *Jacobs* v. *Crédit Lyonnais*: "The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties." That states the rule of law to be found in many places, and that is the basis of the decision in *The Peninsula and Oriental Steam Navigation Company* v. *Shand* (*ubi sup.*). But what is called in *Jacobs* v. *Crédit Lyonnais* (*ubi sup.*) the broad rule, can be largely departed from; one of several reasons, as is pointed out in that case as deserving of consideration, being that the *lex loci solutionis* is different from the *lex loci contractus*. The case of *Hamlyn* v. *Talisker Distillery* (*ubi sup.*) illustrates that proposition, where, there being a difference between the English and Scotch law, and it being shown that if the Scotch law were applied it would contradict the express language of the contract, the conclusion was that the parties did not intend to be governed by that law. It seems to me that I should be deciding according to those principles, and in accordance with the judgment in *Re Dever* (*ubi sup.*), if I held that, whatever may be the law necessary for determining the legal discharge to the company, the law of England applies to the distribution between the parties; and it may well be that, although the society intended to obtain a discharge according to the law of their own domicile, the State of New York, yet that those benefiting by these policies should be governed by English law. As to the point of legal discharge to the society, I need not decide it, as the society, it is conceded, has got a legal discharge; but I cannot think that it was intended by the parties that this contract, as regards its operation with respect to the persons benefiting under it, was to be determined by the law of the State of New York. The society with which we are dealing carries on its business in New York, and may be elsewhere, and is governed by the law of that State, one of many sovereign states of the United States of America, which have laws differing from one another, and from ours in some respects, there being a very great divergence certainly as regards the personal status of infants and guardians, questions which might arise on the determination of this contract, and it certainly seems to me difficult to believe that an Englishman residing here ever intended to make this contract, a contract correctly described as a post-nuptial settlement in accordance with the law of New York. I see nothing really against that view; and I am of opinion that the *lex loci solutionis*, the law of the place where the contract is to be performed, ought to receive the greatest consideration in dealing with a contract of this kind. Assuming then that this society is daily making contracts in various countries—a fact which no doubt causes some inconvenience—still I think I must hold that the parties must be taken to have intended (once rid of the question of legal discharge) that the interests of the beneficiaries should be decided according to the law of their domicile. That enables me to put aside the evidence as to the law of the State of New York. With regard to the meaning of the words themselves they are not so clear. Mr. Marten was right in saying that the direction to pay to the children and their guardians for their use pointed to a tenancy in common, although the point is not precisely covered by either of the two cases, *Howard* v. *Collins* and *Re White's Trusts* (*ubi sup.*) cited on that point, though the former goes a long way towards it. However, the guardians could not have applied the moneys for the benefit of the children without giving them their aliquot shares. I think he would be bound to say, Here is a sum divisible between the children in equal shares. There would be a legal obligation on him so to do. Therefore, so far as that is concerned, I think there would have been a tenancy in common. But that does not solve the difficulty.

We have not yet found out who the children are who are to take, and we have other words to consider showing the intention. There is the word "surviving" which means living beyond some point of time, but, as often happens, that point is not mentioned. On the construction, however, I think that point is the death of the husband, not that of the wife. The intention is that if the wife be living when the husband dies she takes, but if not, then those children who survive the husband are to take. There was only one child, Mrs. Wrigley, who was living at that time; and she therefore is entitled to the whole of the moneys paid under the policies.

Solicitors: *Ramsden, Radcliffe*, and *Co.*, for *Ramsden, Sykes*, and *Ramsden*, Huddersfield; *Iliffe, Henley*, and *Sweet*, for *Laycock, Dyson*, and *Laycock*, Huddersfield.

QUEEN'S BENCH DIVISION

June 17, 18, *and July* 4.

(Before Wright and Kennedy, JJ.)

Reg. *v.* The Vestry of St. George, Hanover-square. (*a*)

Metropolis management—Sewers—London County Council—Power of County Council to order vestries to make sewers—Metropolis Local Management Act 1855 (18 *&* 19 *Vict. c.* 120), *s.* 138.

Sect. 138 *of the Metropolis Local Management Act* 1855 *does not empower the London County Council, as the successors of the Metropolitan Board of Works, to order a vestry to carry out specific new works of sewerage in the metropolis, but leaves to the vestry the initiative in this respect. The section merely gives to the County Council a control or supervision over the construction and arrangement of such new sewers.*

Rule for a *mandamus* to the Vestry of St. George, Hanover-square, in the county of London, commanding them to comply with an order made by the London County Council on the 4th Dec. 1894, directing the vestry to construct a sewer therein described, or to execute sufficient works to secure the communication with the main sewers of the metropolis of the sewer or drain receiving the sewage from certain premises in the said order mentioned.

The rule was obtained at the instance of the London County Council, and the question was whether the London County Council, as the successors of the Metropolitan Board of Works, had power to make the order in question ordering the vestry to construct the sewer.

The attention of the county council had been called by the Thames Conservators to the fact that the drainage of the houses Nos. 102, 103, 104, Grosvenor-road, Pimlico, was discharged into the river Thames. The county council communicated with the local authority, the Vestry of St. George, Hanover-square, with a view to steps being taken by that body to divert the sewage into an adjoining local sewer, but the vestry declined to execute the necessary works.

The county council were strongly of opinion that the sewage from these houses should be diverted from the river, and that the proposed communication should be made, and they made an order upon the vestry to construct a sewer to receive the drainage of the premises in question.

The vestry refused to carry out this order, contending that the London County Council had no power to make the order.

The above rule was then obtained.

Channell, Q.C. and *Macmorran*, for the Vestry, showed cause.

Bosanquet, Q.C and *English Harrison*, for the County Council, in support of the rule.

Cur. adv. vult.

July 4.—Wright, J.—The question in this case is, whether the County Council of London, as representing the old Metropolitan Board of Works, had power to order the vestry of St. George's, Hanover-square, to construct a new sewer for the purpose of taking the sewage from two or three houses on the edge of the Thames Embankment into one of the low level sewers at some distance inland. By the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), s. 69, the vestries have imposed upon them a duty, limited in some respects by decisions so as not to make it an absolute duty, to construct sewers for the purpose of carrying what may be called local sewage; and it is material to observe that they could not make any local sewers except with the previous approval of the Metropolitan Board of Works. I point to that as rather tending to show that the system intended was one which left the initiative to the vestry, and merely gave the control to the Metropolitan Board of Works. Then by sect. 135 the Metropolitan Board of Works were intrusted with power for making main sewers—not an absolute duty, but powers—because it is enacted that they shall provide for such sewers so far as they think necessary or proper; they are required to provide them to that extent. "Such board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, and shall also make all such sewers or other works and such diversions or alterations of any existing sewers or works as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis." Then by the Act of 1858 (21 & 22 Vict. c. 104), a duty was cast upon the Metropolitan Board of Works to construct a system of sewerage so that the sewage should, as far as practicable, not pass into the Thames, and by the Act of 1862 (25 & 26 Vict. c. 102), several amendments were made in the law. Going back to the Act of 1855, sect. 138 of that Act, which is the section on which the question turns, enacts that, "in order to secure the efficient maintenance of the main and general sewerage of the metropolis," the Metropolitan Board of Works shall from time to time "make such general or special order as to them may seem proper for the guidance, direction, and control of the vestries of parishes and district boards in the levels, construction, alteration, and maintenance, and cleansing of sewers in their respective parishes or districts, and for securing the proper connection and inter-communication of the sewers of the several parishes and districts and their communications with the main sewers vested in the said metropolitan board, and generally for the guidance, direction, and con-

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

trol of vestries and district boards in the exercise of their powers and duties in relation to sewerage; and all such orders shall be binding upon such vestries and boards." The real question is whether that section authorises the making by the Metropolitan Board of Works, now represented by the County Council, of the order in question. Stated shortly, it appears to me that that section does not empower the county council to take the initiative by ordering specific new works of sewerage. I think it is intended for purposes of control over the construction and arrangement of sewers, and not for the purpose of enabling the London County Council to call on the vestry to make sewers. If the vestry does make a sewer the sewer must be made in such a way as the county council approve. If the sewers, either existing or future, are made at levels, or in a manner which would prevent their properly communicating with the general system of the main sewerage, then, as it seems to me, the county council may give directions for their alteration, so that they may be made suitable for connection with the main sewers; but I see nothing in the section which authorises the county council to take away from the vestry the initiative as to making new sewers, or which enables the county council to replace the discretion of the vestry by its own discretion as to what new sewers shall be made. Then coming to the Act of 1862 (25 & 26 Vict. c. 102), in the 32nd section, wherein sect. 138 of the former Act is recited, there is an enactment with reference to the construction of sewers partly within and partly without the district of the vestry; but I cannot find that there is anything in the section which really helps us in the matter. Sect. 45 provides that the vestry must submit plans of the new sewers to the Metropolitan Board of Works, and "no such sewer or works shall be proceeded with without the approval in writing or contrary to the direction of the said board;" and sect. 83 enables the county council to make bye-laws in relation to the levels and things which are therein mentioned as to the construction and maintenance of the sewers. All those enactments seem to me to be regulative enactments merely, and not enactments authorising the county council to command the vestry by an order in the nature of a *mandamus* to exercise their powers, and that is the whole of the case. I will only add that there is a decision in the case of *Reg.* v. *The Vestry of St. Luke's, Chelsea* (5 L. T. Rep. 744; 31 L. J. 50, Q. B.), which seems to me to throw some light on the matter. There some private person obtained a *mandamus* to the vestry of St. Luke's to construct sewers in a part of their district, and upon demurrer it was held that the *mandamus* ought not to go. The whole matter was very fully argued, but it does not seem to have occurred either to the counsel or any member of the court having all the sections before them, that the Metropolitan Board of Works had the jurisdiction which is now claimed for their successors. If they had, the court would no doubt have said that that is the proper remedy, and not to come to the Queen's Bench for a *mandamus*. On the contrary, they point out that it is the approval of the Metropolitan Board of Works that the Act contemplates, and I think the whole tenor of the judgment supports the view we both take in this matter.

Kennedy, J.—I am of the same opinion. It is conceded, and is part of the clear facts of the case, that the object of this order was not so much in reference to the effectual drainage of this particular district, as for the purpose of preventing the outfall within the metropolis of certain sewage. That being so, the duty, as it appears to me upon the consideration of the various statutes, is not one as to which an order of this kind can be made upon the minor authority by the general authority which seeks in this case to make it. The 69th section of the earliest Act lays the duty upon the vestry of every parish mentioned in certain schedules, and certain other bodies there mentioned, to do such works as may be necessary for effectually draining their parish or district, and it appears to me that the sections which deal with the extent to which the general central authority can interfere, when fairly read, present a scheme under which a control, direction, and supervision are given to the central authority, but do not give such a power as is sought to be enforced here by the direction to make certain specific sewers. If, for the prevention of a certain quantity of sewage going into the Thames at a point within the metropolis, the central authority had the power simply to order the various vestries to construct such works, then the powers which are given by sect. 135 to the central authority would be needless. It seems to me that the true construction of the provisions of the sections taken together is to give to the county council as the central authority a power of supervision and control, but not a power authorising them to order a district to carry out such work as is sought to be enforced here. Because, when we turn to sect. 138 of 18 & 19 Vict. c. 120, and to sect. 136, which is now repealed, the Legislature, after having, in sect. 69, imposed duties upon the local bodies, proceeds to say that the Board of Works shall make such sewers and works as they think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis. If the contention for the county council were well founded, that is needless, because all the Board of Works would have to do would be to make separate orders on each of the local bodies to carry out, at their expense, but subject to the direction and control of the central authority, those very works which by sect. 135 they are charged with doing, and sect. 135, so far as anything except the existing main sewers is concerned, would be a useless and needless section. Sect. 136, which follows, is now repealed, because under a later Act the Metropolitan Board of Works and their successors have now power to carry out the works which are needed and ought to be made under sect. 135. If the Metropolitan Board of Works or their successors think such works necessary for preventing the outfall of sewage within the metropolis into the Thames, they have now the power to carry out such works as they think right according to their plans; but, taking the scheme of the Act, the duty of doing that particular thing—preventing sewage pouring into the river within the metropolis—was charged upon the Metropolitan Board of Works, not as an authority to order, but as an authority to do the work themselves. Sect. 138 of the Act of 1855 is followed by sect. 83 of the 25 & 26 Vict. c. 102, which is the section giving the Metropolitan

Board of Works the power to make bye-laws for the guidance of the vestry in the construction of sewers. That section ought not to be construed as empowering the Board of Works to give such a direction as is made here—a direction not for the purpose of maintaining the main and general sewerage of the metropolis, but for the purpose of keeping the river within the metropolis clear, as specified in sect. 135 of the earlier Act. It may be that, under the Rivers Pollution Prevention Act 1876, or some other Acts relating to the metropolis, the local authority may possibly be indirectly compelled to do such work as this under provisions for preventing the pollution of the river. That, however, is not the question here. The question is, whether there is a power given to the county council to make an order for the performance of a duty which I think is charged upon that body in respect of construction. I think the county council has no such power.

Rule discharged with costs.

Solicitors for the Vestry, *Caprons, Dalton, Hitchins*, and *Brabant*.

Solicitor for the London County Council, *W. A. Blaxland*.

June 19, 22, 27, *and July* 6.

(Before WILLS, J.)

CLUTTON AND OTHERS *v.* ATTENBOROUGH AND SON. (*a*)

Bill of exchange—Cheques—Cheques obtained by fraud payable to order of non-existing payee—Forgery of name of payee—Holder of such cheques in due course—Return of money paid by mistake—Bills of Exchange Act 1882 (45 *&* 46 *Vict. c.* 61), *s.* 7, *sub-sect.* 3.

A clerk of the plaintiffs by a system of fraud carried on for many years obtained, by means of forged certificates for work never done, a large number of crossed cheques drawn by the plaintiffs to the order of a non-existing person, and after indorsing the cheques in the name of the non-existing payee he paid the same to the defendants, who were pawnbrokers with whom he had been in the habit of pledging articles in the name of the fictitious payee. The course of dealing between the clerk and the defendants was that, when a cheque was cleared and the defendants had received from the plaintiffs' bankers the amount of the same, the clerk purchased from the defendants some goods and received the balance of each cheque in cash, and though there were elements of suspicion the defendants received the cheques honestly and for value and without notice of the fraud.

Held, (1) *that the payee, being a non-existing person—although not so to the knowledge of the drawer—was a "non-existing or fictitious person" within the meaning of sect.* 7, *sub-sect.* 3 *of the Bills of Exchange Act* 1882, *and that the cheques were consequently payable to bearer; and* (2) *that the defendants being holders for value and in good faith were "holders in due course," and would have been entitled to recover upon the cheques from the plaintiffs if the plaintiffs had refused to pay the same; and* (3) *that therefore the plaintiffs having paid the cheques to the defendants were not entitled to a return of the sums so paid as being money paid under a mistake.*

ACTION tried by Wills, J. without a jury, to recover from the defendants, who were pawnbrokers and jewellers, a sum of 3558*l.* 13*s.* 2*d.*, as money paid by the plaintiffs to the defendants under a mistake of fact.

The facts, as stated in the written judgment of the learned judge, were as follows:—

The plaintiffs are land agents, and amongst many estates manage those of the Ecclesiastical Commissioners, with whom their transactions amount to as much as 700,000*l.* a year. One of the plaintiffs' clerks, named John Piper, managed to carry on a system of fraud in their office, by which, in the course of eight years, he obtained cheques, 640 in number, and in value amounting to some 18,000*l.*, drawn by the plaintiffs to the order of non-existing persons for work never done, and for goods never supplied. These cheques he stole, and indorsed in the name of the non-existing payee. The whole of these cheques were cashed by the plaintiffs' bankers, and allowed in account by the Ecclesiastical Commissioners. Ninety-seven of them, amounting in the whole to 3558*l.* 13*s.* 2*d.*, were between the 1st March 1887 and the 9th Jan. 1894, paid by Piper to the defendants, who are pawnbrokers and jewellers, of Fleet-street, and who gave value for them. The plaintiffs claim to recover the amounts of these cheques, which were paid by their bankers to those of the defendants, as money paid by them under a mistake of fact, and which they say the defendants have no right to retain.

It appeared that all letters received at the plaintiffs' office were opened by a secretary. When he thus received an account for work done or goods supplied for an estate which they managed, he passed it on to the "account department," where it was received and sent on for verification to the "management department." It was there examined by the person who looked after that particular estate, and, if found in order, initialled by him and taken back to the account department, where a certificate of the nature and amount of the bill, together with the name of the estate to which it was charged, was prepared by a clerk, and initialled by the head of the department. This certificate was then laid before the cashier, who prepared a cheque accordingly, payable to order, which was then submitted, with the certificate, to one of the principals, who would sign it. The signed cheque was then sent back to the account department, together with the certificate, whence it was, with the bill, posted to the payee. The day's certificates were handed to the head of the account department, and, when the receipted account came back from the customer, it was, together with its corresponding certificate, placed amongst the vouchers relating to the same estate. In the meantime, it would lie upon the table of the head of the account department, and be accessible to the persons employed in that department. Once a year—in the case of the Ecclesiastical Commissioners—the books were made up, and an account made out for them, the various payments being entered "as per voucher No. 3349," or whatever the number might be, and the account and vouchers were put in order for audit. Piper was a clerk in the account department, and the clerk who arranged and checked

(*a*) Reported by W. W. OBR, Esq., Barrister-at-Law.

the vouchers for the annual audit. He must have made a careful study of the weak points, both of the plaintiffs' system and of the manner in which it was carried out. He had observed that an account, on first passing through the account department on its way to the management department, was not recorded, and that, after it had been verified and initialled in the management department, neither it nor the cheque drawn to pay it over passed back into the management department, nor was the receipted account, when returned, taken into that department. He must have observed, also, that the certificate, which was prepared in the account department and initialled by the chief clerk therein was never compared with the account, and that the principal who signed the cheques had no personal knowledge of the persons who were employed to do work on the numerous estates of the Ecclesiastical Commissioners, nor even of their names. He must have observed, also, that when the certificate and cheque were returned to the account department, it was possible for him to obtain possession of them without being detected, and that the certificates were so kept that he could get at them and abstract at pleasure any particular one that it was necessary for him to withdraw from observation; and, further, that as the receipted account never went back to the management department, and its passage before payment through the account department was never recorded, the fact that no receipt came to hand in respect of any supposed account for which a cheque had been drawn would escape notice. It appeared to be nobody's business to see that there was a voucher for money paid; and he was, in fact, able to possess himself of the proceeds of 640 cheques for which no accounts had ever been rendered, and no receipts either taken or received. He simply forged the certificates for the cashier, and subsequently stole the cheques and their corresponding certificates from the account department, and disposed of the cheques. Piper would, however, necessarily have been discovered if he had not been able to satisfy the audit of the Ecclesastical Commissioners, so he forged a voucher corresponding with the amount of each cheque consisting of a bill supposed to be rendered by a tradesman or workman, real or fictitious, to a real tenant of the estate, or to the Ecclesiastical Commissioners, for work supposed to have been done on that estate. These he put amongst the genuine vouchers, and when the audit was at hand he numbered them with their proper numbers. In the accounts rendered to the Ecclesiastical Commissioners the payments were numbered and described as being "as per voucher, No. 'so-and-so.'"

It was not proved or stated before the learned judge, but it was almost a necessary element in the successful fraud, that the numbers of the vouchers must have been either inserted—in the account to be rendered to the Ecclesiastical Commissioners—by Piper himself or by someone who took them from the vouchers themselves after Piper had placed them in order and duly numbered them, and who knew nothing of the business of the estates. There was thus in the audit no comparison of the vouchers with the cheques or certificates.

Most of the forged certificates were found in Piper's house upon his arrest, and there was no necessary correspondence either as to the subject-matter of the supposed transaction or as to the name of the person supposed to be entitled to payment, or in short in anything save amount, between the certificate and the forged voucher for the same sum. The name selected by Piper for the payee of the cheques with which this action is concerned was "George Brett." He forged certificates of the kind above described, one or two of which may be given as examples. For instance:

Timber account, Frindsbury, &c.—Pay Mr. George Brett, planting Norway maple, 35*l.* 17*s.* (under E.C. authority). J. F.—3/3/90.

"J. F." means "James Frewen," the head of the account department. Mr. Frewen was not called, but it was stated and accepted that he would not have been able to say whether these initials were in his handwriting or forgeries, so that it is clear that the only person who checked the certificates knew nothing about the estate or the work done. No planting was in fact done at Frindsbury Farm, and no authority was ever given for it by the Ecclesiastical Commissioners.

When the time came for preparing for the audit the voucher which Piper forged was as follows:

Ecclesiastical Commissioners to George Brett, 12th Feb. 1890.—6500 larch plants at 6*s.* 6*d.* a hundred—21*l.* 2*s.* 6*d.* Five men and boys making holes for same and planting as agreed for—10*l.* 4*s.* 6*d.*; nine loads best manure, 10*s.*, 4*l.* 10*s.*—total, 35*l.* 17*s.* Settled (1*d.* stamp), GEORGE BRETT. 6th March 1890.

It was indorsed "Lady-day 1890, account voucher No. 3349." Here, as in many other instances, "George Brett's" name was used in the voucher.

The following is an instance of a different kind. The certificate runs:

Timber account. Islip.—Pay George Brett, grubbing trees in wood, 24*l.* 18*s.* 9*d.* (P. B. has bill.) J. F. 6/1/88.

"P. B." were the initials of a clerk in the management department. To this Piper appended subsequently,

Cheque sent. 9/1/88.

The voucher for this amount is as follows:

Ecclesiastical Commissioners to George Finch: 32,000 selected seedlings Norway maple at 12*s.*—19*l.* 4*s.*; 7600 selected two-year-old silver fir, 5*l.* 14*s.* 9*d.*—Total, 24*l.* 18*s.* 9*d.* Paid (1*d.* stamp). GEORGE FINCH.

Whether George Finch was a real person or not did not appear, but it was quite clear that the auditor knew nothing of the business of the estate, and that bills made out as due to fictitious persons answered the purpose as well as anything else; and it was therefore probable that all these accounts were of a similar character to the illustrations given. The defendant carried on business in partnership with his father up to 1892, when, on the death of the latter, he became the sole owner of the business. From 1883 or 1884 Piper had pledged goods in the ordinary way at one or other of the defendants' places of business, and with the defendant and his father he had never used any other name than that of "George Brett."

In Feb. 1887 he first pledged goods at the Chancery-lane establishment, and in March 1887 the ninety-seven transactions began which resulted

in this action. At that date Piper owed money upon a watch, a ring, and some race glasses which he had previously pawned with the defendants. He had then brought the first of these cheques—a crossed cheque—for 21*l.* 10*s.*, and asked to have it cleared; and upon the proceeds being realised he had redeemed some of his goods, paying off the interest due, bought some small trinkets, and received the balance in cash. The redemption of the goods, however, seems on that occasion to have been more apparent than real, as the more valuable articles were re-pledged, so that he really received the greater part of that cheque in money. Similar transactions took place on every one of the ninety-seven occasions on which the cheques in question—all crossed cheques—were handed by Piper to the defendants' firm, or to the defendant himself. Articles of large and small value were systematically bought, and at times articles of great value—a chronometer of the value of 97*l.*, for instance. The larger items were paid for by instalments, the smaller on the spot; at the same time fresh articles were pledged or articles nominally redeemed were re-pledged, often articles were taken out of pawn, and always a cash balance would be handed over to Piper. The net result of these transactions was that goods were bought during the seven years of the aggregate value of 779*l.*, principal was paid off to the amount of 439*l.*, and interest 100*l.*, and cash was paid over to Piper to the amount of 2238*l.*, making on the whole the 3558*l.* odd now sued for.

The learned Judge, having pointed out that the amounts of the cheques cashed for Piper by the defendants during the seven years started with 203*l.* for the last ten months of 1887, and increased perceptibly each year until, in 1893, the amount was 740*l.* odd, continued:—Very little, if any, inquiry appears to have been made as to how Piper became possessed of these cheques. The defendant says he heard from someone in his employment that Piper was a senior clerk in Messrs. Clutton's office, and that the cheques were for extra services. None of the assistants called seemed to know, however, anything about this. Bennett, the chief assistant, said that he understood Piper to be a clerk, and another said he understood that he was a big man at Clutton's, but no one asked him any questions. Until the last three or four transactions value was never given for the cheques until after they had been cleared. Bennett, the only assistant who had any authority to do more than receive the cheque and hand it to the defendant or his father to be dealt with by them, had said that on one occasion, or more, and after a great number of these cheques had been duly honoured, he had asked Piper if he would not take the articles he had just purchased and not wait, as was the custom, for the cheque to be met. Piper declined, saying he would rather wait as usual, and this, said Bennett, "gave me all the more faith in the man."

Sir *E. Clarke*, Q.C., *Finlay*, Q.C., and *Macaskie* for the defendants.—The defendants are entitled to judgment upon two grounds. In the first place, "George Brett" is a fictitious or non-existent person within the meaning of sect. 7, sub-sect. 3 of the Bills of Exchange Act 1882, and, by that sub-section, the cheques were therefore payable to bearer. The case of *The Bank of England* v. *Vagliano Brothers* (64 L. T. Rep. 353; (1891) A. C. 107) establishes that each one of these ninety-seven cheques was a negotiable instrument, and came within the sub-section, and was, consequently, payable to bearer. The cheques, then, being payable to bearer, were received by the defendants from the bearer, Piper, in good faith and for valuable consideration, and without any notice of any fraud on Piper's part. There is absolutely no evidence that the defendants did not take these cheques in good faith, and therefore they have a good title:

The London Joint Stock Bank v. *Simmons*, 66 L. T. Rep. 625; (1892) A. C. 201;

Hunter v. *Jeffery*, cited in Chalmers on Bills, p. 21.

Though "George Brett" was a fictitious person, and though the signing of the name of a fictitious person may be a forgery, if done with intent to defraud, yet here the defendants' title does not depend on the indorsement of George Brett's name. If the plaintiffs had refused to pay the amounts of these cheques over to the defendants, the defendants could have successfully maintained an action against the plaintiffs on the cheques. The plaintiffs, therefore, were under a legal liability to pay these cheques to the defendants, and, having paid the same, they are not now entitled to sue for the return of the money so paid. Upon another ground the defendants are entitled to succeed. The whole facts of the case show that the plaintiffs, by the negligent way in which they had conducted their business in their own office, really conduced to, and were in fact the cause of, the frauds. If it had not been for the plaintiffs' own careless and negligent way of conducting their business, Piper could never have accomplished these frauds. If inquiry had been made as to whether work had really been done, and money paid, the fraud would have been discovered, as the fraud was finally discovered, in the plaintiffs' office. Here, one of two innocent persons has to suffer for the fraud of a third person, and that person ought to suffer whose negligence enabled the fraud to be perpetrated, namely, the plaintiffs; so that the plaintiffs are not entitled to come to the court and ask to have the money returned to them as money paid by them under a mistake of fact. To entitle a person to recover back money paid under a mistake of fact, the mistake must be a mistake as to a fact which, if true, would have rendered the party liable to pay the money, and not merely as to a fact which, if true, would have rendered it desirable that he should pay it (per Bramwell, B. in *Aiken* v. *Short*, 1 H. & N., at p. 215); and the mistake must be one as between the person paying and the person receiving the money, and as to some fact affecting the right of the payee to receive the money: *Chambers* v. *Miller* (13 C. B. N. S. 125, and the judgment of Erle, C.J. (Ib.), at p. 133; and the judgment of Blackburn, J. in *Pollard* v. *The Bank of England* (25 L. T. Rep., at p. 419; L. Rep. 6 Q. B., at p. 631; 2 Smith L. C., 9th edit., at p. 462). From any point of view, therefore, the plaintiffs are not entitled to recover.

Sir *R. Webster*, Q.C., *Tindal Atkinson*, Q.C., and *Meek*, for the plaintiffs.—By sect. 30 (2) of the Bills of Exchange Act 1882 the onus of showing "good faith" is on the defendants in this case by reason of the fraud of Piper in reference to the cheques, and that onus

has not been discharged. What were the circumstances under which these cheques were paid by the defendants? Until nearly the last no advance was made by the defendants to Piper until the cheques were paid to the defendants' bankers. That shows that the defendants must have been suspicious with regard to the cheques. In considering whether the defendants took these cheques in good faith or not, regard must be had to the facts of which the defendants had notice. As stated by Lord Herschell in the *London Joint Stock Bank* v. *Simmons* (66 L. T. Rep. at p. 632; (1892) A. C., at p. 221), "If there be anything that excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him, and puts the suspicions aside without further inquiry." Applying that to this case there were clearly circumstances here which ought to have put the defendants on inquiry. Even if the defendants are holders in good faith they would have no title unless these cheques were properly negotiable instruments; but they were only made negotiable by a forged indorsement. It has been assumed, on the authority of *Vagliano's* case, that sect. 7, sub-sect. 3, applies, but that case was the case of an acceptor of a bill and is not conclusive here. If the word "fictitious" means fictitious under all circumstances, then *Vagliano's* case would apply; but we submit that a person is only fictitious within the meaning of the sub-section when he is not only fictitious, but is also not intended to have any connection with the transaction. That was not so here, where the drawer intended the cheques to be paid to a real payee. It is the drawer who designates the payee, and must be assumed to know if he is fictitious, and by sect. 55, sub-sect. 1 (*b*), the drawer is precluded from denying to a holder in due course the existence of the payee. As to mistakes, this is a mistake between the parties, and *Chambers* v. *Miller* (*ubi sup.*) does not apply. As to the argument that the fraud was induced by the plaintiffs' own negligence, the negligence to be an estoppel must be that which arises from the document itself, and must be in the transaction itself, and be the proximate cause leading the third party into the mistake:

Young v. *Grote*, 4 Bing. 253;
Arnold v. *The Cheque Bank*, 34 L. T. Rep. 729; 1 C. P. Div. 578.

The proximate cause of the loss here was not the plaintiffs' negligence—if any—but the forgery of the indorsement by Piper, and the plaintiffs are therefore not disentitled from recovering:

Scholfield v. *The Earl of Londesborough*, 72 L. T. Rep. 46; (1895) 1 Q. B. 536;
The Mayor of the Staple of England v. *The Bank of England*, 21 Q. B. Div. 160.

Sir *E. Clarke*, Q.C. in reply. *Cur. adv. vult.*

July 6.—WILLS, J. read the following judgment:—[His Lordship after stating the facts as above set out, proceeded:] I will now state what seem to me to be the legal principles applicable to the case. By the Bills of Exchange Act 1882, sect. 7, sub-sect. 3, "Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer," and by sect. 73 a cheque is a bill of exchange drawn on a banker payable on demand, and the provisions of the Act applicable to a bill payable on demand apply to a cheque. It has not been contended, and I do not think it possible to contend, that, because the second paragraph of that section specifically applies to cheques the provisions of the Act applicable to bills payable on demand, the general provisions which apply to all bills do not apply to cheques; and in the arguments, sect. 7, sub-sect. 3, has been treated by both sides as applicable to cheques. The only contest has been as to its true meaning and effect. Now the *Bank of England* v. *Vagliano* (*ubi sup.*) appears to me to settle conclusively, first, that the Act, where unambiguous, defines what the law is, and that it is of little use to inquire whether it alters or adopts the law which existed up to the time when it was passed; secondly, that in every case in which, as a matter of fact, it can be predicated of the "payee" that he is fictitious or non-existent, the bill may be treated as payable to "bearer" (per Lord Herschell, p. 146); and, thirdly, that it may be so treated by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer. An attempt was made by Mr. Tindal Atkinson in his very subtle and ingenious argument to import into the sub-section the qualification that the payee, in the case of a cheque, must be non-existent or fictitious to the knowledge of the drawer, in order to come within the enactment. This seems to be contrary to the whole tenor of the decision in *Vagliano's* case. The language of the Act, say the learned Lords, one and all, is clear and unambiguous and admits of no qualification, and it is against the true canons of construction to import one. It is quite true that Lord Herschell enters into a discussion to show that in the case of a bill accepted there is no injustice or hardship done to the acceptor by the enactment, and gives reasons, many of which are not applicable to the case of a cheque, which has no acceptance and is not intended to have one. The discussion was natural enough with reference to *Vagliano's* case; but with all due submission it was supererogatory. When their Lordships had once come to the conclusion that the words of the Act were unambiguous and unqualified, the consequences were of little moment, and whatever they were, must follow. But much of the reasoning is equally applicable to a cheque. Who is it that sends the cheque forth under such circumstances that an indorsement to complete its negotiability is impossible? The drawer. Whose duty was it to ascertain that there was a real payee before signing it? The drawer's, surely. Who rendered possible the particular fraud of putting a false name on the back by way of indorsement? The drawer. And who, therefore, ought to suffer if one of two innocent persons must suffer? Why, surely the drawer. And how is it possible to import into sub-sect. 3 a proviso that the general enactment, though applicable if the bill has been accepted, is not to apply against the drawer if unaccepted, or to read the same words as meaning one thing if applied to one set of circumstances, and something quite different if applied to another? I have, therefore, no doubt that these cheques are to be treated as payable to "bearer." If so, the defendants were entitled to recover upon the cheques, if holders in due course, and by sect. 30, sub-sect. 2 (Bills of Exchange Act 1882), they,

as the holders, are *primâ facie* deemed to be holders in due course. It lies, therefore, upon the plaintiffs, in order to succeed in this action, to prove that the defendants were not holders of these cheques in due course — that is (as they undoubtedly gave value for them), that they were not holders in good faith, or that they had notice of a defect in the title of Piper. I do not, in this case, attach any serious importance to the question upon whom lies the burden of proof. But it is always convenient to bear it in mind, and that burden is clearly upon the plaintiffs. I dismiss from consideration the latter portion of sect. 30, sub-sect. 2, because this is in no possible sense an action upon a bill, but for return of money had and received to the use of the plaintiffs. By sect. 90 a thing is deemed to be done in good faith within the meaning of the Act where it is in fact done honestly, whether it is done negligently or not. The plaintiffs therefore have to prove that the defendants, in taking the cheques, acted dishonestly or with notice of a defect in the title of Piper to these cheques. No other defect can be suggested than that Piper came by them dishonestly. To take cheques with notice that the person tendering them came by them dishonestly would be in itself dishonest. The simple question in this case was, did Attenborough act dishonestly or not in taking these cheques? One of the strongest facts—if not the strongest—against the defendants is that Attenborough says he heard at some time—no one asked him when—that the cheques had been given to the person, whom I have no doubt the defendants and all the clerks in their office believed was the payee, for extra services in the office. The probabilities would be that this was some time early in the series of these transactions. Attenborough says that he was also told that "Brett" was the senior clerk in Messrs. Clutton's. Bennett, the manager, says he supposed him to be a clerk there, but made no inquiries as to his position, being satisfied with the fact that all the cheques were duly honoured by the plaintiffs' bankers. I think it probable that Piper, *alias* "Geo. Brett," did pose as the senior clerk. He must have been a man of assurance and resource or he could never have done what he did, and whatever information the defendants or their servants had obviously came from Piper, who was very unlikely to minimise his position. The senior clerk in Messrs. Clutton's immense business might well be expected to be in receipt of a handsome salary; but even if the senior clerk in Messrs. Clutton's office, 200*l.* or 300*l.* a year for extra services would be a very large addition to salary, and the defendants cannot possibly have believed that 700*l.* a year—to which these cheques ultimately came—were for extra services. To do Mr. Attenborough justice he was never specifically asked whether he believed the statement. I may add that I did not like his manner in the witness-box, and it was not such as to inspire me with confidence. But I do not think that the course of dealing was unnatural. From the first no consideration was given until the cheques were honoured; and, although the large and increasing amounts of the aggregates must have attracted attention, it is impossible not to feel that bane and antidote went together. The cheques were all honoured, and, with the utmost desire not to shield misconduct, I cannot understand how, when year after year they continued to be regularly honoured, the pawnbroker could be expected to doubt that, singular as the circumstances might be, Messrs. Clutton could have so little knowledge of their own concerns as to be giving their cheques to the same man, month after month, without being satisfied of the regularity and propriety of his dealings with them. The effective claim in this action deals with cheques cashed by Messrs. Clutton's bankers after the 6th June 1888 earlier transactions being statute-barred. By that time sixteen cheques amounting to over 385*l.*—sometimes two being dated within two or three weeks of one another—had been continuously honoured during a year and a quarter. How can I say, then, that the pawnbroker was not justified in continuing to take them? And if, as time went on, the multiplication of transactions and their increasing amounts may have seemed unaccountable without further knowledge, surely also the greater the amounts and the greater frequency with which they occurred the greater the improbability—if they were honoured—that there was anything wrong about them, and the less reason therefore for pursuing inquiries which really did not concern the pawnbroker. It would, I think, be exacting a pedantic standard of duty to say that the defendants ought to have settled by inquiries that which to them might be a mystery which, as it seems to me, they could not reasonably suppose was a mystery to Messrs. Clutton, who could not possibly be ignorant that they were paying these cheques as they fell due upon indorsements which the defendants knew to be those of the man with whom they were dealing. Surely for the defendants this would naturally be accepted as the cardinal fact. Though people have before now robbed their employers for many years without being found out, I doubt whether there ever was an instance before of a man successfully getting his employers to pay 640 of their own cheques during a period of eight years, and to the amount of nearly 18,000*l.* upon forged indorsements, without a farthing of consideration for any one of them. A great deal has been said on behalf of the plaintiffs about the defendants getting the cheques cashed in nearly every instance before the consideration for them was given to Piper. It seems to me that, at the outset, this was most natural, and, as long as Piper did not ask for any change of system, it was not surprising that the pawnbrokers should make none. I do not think the story told by Bennett in this connection at all improbable, and I do not see why I should not believe Bennett when he says that Piper's refusal to take the goods before the cheques were honoured "increased his faith in the man." I think that Bennett's conduct throughout was natural enough, and that when he found that all the cheques passed through his master's hands without observation, and were duly paid, he was unlikely to ask more, or trouble himself to get an explanation why the cheques were always "crossed" in the case of a man who, apparently, had no banking account. Bennett, notwithstanding the attack upon him by Mr. Tindal Atkinson, did not impress me unfavourably. Great stress was also laid, naturally enough, on the repeated purchases of jewellery and such-like articles by Piper as a matter which ought to have excited

suspicion. They must have led anyone to the conclusion that the purchaser was leading a life of extravagance, and probably was given to making expensive presents to women. But I cannot see that the fact that Piper might have been making a questionable use of his money should cause a suspicion that it was not honestly come by, in presence of the overwhelming fact that cheque after cheque, no matter how the proceeds might be spent, was duly honoured. The money expended in jewellery, large as it was, left between three and four times as much in cash handed to Piper, so that, if the cheques were rightly come by, there was, after all, no reason to suppose that he was not leaving himself ample means to live upon. In my opinion, therefore, I ought to find, as a fact, that both the defendants and Bennett, their assistant, received these cheques honestly, and the functions of the other assistants was merely mechanical. Circumstances which ought to have put a man upon inquiry are not enough; shutting a man's eyes to them is not enough. Such things constitute evidence of fraud, but they do not constitute fraud. A man's having no right to shut his eyes is a totally different thing from his wilfully shutting them. The one may be evidence of fraud, the other is fraud. The distinction will generally be found pretty sharply drawn in the common law decisions, where the necessity of separating the respective domains of judge and jury is seldom lost sight of. The confusion has arisen from a misapprehension of cases in equity, where observations tending to establish fraud have been mistaken for descriptions or definitions of fraud. But it is now well established that fraud, as the late Lord Chief Justice was wont to observe, "means fraud and nothing else." Upon these grounds I am of opinion that the defendants are entitled to judgment, of course with costs, and the view I have taken relieves me from the necessity of discussing a variety of other points raised for the defendants by Sir Edward Clarke and Mr. Finlay.

Judgment for defendants.

Solicitor for the plaintiffs, *H. S. Clutton.*

Solicitors for the defendants, *Stanley Attenborough* and *Tyer.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 11 *and* 12.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Ebbetts *v.* Conquest. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Landlord and tenant—Underlease—Covenant to keep the demised property in repair—Breach of covenant—Measure of damages.

Where an under-lessee has committed a breach of a covenant to keep the demised property in repair, the measure of damages to which the immediate lessor is entitled is not the same as in the case of a direct lease.

Where an under-lessee, who has committed a breach of a covenant to keep the demised property in repair, has notice that there is a superior landlord, the damages to which the immediate lessor is entitled are measured by his liability over to that landlord, the damages being the difference between the value of the immediate lessor's reversion with the covenant to keep in repair performed and its value with that covenant not performed.

Decision of the Official Referee affirmed.

Hadley *v.* Baxendale (9 *Ex.* 341) *applied.*

By indenture of lease, dated the 8th May 1840, certain hereditaments, forming part of the estate of St. Botolph Without, Bishopsgate, were demised by the trustees of St. Botolph to Thomas Rouse for sixty-one years from Michaelmas-day 1837.

The lease contained a covenant by the lessee during the term to keep the premises in good and sufficient repair and condition, and a covenant to yield them up at the end of the term in good repair, reasonable use and wear and damage by fire excepted.

By underlease, dated the 24th March 1851, Thomas Rouse granted an underlease of part of the property to Benjamin Oliver for forty-seven and a half years from Lady-day 1851, less ten days. The underlease contained covenants substantially identical with the covenants above referred to in the lease. The underlease showed, on the face of it, that it was an underlease and not a lease by a freeholder, the rent being reserved to Rouse, his executors, administrators, and assigns, and there being several references to "the superior landlord."

Rouse having died, he was represented by the plaintiffs, who were the trustees of his will, and his interest in the premises comprised in the lease was vested in them.

On the 9th Aug. 1882 the premises comprised in the underlease were assigned by Oliver to William Booth for the residue of the term thereby created, which would expire ten days before Michaelmas 1898. Oliver having died, he was represented by the defendant Conquest, who was the executor of his will.

In 1894 the plaintiffs commenced this action against Conquest and Booth, to recover damages in respect of an alleged breach by Booth of the covenant in the underlease to keep the premises in repair, and, so far as necessary, to have the estate of Oliver administered by the court.

It was decided by Romer, J., before whom the action came on for trial in Dec. 1894, that there had been a breach of covenant, which, indeed, was not denied. And, by an order dated the 5th Dec. 1894, it was referred to the official referee to inquire and report what damages had accrued to the plaintiffs, by reason of all breaches committed or allowed since the 10th Aug. 1882, of any of the covenants to repair contained in the underlease of the 24th March 1851, and to assess the amount of damages.

The defendants contended before the official referee that, where an action was brought during the continuance of a tenancy for breach of a covenant to keep the property in repair, the proper measure of damages was the extent of injury done to the marketable value of the reversion. Evidence was given to show that, at the end of the term, the site would have to be cleared to be of any value, the only profitable way of dealing with it

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

being to treat it as building ground, the buildings being worth nothing but to be pulled down. The evidence also went to show that, if they were put into repair, they would be worth 200*l.* more to pull down and carry away than if not put into repair.

The defendants contended, therefore, that at most the value of the plaintiffs' reversion had only been diminished to the extent of 200*l.* by the want of repair. The official referee did not adopt this view, but by his report, dated the 20th March 1895, found that, as the plaintiffs, at the expiration of their term would have to pay the full expense of putting the buildings into repair, that expense must be taken into account in assessing the damage which they had sustained. He considered that on the evidence the expense of putting the buildings into repair would be about 1500*l.*, and, allowing for the time to elapse before that sum would become payable, he assessed the damages at 1305*l.*

From that finding the defendants now appealed.

Haldane, Q.C. and *Sargant* (*H. Courthope Munroe* with them) for the appellants. — This action is not brought on the covenant to deliver up the premises comprised in the lease in good repair, but on the covenant to keep them in repair during the term. The proper measure of damages, according to the plaintiffs' contention, would be the amount which it would cost to fulfil that covenant; that is to say, the sum which it would cost to put the premises in proper repair, allowing a discount for the period for which the underlease has yet to run. We submit, however, that the damages should be based on the depreciation in the selling value of the plaintiffs' reversion. The buildings would be of little or no value at the end of the term in their existing condition, nor even if put in repair. The site to be used profitably must be used in some other way. The plaintiffs would have to pull the buildings down, sell the materials, and erect buildings of a different character. The official referee, acting on the first principle, has assessed the damages at 1305*l.* We say that the amount should be 200*l.*, the proper measure of damages being the difference between the selling value of the materials as matters stand, and that which would have been their selling value if the covenant had been performed. The covenant to repair is not one of which the courts grant specific performance. Only damages are recoverable, and those damages, as the authorities show, are arrived at on the principle of making good the loss which the plaintiff has suffered. The measure of damages is not the expense of putting the premises in repair, but the present depreciation of the value of the reversion. The case of *Vivian* v. *Champion* (2 Ld. Raym. 1125) it is true is against us. But ever since that decision there is a consistent line of authorities showing that in the case of covenants to "keep in repair" the right principle is the one which we contend for, though in some of the cases there are, no doubt, dicta to the effect that the rule is different in the case of covenants "to yield up in repair." The old cases are as follows:

Smith v. *Peat*, 9 Ex. 161;
Turner v. *Lamb*, 14 M. & W. 412, 414;
Davies v. *Underwood*, 2 H. & N. 570.

The modern cases are as follows:

Mills v. *The Guardians of the East London Union*, 27 L. T. Rep. 557; L. Rep. 8 C. P. 79;
Joyner v. *Weeks*, 65 L. T. Rep. 16; (1891) 2 Q. B. 31;
Henderson v. *Thorn*, 69 L. T. Rep. 430; (1893) 2 Q. B. 164;
Whitham v. *Kershaw*, 16 Q. B. Div. 613;
Wigsell v. *School for the Indigent Blind*, 46 L. T. Rep. 422; 8 Q. B. Div. 357;
Coward v. *Gregory*, 15 L. T. Rep. 279; L. Rep. 2 C. P. 153, 172.

[Lopes, L.J. referred to *Inderwick* v. *Leech* (1 Times L. Rep. 95, 484) cited in *Joyner* v. *Weeks* (*ubi sup.*).] From the cases it is now established that the dictum of Lord Holt in *Vivian* v. *Champion* (*ubi sup.*) is not sound. The official referee admitted the principle of these cases, but considered that, as the term was so near its close, and the reversioners were themselves tenants, the depreciation of the reversion must be measured by the expense of putting the premises into repair. But this, we submit, is not the correct view. The depreciation of the reversion depends upon its selling value, and the surrounding circumstances must be taken into account.

R. F. Norton (*Jelf*, Q.C. with him) for the respondents.—The argument of the appellants comes to this, that if a freeholder lets a chapel the lessee's surveyor may say that the property would let better as a public-house; and that therefore he will only pay damages on the footing of the house being pulled down. That cannot be the law, and the case of a leaseholder letting a house is an *à fortiori* case. There is no difference between the covenant to keep in repair and to yield up in repair, except that in an action on the former discount is allowed. The plaintiffs no doubt are suing on the covenant to keep the buildings in repair, not on the covenant to deliver up the premises in good repair. But they are themselves bound by their covenant with the superior landlord to deliver up the premises in good repair at the end of the term, and the injury to their reversion is measured by this liability. The plaintiffs could not sell their reversion now without giving an indemnity to the purchaser against the covenant with the superior landlord. Therefore, the injury to the reversion must be in some way measured by the cost of the repairs; and in what way this should be done ought to be left to the official referee. The evidence that the buildings are only fit to be taken away, and will be only worth 200*l.* more to be taken away if put into repair, is irrelevant to our case. We cannot take the buildings away nor utilise the site as a building site. An intermediate landlord may recover substantial damages from his lessee for breach of a covenant to keep in repair, because he is liable to the superior landlord under the covenant to deliver them up in repair:

Davies v. *Underwood* (*ubi sup.*).

There is another case which has not been already referred to, namely, *Clow* v. *Brogden* (2 Man. & Gr. 39, 54); I cite it for a dictum of Tindal, C.J., who says: "I see no reason why the plaintiffs should not recover in this action the sum of 29*l.*, the amount agreed upon as the damages for the dilapidations caused by the breach of the covenant to repair entered into by the defendants. The answer set up is, that the plaintiffs have sustained no actual damage, because (partly, at least, by the default of the defendants) the term in the premises has been determined. I think that it does not

lie in the mouth of the defendants to make such an objection. But, independently of that, I am not convinced that the objection is reasonable; for the plaintiffs may be answerable over to the superior landlord for the amount of these damages; and I see no ground why they should not recover them from the defendants." That case shows that, if there is a liability over, the plaintiff may recover damages in respect of it. The damages sustained by the plaintiffs are, that when their term ends they will have to incur the expense of putting the property into repair. The official referee by making a discount has allowed for the fact that that expense will only have to be incurred after a lapse of time. The official referee has, I submit, proceeded therefore upon a correct principle.

Haldane, Q.C. in reply.—The difference between a covenant to do a particular thing, and a covenant to indemnify the covenantee against the consequences of its not being done appears from Mayne on Damages, 5th edit., p. 99. There is no covenant to indemnify in the present case; therefore only the natural consequences of the breach of the covenant to keep in repair are to be looked to, and they are the same whether the covenantee is a freeholder or a leaseholder. When an action is brought pending the term the depreciation in the value of the reversion is the only measure of damages. In an action by a landlord against a tenant for waste, the diminution in value of the reversion was taken as the measure of damages:

Whitham v. *Kershaw* (*ubi sup.*).

He referred also to

Hadley v. *Baxendale*, 9 Ex. 341.

Lindley, L.J.—I do not think that it is necessary to take further time to consider this case. It has been fully argued on both sides, and I think that the official referee was right in the view which he took. What we are dealing with is very important. It is an action brought by the plaintiffs, who may be treated as standing in the place of Mr. Rouse, against Mr. Conquest, who may be treated as standing in the place of Mr. Oliver, to whom I will refer presently, and against Mr. William Booth, who is an assignee, as I understand it, of Mr. Oliver. Now the action is brought in respect of a breach of covenant to repair. The state of things was this: The covenant to repair which is sued upon is contained in an indenture of underlease of the 24th March 1851, made between Mr. Rouse, who was himself a tenant under the Bishop of London, and Mr. Oliver. Mr. Oliver is dead, and, as I have said, Mr. Conquest represents him, and he has assigned to Mr. Booth. Now the underlease itself shows plainly enough what the position of the parties was; that is to say, the under-lessee knew perfectly well that his lessor was himself a lessee, and knew perfectly well that he was taking an underlease. Whether or not he looked at the lease under which his immediate lessor held I do not know. But it is important to observe that the parties knew perfectly well their relative positions, because when we look at the underlease we see constant references to the superior landlord there. For example, there is liberty reserved to the agents of the superior landlord to come in and do repairs, and there is a covenant not to do anything which will annoy the immediate lessor's landlord or the tenants of the superior landlord. Now the covenants which are contained in the underlease, and with which alone we have to deal, are covenants to repair. I understand those covenants to mean, to put into repair the premises demised — which now practically consist of this Grecian Theatre—to repair them and to keep them in repair, and to deliver them up at the end of the term in good repair. Now there is not in this underlease any covenant to indemnify the immediate lessor against his liability to his superior landlord in respect of repairs. The consequence of that is, that under these covenants the immediate lessor cannot get, by a long way, so much in the shape of damages as he might if he were suing upon a covenant for indemnity. Now what is the state of things? The state of things is, that this property demised by the underlease is out of repair. The plaintiffs are reversioners. Their reversion consists only of about ten days, but they are liable over, on the expiration of their lease, to deliver up this property to their landlord, who is the Bishop of London, in proper repair. That is conceded, and the circumstance is all important in investigating what is the proper amount of damages to which they are entitled for breach of the covenant on which they sue. The underlease itself has not yet run out. When this action was commenced there were about four or four and a half years to run and there are now about three and a half years. But the action is not brought for a breach of the covenant to leave in repair, because the time for suing on that has not arrived. The action is brought for breach of the covenant to keep in repair. Now what is the rule as to ascertaining the damages for a breach of that sort? The breach is not in controversy. It appears to me that this is an ordinary action for a breach of contract, and that the general principle applicable to it is that laid down in *Hadley* v. *Baxendale* (9 Ex. 341, 354). I will refer to that case, because that case appears to me to cover the present case itself. The rule itself is perfectly familiar to us all, but I cannot repeat it from memory without a reference to what was said. As appears from the report, Alderson, B., in delivering the considered judgment of the court, said: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." I take it that the rule is what I have just referred to, and I apply that rule to this case, and it is because of the importance of the lessee knowing the position of his lessor that I

refer to this underlease. If this underlease had not disclosed the fact that it was an underlease, possibly the observations which I have made would require some modification. What then are the damages which the plaintiffs have sustained by reason of the breach by the lessee of his covenant? It appears to me that, applying *Hadley* v. *Baxendale* (*ubi sup.*), the damages which they have sustained are to be measured by their liability over to their lessor, which was one of the circumstances, special if you like, but known to and reasonably within the contemplation of the defendants, far short of a covenant of indemnity. To put the matter in another form, there are certain rules for ascertaining damages. In cases of this kind, when you are suing in the case of a breach of covenant to repair, there are certain subsidiary rules for ascertaining the amount of those damages. What would be the true measure of damages here? The lessee can say to the lessor: "The term is not out—you are suing me for a breach of covenant to keep in repair." The cases go to this length, that in an action of that kind you must look at the value of the reversion. Now, what are the damages? Surely the damages sustained by the plaintiffs, and for which the defendants are liable upon the principle of *Hadley* v. *Baxendale* (*ubi sup.*) must be reckoned thus: Ascertain what is the difference in value between the reversion with the covenant performed as it ought to be, and the value of that reversion with the covenant unperformed which it ought not to be. That represents the damages which it appears to me the defendants ought to pay the plaintiffs. The learned official referee has taken that view, and he has assessed the damages upon that principle. He says that the principle he goes upon is this: The term is very nearly at an end; it has got three and a half or four years to run. The value of the ten days of reversion if the property was in repair is so much. If the property is out of repair it is so much, and the difference is 1300*l.* He gets at it in this way: He says that it will cost over 1500*l.* to put the property in repair, and he discounts that sum and makes the damages 1305*l.* Now, Mr. Haldane says that that is wrong in principle because that is really giving the plaintiffs an indemnity when there is no covenant for it. My answer to that is, that it may be in this particular case an indemnity, but if the plaintiffs were suing upon a covenant of indemnity they might get a great deal more. Mr. Haldane says that you must treat this as an ordinary case of landlord and tenant where the landlord is the reversioner. He says you must look at the value of the reversion apart from these special circumstances to which he alluded, and apart from that which is all important in this case, namely, the liability over. If you were dealing with a reversion in fee I do not suppose that this sum of 1305*l.* would be the measure of damages. I think that that is very likely, but you cannot leave out the cardinal point in this case, on which the whole case turns, namely, this liability over. It seems to me, therefore, that the learned referee is right, and at all events it would not be prudent to say he was wrong. I have not gone into these calculations, but there is nothing wrong in the principle he has adopted. Therefore I think that the appeal ought to be dismissed, and dismissed with costs.

LOPES, L.J.—I am of the same opinion. The general rule with regard to damages in actions of this kind may be stated thus: Where the term has come to an end, and the action is on the covenant to leave in repair, the measure of damages is the sum it will take to put the premises into the state of repair in which the tenant ought to leave them according to his covenant; and the measure of damages for the breach of a covenant to keep in repair during the currency of the term is the loss which is occasioned to the lessor's reversion—a loss which will be greater or less according as the term of the tenant at the time of the breach has a greater or less time to run. Those I think are the general rules which are deducible from the cases. But there are special circumstances in this case which prevent this particular case from coming exactly within either of these rules. The special circumstances which I allude to are, that there is a liability over. In this case the under-lessee knew that he was taking from a lessee, and I cannot doubt that he knew of the covenants in his lessor's lease, and amongst those covenants is a covenant to yield up in repair on the termination of the lease. To my mind that is the most important matter in this case when we have to come to deal with the question of damages. We have, therefore, under these circumstances, to consider what is the loss to the lessor's reversion; in other words, what is its marketable value. Supposing he offers it for sale. I presume the purchaser would say: "If I buy I buy subject to a liability to yield up the premises in repair. I can only, therefore, give you such a sum as the premises are worth after deducting from that sum the cost of repairs." In my view the plaintiffs are entitled to say: "We are liable to our lessor to give up these premises in repair. If you had observed your covenant and kept the premises in repair the reversion would be worth so much. You have not kept it in repair, and it is worth so much less, that so much less being what it will cost to put it in repair. Therefore the loss to the reversion is the cost of putting those premises in repair." Now, if I had to deal with this case with a jury I should have left the question to them in the way I have already stated. I should say, "What you have to consider is what is the loss enured to the plaintiffs' reversion." In order to arrive at that you must in your own minds determine what is the value of this reversion with this covenant observed, and what is the value of this reversion with the covenant not observed, and the difference between those two sums will be the loss which the plaintiffs have sustained in respect of their reversion. I did not at first very clearly understand how the official referee had dealt with the matter. But it seems to me that that is the way in which he has dealt with it. He has taken all these matters into consideration, and he said that practically the loss that has accrued to the reversion is the difference between the value of the reversion with the covenant performed and the value with the covenant unperformed. That amounts to 1500*l.*, which discounted, as it ought to be, will amount to the sum of 1305*l.* Whether that is a proper figure or not I am not prepared to say, because we have not the figures before us. But most distinctly I cannot say that the official referee is applying a wrong principle. Nor can I say that is not a right and proper figure for him

to have assessed. I think therefore that the appeal fails.

Rigby, L.J.—I am of the same opinion in this case, in which it has been argued, and quite rightly argued, that the particular figures are not brought before the court. It is a question of principle, and principle only. No attempt has been made, and I presume no attempt could really be made, to affect the figures, unless we can affect the principle upon which they are arrived at. The authorities referred to by Mr. Haldane clearly show that, as a general rule, there is a difference in the assessment of damages in the case of a breach of a covenant to yield up in repair brought after the determination of the term, and the case of a breach of a covenant to keep in repair brought during the continuance of the term. In the first case, by the authorities it is laid down upon grounds of convenience, and indeed it is no doubt an arbitrary rule, that whether or not the lessor in fact loses, he shall be paid the amount which would be necessary to place the premises in good repair. It may happen that even a payment of that amount would not induce him to repair. It may be far more to his interest to let the buildings be pulled down. But these considerations are not taken into account, principally because they depend upon the arrangements which the lessor has made with other persons, with which the lessee has nothing at all to do, and as to which in general he will have no information, and as to which at the time he enters into the bargain he can have none. Then there is another rule, which is this: On a covenant to keep in repair, the general rule is that you are to take the effect upon the value of the reversion, treating it as though it were carried into the market for sale under such circumstances that the purchaser might do whatever he liked with the property, turn it to the best advantage—which I will assume in this case would be by pulling down the buildings altogether, and treating the property so purchased as a mere building site. The very fact that the rule is stated in those terms appears to me to prevent the possibility of applying it to a case of this kind. This reversioner for ten days cannot take his reversion into the market, and sell it to a purchaser who shall be able to deal with it as he pleases as building ground. His interest is such that he cannot touch the buildings except for the purpose of repairing them. He cannot pull them down, and cannot convert the property into a building site. Therefore the supposed standard, which is a perfectly good standard of reason and sound sense, as well as of authority, when applicable to the case of a freeholder who can deal with his reversion as he likes, and give similar rights to the purchaser, ought certainly not *primâ facie* to apply to a case of the present kind. Mr. Haldane was not able to point out an authority in which that principle had been so applied. And I think, from the very terms of the rule, and in the absence of authority, it ought to follow, upon common sense grounds, from the very statement of the rule itself. My conclusion is, that that rule does not apply to the present case. What rule then ought to apply? We must consider what the position of the parties is. Mr. Oliver, through whom Mr. Booth claims, and by whose bargain he is bound, knew well that this property was not the freehold of Mr. Rouse, who demised to him. He had clear notice, upon the face of his own underlease, that it was an underlease, and that there was a subsisting lease from the superior landlord, the Bishop of London, represented at the present time by the plaintiffs. Knowing that, what is the clear rule of law? He must be taken to have known all the terms of that superior lease in the same way as if they had been cited at length in his own underlease. It would appear that the original lessee was under liability himself to keep in repair, and a further liability, at the end of the term, under the covenant, to yield up in repair. Now, applying the rule of *Hadley* v. *Baxendale* (*ubi sup.*), what must be taken to have been in the contemplation of the parties? The fact which was known to the under-lessee, that his immediate lessor was under liability to keep in repair and to yield up in repair, becomes one of the circumstances of the case to be looked at in the assessment of damages. The measure of damages is the injury to the plaintiffs—I do not say to the plaintiffs' reversion necessarily, but the loss to the plaintiffs arising directly out of the breach—a loss which must be known to be the necessary consequence of the breach under the circumstances of the plaintiffs' covenant with the superior landlord. The learned official receiver appears to me to have taken the right view. I will not say the right view to a pound or two, because you can never say that in a question of damages. But the question is, Is he wrong, and can we say that he has made such a mistake in principle that we are bound either to reverse him or to send the case back to him? I cannot find that he has done anything of the sort. Mr. Rouse or his representatives will be worse off by reason of the non-performance of the covenant by about what it would cost at the end of the term to repair the premises and yield them up in good repair. That, of course, is not capable of being assessed with complete accuracy, but a good approximation can be made. The learned referee has taken evidence, and found that between 1500*l.* and 1600*l.* would be required for that purpose. He has taken from that a discount which reduces the whole sum to 1305*l.*, and the result is that he has awarded that sum as damages to the plaintiffs. I think that he was right in so doing. I will only observe that, if the supposed general rule of the diminution of the reversion were to apply to a case of this kind, the result would seem to follow that, in a case of a ten days' reversion or three days' reversion, nothing but nominal damages could be recovered during the term upon the covenant to keep in repair. That is to say, if you take the sum at which the ten days or three days is assessed as the reversion, you can only give damages up to that as full value. I daresay the result would be, that they would say that the ten days' term was worth 40*s.*, and we could only reduce it to nothing and give 40*s.*, and so it would be in every covenant in an underlease. I am of opinion that there has been no miscarriage, and that the sum of 1305*l.*, so far as I can say without the figures being before me, represents fairly the damage which the plaintiffs have sustained. Under these circumstances the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: for the appellants, *Ranger, Burton,* and *Frost*; for the respondents, *Clarke* and *Calkin.*

Wednesday, July 3.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

DOBELL AND CO. *v.* THE STEAMSHIP ROSSMORE COMPANY LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Shipping—Bill of lading—Shipowner's exemptions—Exercise of due diligence by owner—Negligence of servant—Liability.

Goods were shipped under a bill of lading which exempted the shipowners from liability for damage to the goods arising from faults or errors in navigation, or in the management of the ship, provided that due diligence had been exercised by the owners to make the ship in all respects seaworthy.

Damage was caused to the goods during the voyage through the unseaworthiness of the vessel. The unseaworthiness of the vessel was due to the negligence of the carpenter employed by the shipowners to see that the vessel started on her voyage in a seaworthy condition.

Held, that the shipowners had not, by their agents, exercised due diligence to make the ship seaworthy, although they had employed a fit and proper carpenter for that purpose; and therefore they were not relieved by the bill of lading from liability for the damage to the goods.

THIS was an appeal from the judgment of Lawrance, J., sitting without a jury, at the trial of the action at Liverpool.

The action was brought by the shippers of a cargo of oil cake against the owners of the steamship *Rossmore* for damage caused to the cargo during the voyage, the amount of which was agreed at 70*l.*

The oil cake was shipped at Baltimore, U.S.A., for carriage to Liverpool under a bill of lading, of which the material parts are as follows:

Shipped in good order and condition by J. C. Moore and Co. . . . for shipment in the s.s. *Rossmore* (from Baltimore for Liverpool) . . . 768 bags oil cake . . . and the said goods are to be delivered in the like good order and condition at the port of Liverpool. . . . Neither the vessel, her owners, agents, or charterers shall become, or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel, provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped, and supplied . . . not accountable for the unseaworthiness of the vessel at the commencement of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness), or otherwise howsoever. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in, the Act of Congress of the United States approved on the 13th Feb. 1893.

By the Act of Congress of the United States approved on the 13th Feb. 1893 (fifty-second Congress, sess. II., c. 105), it is provided as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement, whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants, to carefully handle and stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

5. That for a violation of any of the provisions of this Act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner, or master is guilty of such violation, and such vessel may be libelled therefor in any district court of the United States within whose jurisdiction the vessel may be found. One half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States.

The *Rossmore* left Baltimore with a port improperly caulked, through which the sea-water entered during the voyage, and damage was thus caused to the cargo. The port was not easily accessible during the voyage, and it was admitted that, according to the decision of the House of Lords in *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 App. Cas. 72), the vessel was unseaworthy.

It was also admitted that this unseaworthiness was due to the negligence of the carpenter who had been employed by the defendants to see that the vessel was in a seaworthy condition before she started on her voyage, but the defendants relied upon their having exercised due diligence in employing an efficient carpenter for this purpose.

At the trial of the action without a jury Lawrance, J. gave judgment for the plaintiffs.

The defendants appealed.

Pickford, Q.C. and *A. D. Bateson* for the defendants.—The defendants are relieved by the bill of lading from any liability in respect of the damage

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

for which this action is brought. The leaving of the port-holes not properly closed was either an "error in navigation" or in the "management of the vessel." In *Carmichael* v. *The Liverpool Sailing Ship Owners' Mutual Indemnity Association* (57 L. T. Rep. 550; 19 Q. B. Div. 242) it was held that damage caused by the negligence of persons in charge of a ship in leaving a port-hole insufficiently secured, was damage arising from "improper navigation of the ship." The owners have exercised due diligence in appointing an efficient carpenter to see that the ship was seaworthy. The defendants have not been personally guilty of any negligence, and are therefore relieved from any liability for the damage complained of by the bill of lading. This has been held in America to be the meaning of the Act of Congress:

The Sylvia, not yet reported.

Joseph Walton, Q.C. and *Carver* for the plaintiffs.—It is not enough that the owners have personally used due diligence in making the vessel seaworthy. The word "owner" in sect. 3 of the Act of Congress means, not the owner personally, but means "himself or his servants." If the section is construed to exempt the owner from liability for the negligence of his servant, provided that he has exercised due diligence in appointing an efficient servant, the section would be nullified. A shipowner must necessarily act by agents, he cannot do everything personally. This is especially obvious in such a case as the present, where the shipowner is a company. Next, assuming that the owners have exercised such due diligence as is referred to in the bill of lading, yet they are then only relieved from certain matters. It is said that in this case there has been a "fault or error in navigation" or in the "management of the vessel." Those words mean a fault or error on the part of the persons navigating the ship. They do not include the negligence of the carpenter in not caulking the port-holes properly before the ship had started on her voyage:

The Ferro, 68 L. T. Rep. 418; (1893) P. 38.

The case of *Carmichael* v. *The Liverpool Sailing Ship Owners' Mutual Indemnity Association* (*ubi sup.*) has no application here. That case is really similar to *The Warkworth* (51 L. T. Rep. 558; 9 P. Div. 145). Those two cases have no analogy to the present one, because the port, through which the water came in this case, could not be touched when once the ship had started on her voyage. Neither has *The Sylvia* (*ubi sup.*) any bearing on this case, because there the ship was not unseaworthy; the port-hole there could have been shut at a moment's notice at any time when bad weather came on.

Bateson replied.

Lord Esher, M.R.—In this case we have to deal with a bill of lading, which, though given at Baltimore, in America, is an English bill of lading. By it an English shipowner contracted with an English shipper for the carriage of certain goods from America to Liverpool. On the voyage the goods were damaged by sea-water which got through a port that had not been properly fastened, and the shipper has now brought this action against the shipowner upon the bill of lading for breach of his agreement to deliver the goods in good order and condition. The shipowner says he is not liable, and he relies upon the exceptions in the bill of lading. The facts as to the cause of the damage to the goods are not in dispute, and the sole question we have to decide is as to the true construction of the bill of lading. Now, by reference to a United States Act of Congress, certain words have been brought into the bill. The American Act is not, as an Act of Congress, binding on the parties to this action, but the words used in it are by reference introduced into this bill. That is a very clumsy contrivance, but we have to construe the bill, reading into it the words so introduced by reference. First, we have a clause in it expressly providing that "neither the vessel, her owners, agents, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel, provided due diligence has been exercised by her owners to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied." That means that, unless the obligation of the owners to use due diligence to make the vessel seaworthy has been fulfilled, the exception in the earlier part of the clause is not to have any effect. Then comes the clause which brings in the words of the American Act, the effect of which is to repeat over again some of the words which are already in the bill. That again is a very clumsy contrivance. However, we have got to construe the words. The words of the Act which are brought into the bill are these: Sect. 1 provides that it shall not be lawful to insert in any bill of lading any clause whereby the owner of the vessel shall be relieved from liability for loss or damage arising from negligence in loading, stowing, keeping, or delivering the goods that have been shipped on the vessel. After that comes a section which, say the owners, relieves them from liability for damage caused through the unseaworthiness of the vessel to the plaintiffs' goods. That seems to me to be rather nonsensical. Sect. 3 provides that the owners shall not be held responsible for damage resulting from faults or errors in navigation, or in the management of the vessel, upon the condition that they shall have exercised due diligence to make the vessel in all respects seaworthy. Now, in the present case, the vessel was not seaworthy, but the owners contend that they are not liable for the resulting damage to the goods of the plaintiffs, on the ground that they used due diligence to make the vessel seaworthy. It is argued that, if the owner of a ship has done all that he personally could do to make his ship seaworthy, but through the fault of one of his servants she was not seaworthy, he is protected by the words of sect. 3 from liability for the consequences. Now, the owners of the *Rossmore* were not at Baltimore when she started on her voyage, nor were their managers there, and that was known to the parties to this action. How can it be said that anyone supposed that the owners were there, personally seeing what was being done to make the ship seaworthy? It seems to me obvious that in this clause "owners" must include not only the owners personally, but also their agents, whose business it is to see that the ship starts on her voyage in a seaworthy condition. If the owners' agent appointed a carpenter, he ought to have seen that the carpenter did what was necessary to make the ship seaworthy. If the carpenter himself was the owners' agent, then it was still

his duty to make the ship seaworthy. Here the ship was not seaworthy when she started on her voyage, and whether that was the fault of the agent or the carpenter, it was the fault of the person who was bound to attend to the owners' duty to see that the ship started in a seaworthy condition. What happened was this: She started with a port open. If that had been all, and the port could have been shut immediately it became necessary, the ship would not have been unseaworthy. It is true that it would have been possible to fasten the port during the voyage, but the ship was so loaded that there was no facility for doing so after the voyage had begun. It could not have been shut without considerable exertion, as the crew would have to be employed for some time in moving the cargo, in order to get at the port. In the meantime, while they were doing that, the water would have been coming in through the port, and doing damage to the cargo. The result is, that this ship was not seaworthy at starting, and that was so through the fault of some agent of the owners, whose duty it was to see that she started in a seaworthy condition. Therefore, the owners have not used due diligence, through their servant, to make the ship in all respects seaworthy. The two cases cited by the appellants, of *Carmichael and Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (57 L. T. Rep. 550; 19 Q. B. Div. 242) and *The Sylvia* (*ubi sup.*), have no bearing upon this case. The owners have not fulfilled their duty, and are not relieved from responsibility by the bill of lading. The appeal is dismissed.

KAY, L.J.—Nothing could be more inartificially drawn up than this bill of lading. On the whole the result of the provisions as to relief of the owners from liability if they have exercised due diligence to make the vessel seaworthy, and of the words which have been incorporated from the United States Act of Congress, seems to me to be this. The owners meant that, upon the fulfilment of certain conditions, they should be exempt from liability for any damage to the goods arising from "faults or errors in navigation or in the management of the ship." Those last words I will agree are equivalent to faults or errors in the management of the ship during the voyage, because it seems to me quite plain that the owners must have exercised due diligence in making the ship in all respects seaworthy and properly manned, equipped, and supplied, before they are to be entitled to the exemption. That seems to me to be fully expressed in the bill of lading without any reference to the incorporated words of the American Act, because the express words used in the bill are much the same as the words used in the Act. Not only is the bill badly drawn, but the Act itself seems to me most inartificial, sects. 1 and 3 being somewhat contradictory, as the Master of the Rolls has pointed out. But however that may be, the meaning of these clauses in the bill are that, provided the owner has fulfilled certain conditions, he is not to be held liable for "faults or errors in navigation or in the management of the ship." The next point that was argued was, that there had not been any such fault or error in this case. What happened was this: The ship put to sea with one of her ports insufficiently fastened, so that water got into the ship and damaged the cargo. It is unnecessary for me to give any opinion as to whether that was a "fault or error in navigation or in the management of the vessel," but I confess I should be inclined to think that those words would apply to faults or errors in sailing the ship during her voyage, and would not include the matter which caused the damage in this case. But it is not necessary to give a decided opinion on this point. The real point is, whether the owners exercised due diligence to make the vessel seaworthy and thereby fulfilled the condition of their exemption from liability for the damage to the goods. After the decision of the House of Lords in *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 App. Cas. 72) it cannot be denied that the ship was unseaworthy. Lord Blackburn there said that, if a ship went to sea with a port unfastened, and it would take a great deal of time to remove the cargo in order to get at it and fasten it, the ship would be unseaworthy; but if the port could be shut at a moment's notice if the sea became rough, then the ship could not be called unseaworthy. Those words of Lord Blackburn were referred to with approval by Lord Herschell in the recent case of *Hedley* v. *The Pinkney Steamship Company* (70 L. T. Rep. 630; (1894) A. C. 222). Therefore it is clear that the *Rossmore* was unseaworthy when she left Baltimore. The essential point in this case is whether that unseaworthiness was owing to a want of due diligence on the part of the owners. The owners say it was not, because they had appointed a fit and proper carpenter to see that the ship was seaworthy. I cannot agree that that is an answer to the question. The contract is, that the owners shall, if not personally, at least by the eyes of proper and competent agents, be sure that the ship is seaworthy before she leaves the port. It is obvious that the owners themselves cannot make the ship seaworthy. They must act through agents. Therefore the word owners in this clause must be construed as including the agents by whom they act. There is nothing in the bill to exempt the owners from the negligence of their agent, even if they should appoint the best they could find. It cannot be said that the owners fulfilled their duties under this bill of lading by appointing a competent agent. I think the negligence of the carpenter in this case was the negligence of the owners. As they have been negligent in sending the ship to sea in an unseaworthy condition, they have not fulfilled the condition that they should exercise due diligence in the matter, and therefore they cannot rely upon the exemption from liability. I agree that the appeal must be dismissed.

SMITH, L.J.—This is an action by the owners of goods which were damaged by sea-water during their carriage on the defendants' ship. They sue the shipowners for breach of their agreement to deliver the goods in good order and condition. The shipowners rely on the exemptions from liability contained in the bill of lading. It is clear that the ship was not seaworthy when she sailed from Baltimore, and that by reason of her unseaworthiness the plaintiffs' goods were damaged. The owners, however, claim to be exempt from liability under a clause in the bill of lading which incorporates in the bill the words of an American Act of Congress. The bill must be construed as if the words of that Act were written out in it. Sects. 1 and 2 are in favour of the shipper, and

provide that it shall not be lawful for a shipowner to exempt himself from liability for damage to the cargo arising from the negligence of himself or his crew. Sect. 3 is in favour of the shipowner, and provides for his exemption from liability in certain cases if he shall have exercised due diligence to make the vessel in all respects seaworthy. Does that mean that by means of his own eyes and hands he is to make the ship seaworthy? It is impossible that that should be the meaning. It must mean that he is to exercise due diligence both personally and through his agent. That is what the defendants have to prove here. Now, it is not denied that the carpenter employed by the defendants did not use due diligence in seeing that the ship was seaworthy when she left Baltimore. Therefore the defendants have not shown that they have fulfilled the condition without which the rest of the clause exempting them from liability does not come into play. It is therefore unnecessary to give any opinion as to the meaning of the words used in the other part of the clause, "faults or errors in navigation or in the management of the ship." One word with regard to the case of *Carmichael* and *Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (*ubi sup.*). That case has no application to this. It arose on a policy of insurance against loss or damage to goods caused by the "improper navigation of the ship carrying the goods." A loss was caused by water getting through a port which had been insufficiently fastened and damaging the goods. The court held that the damage arose from improper navigation of the ship. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Walker, Son,* and *Field,* for *Weightman, Pedder,* and *Weightman,* Liverpool.

Solicitor for the defendants, *Alfred Bright,* for *Bateson* and *Co.,* Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 7, 8, 28, *June* 26 *and* 29.

(Before STIRLING, J.)

HOWARD *v.* FANSHAWE. (*a*)

Landlord and tenant—Lease—Forfeiture for nonpayment of rent—Peaceable re-entry by landlord—Right of tenant to relief—Chose in action—Bankruptcy of tenant—Assignment of lease by trustee in bankruptcy—4 Geo. 2, c. 28, s. 4—Common Law Procedure Act 1852 (15 *&* 16 *Vict. c.* 76), *ss.* 210, 211, 212—*Bankruptcy Act* 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 44, 168.

The ground upon which the court gives relief in cases of forfeiture for nonpayment of rent is, that the proviso for re-entry is in the view of the court simply a security for the rent. It is immaterial, therefore, for this purpose whether the lessor obtains possession of the premises by peaceable re-entry or by process of ejectment.

By sect. 212 *of the Common Law Procedure Act* 1852, *on a tenant paying the rent in arrear and costs the proceedings in ejectment are to cease, and if relieved in equity he is to hold the demised premises according to the lease thereof made, without any new lease.*

Held, that the section was a remedial one, and was applicable not only to cases in which there had been proceedings in ejectment, but also to cases in which the landlord had recovered possession by peaceable re-entry.

The right of a lessee to be relieved from the forfeiture of a lease for nonpayment of rent is a chose in action, *and vests on his bankruptcy in his trustee, who is entitled to sell and assign such right to a purchaser.*

Seear *v.* Lawson (42 *L. T. Rep.* 893; 15 *Ch. Div.* 426), *and* Guy *v.* Churchill (60 *L. T. Rep.* 473; 40 *Ch. Div.* 481) *applied.*

TRIAL OF ACTION.

Some time previously to Dec. 1892 the defendant entered into an agreement with Lewis Etheridge, a builder, for the erection of certain dwelling-houses in Stanley-road, in the parish of Dagenham, in the county of Essex, and for the granting to Etheridge of leases of the houses so to be erected.

On the 2nd Dec. 1892 the defendant granted to Etheridge a lease of No. 5, Stanley-road, for ninety-nine years from the 25th March 1892, at a peppercorn rent for the first year, and thereafter at the rent of 5*l.* paid quarterly. When this lease was granted No. 5, Stanley-road was not completed, and Etheridge could not have required it to be made; but the lease was actually given to him by the defendant for the express purpose of raising money thereon.

On the 14th Dec. 1892 Etheridge deposited the lease with the plaintiff by way of security for an advance of 200*l.* and interest. In like manner a lease of No. 1, Stanley-road, was granted to Etheridge on the 22nd Dec. 1892, and was on the 14th April 1893 deposited with the plaintiff to secure another sum of 200*l.* and interest.

The leases dealt with the houses as completed. Each lease contained a proviso enabling the lessor to re-enter on any part of the demised premises in the name of the whole "if and when any part of the rent hereby reserved shall be in arrear for twenty-one days next after the same shall have become due, whether the same shall have been legally demanded or not, or if the lessee, his executors, administrators, or assigns, shall not truly observe and perform all and singular the covenants and provisions hereinbefore contained." "And thereupon," it was provided, "the term hereby granted shall absolutely determine."

On the 6th Feb. 1894 Etheridge was adjudicated a bankrupt. At this date the houses Nos. 1 and 5, Stanley-road, were incomplete. They appeared to have had front doors, but neither back doors nor windows.

On the 20th Feb. 1894 the plaintiff's solicitor saw the defendant's solicitors, and negotiations took place with a view to the plaintiff's title being completed. On the following day, without notice to the plaintiff, a clerk to a land agent, acting under instructions given him by the defendant's solicitors, went to Nos. 1 and 5, Stanley-road, entered each of them by the back door, and affixed to the front door a notice to the effect that possession had been taken on behalf of the defendant.

On the 23rd Feb. 1894 the defendant's solicitors,

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

by letter, gave the plaintiff's solicitor notice that possession had been taken, "in consequence," as was stated, "of breaches of covenant." It was further stated that possession was taken on the 21st Feb., at which date rent was in arrear under both leases.

Thereupon, certain correspondence took place between the solicitors of the plaintiff and defendant, in which the plaintiff's solicitor stated that his client would either take an assignment of the old leases from the trustee in bankruptcy, and complete the buildings, or else take a new lease. On the 25th April the defendant's solicitors wrote, intimating that their client could not grant fresh leases without provision for claims which he had against Etheridge in respect of bricks supplied to him and sand taken by him from the property, amounting to 81*l.* 8*s.* 6*d.*

On the 4th May the plaintiff's solicitor wrote, stating that his client declined to pay anything whatever beyond the costs of the new leases; but that, if the new leases were granted, he would at once proceed to complete the property.

On the 28th May 1894 the defendant's solicitors wrote, stating that the houses were to be sold.

On the 28th June 1894 the plaintiff tendered to the defendant the sum of 9*l.* 7*s.* 6*d.*, the amount of the ground rent in arrear, but the tender was refused.

By a deed, dated the 5th July 1894, the trustee in bankruptcy of Etheridge, in consideration of 5*l.*, assigned to the plaintiff all his interest in Nos. 1 and 5, Stanley-road.

On the 6th July 1894 the plaintiff brought this action, claiming possession of the properties comprised in the leases at the rents and under and subject to the lessee's covenants and conditions in such leases respectively reserved and contained; and relief from any forfeiture of the said leases on payment of the rents reserved by the leases respectively, or on such terms as the court should think just.

Apart from the nonpayment of the rent, it was not at the trial alleged that any breach of covenant had been committed which would justify the re-entry; and the question was whether, under these circumstances, the plaintiff was entitled to be relieved from the forfeiture.

The Common Law Procedure Act provides (sect. 210) with regard to proceedings in ejectment by a landlord for nonpayment of rent, that if a lessee or his assignee shall permit and suffer judgment to be recovered on a trial in ejectment and execution to be executed thereon without paying the rent and arrears together with full costs, and without proceeding for relief in equity within six months after such execution executed, then the lessee and his assignee shall be barred and foreclosed from all relief or remedy in law or equity, and the landlord shall thenceforth hold the demised premises discharged from the lease.

Sect. 211 provides that if the lessee shall within the time aforesaid proceed for relief in any court of equity, he shall not have or continue any injunction "against the proceedings at law on such ejectment," unless he shall within forty days next after a full and perfect answer shall be made by the claimant in such ejectment bring into court, and lodge with the proper officer such sum of money as the landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the suit.

Sect. 212 is as follows:

> If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord . . . or pay into court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease.

Stroud for plaintiff.—The right of re-entry on forfeiture of a lease for nonpayment of rent is a mere security for the payment of the rent; and there is the same ground for relief as in the case of forfeiture for nonpayment of a mortgage debt on the day appointed: (Storey's Equity Jurisprudence, 12th edit., vol. 2, sect. 1315, p. 559.) The rule was laid down by Lord Nottingham in *Cage* v. *Russel* (2 Vent. 352), "that a forfeiture should not bind where a thing may be done afterwards or a compensation made for it. As where the condition was to pay money or the like." That rule was applied to forfeiture of leases for nonpayment of rent:

Wadman v. *Calcraft*, 10 Ves. 68, 69;
Sanders v. *Pope*, 12 Ves. 282;
Davis v. *West*, 12 Ves. 475;
Hill v. *Barclay*, 18 Ves. 59, 60;
Reynolds v. *Pitt*, 19 Ves. 140:
Elliott v. *Turner*, 13 Sim. 484.

It would be a strange anomaly if relief could be given where a lessor has proceeded in ejectment to judgment and actual execution (4 Geo. 2, c. 28, s. 2, and the Common Law Procedure Act 1852, sects. 210, 211, 212), and yet that there can be no relief if the lessor, as here, has taken peaceable possession without suit. In *Grimston* v. *Bruce* (2 Vern. 594; 1 Salk. 156) relief was given to a devisee of lands on a breach of condition although the heir had entered without action.

R. G. Wood for the defendant.—If there is any right here to redeem it is not assignable and cannot be demanded by the plaintiff, who was not the original lessee. But there is no right to relief, and no power to give relief, because the lessor has entered without action. *Grimston* v. *Bruce* (*ubi sup.*) was not a case of landlord and tenant. [STIRLING, J.—Why should my arm be shortened by the fact that the lessor himself obtained peaceable possession?] Because the origin of 4 Geo. 2, c. 28, was to restrain proceedings at law, and that defines the jurisdiction to give relief. The preamble shows this where it speaks of the lessee holding out the lessor by injunction. In that Act and in the Common Law Procedure Act 1852 the Legislature confines itself to cases where the lessor takes legal proceedings. If there were the jurisdiction to give relief where the lessor himself gets peaceable possession without action, there would be some case of that kind to be found in the books. None is to be found, and the court will not create a new precedent.

Stroud in reply.—The jurisdiction to give relief in all cases of forfeiture for nonpayment of money is based on the ancient jurisdiction of the court. The power to give such relief was origi-

nally not confined to any definite time after forfeiture:

Bowser v. *Colby*, 1 Hare, 109, 125.

To remedy this, in cases where a lessor has proceeded to judgment and execution in ejectment, the statutes cited require the lessee to come for relief within six months after execution had. That engrafts an exception which only applies to cases where proceedings have been taken, leaving untouched the ancient jurisdiction in cases not within the statutes:

Davis v. *West* (*ubi sup.*).

Cur. adv. vult.

June 26.—STIRLING, J. stated the facts and continued:—It was admitted in the argument by the learned counsel for the defendant that, if on the 21st Feb. 1894 the defendant had recovered possession by means of legal proceedings taken against Etheridge, the latter or his trustee in bankruptcy would be entitled to be relieved, both under the general jurisdiction of the court, and under the statute 4 Geo. 2, c. 28. It was, however, strongly urged that no relief could be given where the lessor had recovered peaceable possession without the assistance of any court; and in support of this contention reliance was placed, first, on the circumstance that no case could be found in which such relief had been given, and secondly, on the preamble to the 2nd section of the statute just referred to, which was said to amount to a recognition by the Legislature that the right only existed where the demised property had been recovered by legal process. On behalf of the plaintiff it was suggested that the property was not really in the possession of the defendant at all, and there was some evidence that workmen in the employment of Etheridge had been on the property since possession was said to have been resumed by the defendant. In the view which I take I do not think it necessary for me to decide whether or no the defendant's possession was good legal possession. If it were, I should probably come to the conclusion that it was good, because from and after the date of Etheridge's bankruptcy the property vested in his trustee, and as against him the defendant was entitled, subject to any right of law, to re-enter and assume legal possession. Then are the arguments as to the effect of the peaceable possession well founded? I will first consider the grounds on which such relief was formerly given by the Court of Chancery. In *Wadman* v. *Calcraft* (*ubi sup.*) Sir William Grant, M.R. says: "The plaintiff seeks to be relieved against a forfeiture of this lease, which he states to have been incurred solely by nonpayment of rent, and if that is the ground of this ejectment, there is no doubt equity will relieve against the forfeiture; considering the purpose of the clause of re-entry to be only to secure the payment of rent, and that when the rent is paid the end is obtained; and therefore the landlord shall not be permitted to take advantage of the forfeiture." In *Sanders* v. *Pope* (*ubi sup.*, at p. 289) Lord Erskine, L.C., says: "There is no branch of the jurisdiction of this court more delicate than that which goes to restrain the exercise of a legal right. That jurisdiction rests only upon this principle—that one party is taking advantage of a forfeiture; and as a rigid exercise of the legal right would produce a hardship, a great loss and injury on the one hand arising from going to the full extent of the right, while on the other the party may have the full benefit of the contract, as originally framed, the court will interfere; where a clear mode of compensation can be discovered. Of this nature is the case, that constantly occurs, confirmed by statute (4 Geo. 2, c. 28), giving a more ready relief at law: a contract to pay rent, with a covenant and clause of re-entry for breach. The obvious intention is to secure the payment of the rent; that the landlord may not be put to his action of debt, coming from time to time against an insolvent estate; but may be enabled to recover possession of the premises. In that case equity is in the constant course of relieving, the tenant paying the rent and all expenses, and placing his landlord in exactly the same situation; and in that case it is not necessary that the failure in paying the rent should arise from accident, the miscarriage of a letter with a remittance, insolvency, or disease; but even against negligence, the tenant being solvent, and not prevented by any accidental circumstance, equity interferes; and upon payment of the rent and all expenses will not permit the tenant to be turned out of possession; considering, that in the one case frequently great hardship might be the consequence; in the other, the party being placed in the same situation, there is no general hardship." In *Davis* v. *West* (*ubi sup.*) Lord Erskine says: "In the late case of *Sanders* v. *Pope* (*ubi sup.*) I was very unwilling to give relief against breach of other covenants, but was compelled by a series of authorities—*Cage* v. *Russel* (*ubi sup.*), *Northcote* v. *Duke* (Amb. 511), *Hack* v. *Leonard* (9 Mod. 90), *Wafer* v. *Mocatto* (9 Mod. 112), *Eaton* v. *Lyon* (3 Ves. 690)—establishing that, where covenants are broken, and there is no fraud, and the party is capable of giving complete compensation, it is the province of a court of equity to interfere, and give the relief against the forfeiture for breach of other covenants, as well as that for payment of rent; and the only distinction is, that in the latter case it is considered so clear, that the object of the clause for re-entry is only to secure the payment of the rent, that the Legislature interposed, and made it unnecessary to come into equity; allowing the tenant, upon the terms and within the time specified by the Act (4 Geo. 2, c. 28), to stop the ejectment; leaving the ancient jurisdiction of equity in every other case untouched." The view there expressed as to other covenants has not been altogether approved, but as regards relief from forfeiture of a lease the principle seems to be well established. In *Bowser* v. *Colby* (*ubi sup.*) the question was raised as to the redemption of a lease which had become forfeited. Wigram, V.C. there says (at p. 128), "The next point taken was, that there are two different species of provisoes in leases; in some, a common clause of re-entry on nonpayment of rent, thereby determining the lease and nothing more; in others, a proviso declaring that, if the rent is not paid, the lease shall be void; and there being in this case a proviso 'that the lease shall become absolutely void,' it is said that there is now nothing for the court to act upon—no lease existing which it can restore to the tenant, and therefore that the court will not interfere. If it could have been shown that a court of equity gave relief only before the landlord had entered, the argument

might have been well founded, but, inasmuch as in most of the cases relief has been given upon bills filed after the landlord has entered, the argument must be fallacious; for when the landlord has entered, the lease is equally at an end in a court of law, whether there is a proviso for re-entry simply, or a proviso that it is to be void on nonpayment of rent." Then after some further observations, which it is not necessary for me to read, he continues (at p. 130), "It appears from the case of *Taylor* v. *Knight* (4 Vin. Abr. Ch. pl. 31, p. 406) and from Lord Eldon's observations in *Hill* v. *Barclay* (*ubi sup.*), that the court formerly used to consider (the lease being gone at law by the re-entry) that the only way it could give relief was by creating a new lease, until the statute, recognising the right of the tenant to be relieved, dispensed with that form of relief, and declared that the last lease should be deemed to have continuance. The analogy to the case of mortgages fortifies the same reasoning. The object of the proviso in both cases is to secure to the landlord the payment of his rent; and the principle of the court is—whether right or wrong is not the question—that if the landlord has his rent paid him at any time, it is as beneficial to him as if it were paid on the prescribed day." The authorities appear to me to establish that the ground on which courts of equity formerly gave relief was that the proviso for re-entry was, in the eye of the court, simply a security for the rent; and on principle I cannot see that it makes any difference whether the lessor avails himself of such security with or without the assistance of a court of law. It is, no doubt, remarkable that no reported case appears to have occurred in which relief was given where the landlord re-entered peaceably, and without bringing ejectment; but it is to be remembered that re-entry in this way can be but seldom effected. Then, as to the preamble to sect. 2 of the Act of 4 Geo. 2. That is as follows: "Whereas, great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for nonpayment of rent, by reason of the many niceties that attend re-entry at common law; and forasmuch as when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay, of recovering in ejectment before he can obtain the actual possession of the demised premises; and it often happens that, after such re-entry made, the lessee or his assignee, upon one or more bills filed in the court of equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur." It is to be observed that in terms the Act seems to contemplate the necessity of an ejectment in every case; but the existence of cases of peaceable re-entry on vacant premises may have been overlooked, or may have been considered of so infrequent occurrence that they were not considered to give rise to any grievance. The statute fixes a period of six months only from recovery in ejectment within which an application for relief may be made, and it is said that the whole evil which the Act was passed to remove would be re-introduced if it were to be held that the jurisdiction to give relief were to be applied in a case where peaceable possession had been taken. Upon that two observations may be made: first, that, if the landlord desires to limit the time within which the tenant can apply for relief, he can avail himself of the processes established by statute for that; and secondly, that it does not follow that a court of equity would now grant relief at any distance of time from the happening of the event which gave rise to it. It appears to me that, inasmuch as the inconvenience of so doing has been recognised by the Legislature, and a time has been fixed after which, in a case of ejectment, no proceedings for relief can be taken, a similar period might well be fixed, by analogy, within which an application for general relief in equity must be made. A court of equity would probably say that the action for relief must be brought within six months from the resumption of peacable possession by the lessor. I think, then, that if the lease had remained vested in Etheridge, or his trustee in bankruptcy, he or his trustee would have been entitled to relief. It was said, however, that the right was personal to the lessee, and that relief could not be given to his mortgagee. It is unnecessary to consider whether a mortgagee is, by virtue of his mortgage, entitled to be relieved from a forfeiture. It would appear from the case of *Hare* v. *Elmes* (68 L. T. Rep. 223; (1893) 1 Q. B. 904), that relief would not, as a rule, be given to an under-lessee or mortgagee in the absence of the original lessee; but in the present case the mortgagor has become bankrupt, and the mortgagee has obtained from the trustee in bankruptcy an assignment of the equity of redemption in consideration of a payment of 5*l*. Now, by sect. 44 of the Bankruptcy Act 1883, all property of the bankrupt vests in the trustee, and by sect. 168 property includes things in action. The right of the bankrupt to be relieved of a forfeiture appears to me to be a thing in action, and to have become vested in the trustee in bankruptcy; and the trustee was entitled to sell the right and assign it to a purchaser: (*Seear* v. *Lawson*, 42 L. T. Rep. 893; 15 Ch. Div. 426; *Guy* v. *Churchill*, 60 L. T. Rep. 473; 40 Ch. Div. 481.) I think, therefore, that the plaintiff is entitled to bring the action. Lastly, it was contended that the plaintiff had deprived himself of his right to relief by the position which he took up in the interval between the 21st Feb. and the bringing of the action, and, in particular, by the letter of the 4th May 1894, in which he declined to pay anything to the defendant except the costs of a new lease. I am unable to take this view of the plaintiff's conduct. I think that the correspondence does not show a refusal by the plaintiff to pay the arrears of rent, but merely a refusal to pay certain sums of money which the defendant had no right to claim. In my opinion, therefore, the plaintiff is entitled to the relief for which he asks.

At the conclusion of the judgment a question was raised whether the plaintiff was entitled to the relief given without a new lease, or whether a new lease should be granted. Stirling, J. directed minutes to be prepared and the case to come into the paper on the 29th June to be spoken to on the minutes.

June 29.—Minutes having accordingly been prepared, the case again came on.

Stroud for the plaintiff.—Sect. 212 of the Common Law Procedure Act 1852 is not to be

confined to cases where a landlord has recovered the premises by proceedings in ejectment, but extends to cases where the landlord has obtained possession by peaceable re-entry. It is, therefore, unnecessary that a new lease should be granted. He referred to

Bowser v. *Colby* (*ubi sup.*).

J. G. Wood for the defendant—The practice of the court formerly, in cases like the present, was to order a new lease to be granted:

Taylor v. *Knight*, 4 Vin. Abr. Ch. pl. 31, p. 406.

Sect. 212 of the Act of 1852 does not apply, as it is confined to cases where proceedings in ejectment have been taken.

Stroud replied.

STIRLING, J.—The point which has now been raised is a difficult one. I do not think, on the whole, that sect. 212 of the Common Law Procedure Act 1852 should be read as limited to a case where proceedings in ejectment have been taken. The series of sections begins with sect. 210. [His Lordship referred to the section, and continued:] Then sect. 211 deals with what is to take place where a lessee comes for relief in equity. It has already been decided by Wigram, V.C., in *Bowser* v. *Colby* (*ubi sup.*), that that section does not apply where there has been no application for an injunction. Then sect. 212 reverts to proceedings where there has been ejectment. [His Lordship read the section, and continued:] The question is, whether the words "such lessee" and "such proceedings as aforesaid," relate merely to a lessee, and proceedings taken by him, when there have been proceedings in ejectment; or whether the section applies to any case where there is an application to a court consequent upon a forfeiture. The statute is a remedial one, and should, I think, be read as widely as possible. Probably what the Legislature had in contemplation when the Act was passed was a case where there had been proceedings in ejectment, as that would be the most prominent case; but the latter part of the section is not, I think, so expressed as to compel me to hold that all proceedings are excluded where there has been no ejectment. I think, therefore, I may add to my judgment a declaration that the plaintiff shall have, hold, and enjoy the demised property, according to the leases thereof, mentioned in the statement of claim, without any new lease, following the words of sect. 212 of the Act. He must, of course, pay the rent, and the defendant must thereupon deliver up possession to him. The plaintiff must bear the costs of the action, except so far as they have been increased by the defendant resisting his claim, and those costs must be borne by the defendant.

Solicitors: *H. C. Barker*; *Flower, Nussey*, and *Fellowes*.

Tuesday, July 23.

(Before STIRLING, J.)

MIDDLETON *v.* BRADLEY. (*a*)

Patent—Practice—Costs—Taxation—Particulars of objections—Certificate—Action not brought to trial—Patent Law Amendment Act 1852 (15 *&* 16 *Vict. c.* 83), *s.* 43—*Patents, Designs, and Trade Marks Act* 1883 (46 *&* 47 *Vict. c.* 57), *s.* 29, *sub-sect.* (6).

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

Sub-sect. (6) *of sect.* 29 *of the Patents, Designs, and Trade Marks Act* 1883 *is not confined to a case where the action has been tried.*

ADJOURNED SUMMONS.

The action was brought to restrain the alleged infringement of a patent, and to prevent the defendant from passing off his goods as those of the plaintiff. After the defendant had delivered his statement of defence and particulars of objections, the plaintiff amended his statement of claim by striking out all that related to the infringement of the patent Thereupon an order was made to tax the costs relating to that part of the action, and the taxing master in so doing had disallowed all the costs of the defendant's particulars of objections on the ground that there was no certificate of the court or a judge that they were "reasonable and proper" as required by the Patents, Designs, and Trade Marks Act 1883, sect. 29, sub-sect. (6).

This was a summons taken out by the defendant to review the taxing master's certificate.

The Patents, Designs, and Trade Marks Act 1883, sect. 29, provides:

(1.) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or, by order of the court or the judge, at any subsequent time, particulars of the breaches complained of.

(2.) The defendant must deliver with his statement of defence, or, by order of the court or a judge at any subsequent time, particulars of any objections on which he relies in support thereof.

(3.) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty must state the time and place of the previous publication or user alleged by him.

(4.) At the hearing no evidence shall, except by leave or the court or a judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered.

(5.) Particulars delivered may be from time to time amended by leave of the court or a judge.

(6.) On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case.

W. N. Lawson for the summons.—The defendant ought to be allowed the costs of his particulars of objections. Sub-sect. (6) of sect. 29 of the Act of 1883 does not apply where the action does not come on for trial. The Patent Law Amendment Act 1852, which was repealed by the Act of 1883, provided (sect. 43) that the plaintiff and defendant respectively should not be allowed any costs in respect of any particulars unless certified by the judge before whom the trial was had to have been proved by such plaintiff or defendant respectively. Under that section it was held that, where a plaintiff had abandoned his action before trial, the defendant was entitled to the costs of his particulars:

Greaves v. *Eastern Counties Railway Company*, 33 L. T. Rep. O. S. 162; 1 E. & E. 961.

The section was also held not to apply to a case of a plaintiff dismissing his own bill before hearing:

Batley v. *Kynock*, L. Rep. 20 Eq. 632.

That section is now replaced by sect. 29 of the

Act of 1883, and I submit the former practice should be followed. Here the plaintiff has, by amending his statement of claim, and striking out all the allegations as to infringement, withdrawn them from the knowledge of the court, and thus prevented the court from certifying whether the particulars of objections are "reasonable and proper" within sub-sect. 29. *Mandleberg* v. *Morley* (72 L. T. Rep. 106; 12 Rep. Pat. Cas. 35), *Longbottom* v. *Shaw* (6 Rep. Pat. Cas. 143), and *Germ Milling Company* v. *Robinson* (55 L. T. Rep. 283; 3 Rep. Pat. Cas. 255), are distinguishable, on the ground that, in those cases, the particulars of objection were before the court. He also referred to

Boake, Roberts, and Co. v. *Stevenson and Howell*, 12 Rep. Pat. Cas. 229;
Peddell v. *Kiddle*, 7 T. R. 659;
Rothwell v. *King*, 4 Rep. Pat. Cas. 397.

A. J. Walter for the plaintiff.—The taxing master's certificate is right. The case is covered by *Mandleberg* v. *Morley* (*ubi sup.*). The words "reasonable and proper" in sub-sect. (6) of sect. 29 must be taken to include the case where no opportunity has been afforded the court of considering the defendant's particulars of objections. The sub-section is imperative upon the taxing master. *Greaves* v. *Eastern Counties Railway Company* (*ubi sup.*) and *Batley* v. *Kynock* (*ubi sup.*) do not apply. They were both decided upon sect. 43 of the Act of 1852, by which the requirement of a certificate was expressly limited to the case where there had been a trial. He also referred to

Cole v. *Saqui and Lawrence*, 59 L. T. Rep. 877; 40 Ch. Div. 132;
Boyd v. *Horrocks*, 6 Rep. Pat. Cas. 41.

Lawson replied.

STIRLING, J. stated the facts and continued:—It is said that in this case there has been no opportunity of obtaining any certificate, and that the case is therefore outside the Act altogether. Sect. 29 of the Act of 1883 deals with the whole subject of particulars. It provides that the plaintiff must deliver particulars of the breaches complained of, and the defendant particulars of the objections he relies on in support of his defence. Then, under sub-sect. (6) it is essential for obtaining any costs with reference to any particulars, that there should be a certificate by the court or a judge that the particulars of breach have been proven, or that the particulars of objections are reasonable and proper. It is said that in this case there was no opportunity of obtaining any certificate as the action was really dismissed by the plaintiff of his own motion, and in support of that reference was made to *Greaves* v. *Eastern Counties Railway Company* (*ubi sup.*). and *Batley* v. *Kynock* (*ubi sup.*), which were both decided on the Act of 1852. Sect. 43 of that Act deals with costs of particulars alone, and it provides that "the plaintiff and defendant respectively shall not be allowed any costs in respect of any particulars unless certified by the judge before whom the trial was had to have been proved by such plaintiff or defendant respectively." Upon that it was held, in *Greaves* v. *Eastern Counties Railway Company* (*ubi sup.*), and *Batley* v. *Kynock* (*ubi sup.*), that where the action did not come to trial, the defendant was nevertheless entitled to the costs of his particulars. The ground of those decisions was, that sect. 43 of the Act of 1852 contemplated only a case where the action was brought to trial and tried, and that the general right to costs which was conferred by the Statute of Gloucester was not taken away in a case where the action was not brought to trial or tried. But I have to deal with a different Act, and different language. Under the present Act, the Act of 1883, the certificate is to be given by the court or a judge, not by the judge who tried the action. It is said that, where there is no trial, a defendant cannot get any decision of the court as to the propriety of his objections. I am not satisfied that that is so. It may be that there has been a motion in the case, or some other interlocutory application, perhaps with reference to the particulars themselves, upon which the court may have had an opportunity of coming to a conclusion on the subject. I cannot come to the conclusion that sub-sect. (6) of sect. 69 is limited to the case where an action is brought on for trial, and tried. The certificate is to be given by the "court or a judge," and that is the language used throughout the preceding sub-sections, all of which seem to refer to interlocutory applications. I think, therefore, that the taxing master was right. No doubt this view of the section may sometimes cause hardship to defendants who are in the position of this defendant, but that may also occur where an action is brought to trial, and not tried out, and the judge has no means of deciding whether the objections are reasonable or not. Whether that difficulty can be got over is not for me to say; I have only to deal with the Act, and I think that sub-sect. (6) of sect. 29 is not confined to a case where the action has come on for trial, so that the reasoning on which *Greaves* v. *Eastern Counties Railway Company* (*ubi sup.*) was decided does not apply. Under the circumstances I cannot do otherwise than say that I agree with the taxing master, and must dismiss the summons.

Solicitors: *J. H.* and *J. Y. Johnson*; *Vincent* and *Vincent*, for *Middleton* and *Sons*, Leeds.

June 13 *and July* 24.

(Before STIRLING, J.)

RUTTER *v.* EVERETT. (*a*)

Receiver—Book-debts—Trustee in bankruptcy—Order and disposition—Notice—Bankruptcy Act 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 44, *sub-sect.* 2 (*iii.*); 49*d.*

In Dec. 1891 *the defendant mortgaged to the plaintiffs certain leasehold premises, trade marks, his business of a tobacconist and book-debts to secure* 1000*l. and interest, the whole sum to be payable upon default of payment of instalments for fourteen days. The deed contained no power to appoint a receiver. In Nov.* 1892 *default was made, and the plaintiffs, under the powers in the Conveyancing Act* 1881, *appointed F. receiver, and he took possession of the premises and carried on the business. On the* 16*th May* 1893 *the defendant committed an act of bankruptcy. On the* 17*th May the present action was commenced for foreclosure and a receiver, and on the* 19*th May F. was appointed receiver and manager. On the* 18*th May the defendant excluded F. from possession of the premises.*

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

A receiving order founded on the act of bankruptcy of the 16th May was on the 16th June made against the defendant, and he was subsequently adjudicated bankrupt.

Neither the plaintiffs nor F. ever gave the bankrupt's debtors notice of the mortgage.

The receiver in the course of his management received book-debts due to the bankrupt at the commencement of the bankruptcy to the amount of 400l.

Held, that the trustee in bankruptcy was entitled to the sum so received.

THIS was a question arising on the accounts of the receiver and manager of a bankrupt mortgagor's business and adjourned into court, as to the ownership of certain moneys, book-debts owing to the mortgagor before his bankruptcy, which had been paid to the receiver and were now claimed by the trustee in bankruptcy of the mortgagor.

The facts of the case, substantially as set out in the judgment of Stirling, J., were as follows:—

By a deed dated the 31st Dec. 1891, the defendant, Henry William Everett (who then carried on the business of a tobacconist at No. 289, Oxford-street and elsewhere) demised No. 289, Oxford-street, to the plaintiffs for the residue of a term of twelve and a half years, less ten days, by way of mortgage, to secure the repayment of 1000l. with interest; and also assigned, by way of further security, certain trade marks, the goodwill and connection of the business of a tobacconist, and also "all moneys to be received by or owing to" the mortgagor in respect of his business of a tobacconist. The 1000l. was to be repaid by monthly instalments, and it was provided that, if the mortgagor should make default in payment of an instalment for fourteen days, the whole should become payable forthwith. The deed contained no express power of appointing a receiver.

In Nov. 1892 default was made in payment of an instalment in accordance with the terms of the deed.

On the 9th May 1893 the plaintiffs executed a written instrument as follows:—

We, . . . by virtue of the power conferred on us under the Conveyancing and Law of Property Act 1881 (as mortgagees of the undermentioned property) and of every other power enabling us in this behalf hereby appoint Charles Ford . . . to be receiver of the income of the premises known as No. 289, Oxford-street, in the county of Middlesex, and of the trade marks . . . and the goodwill of the business carried on by Henry William Everett at No. 289, Oxford-street aforesaid, under the style of Wolff, Phillips, and Co., with all the powers by the said Act conferred on a receiver appointed under the provisions thereof, at the remuneration of 5 per cent. on the gross amount of all moneys received by him.

Ford thereupon took possession of No. 289, Oxford-street, and thenceforward carried on the business of a tobacconist there. It was a matter in dispute whether he did or did not take possession of the stock-in-trade on the mortgaged premises.

On the 16th May the defendant called his creditors together, and, at the meeting, committed an act of bankruptcy by informing them that he was unable to pay his debts, and had suspended payment.

On the 17th May the plaintiffs commenced the present action by originating summons for foreclosure of the mortgaged property.

On the 18th May Everett excluded Ford from possession of No. 289, Oxford-street, and kept the shop closed during the day for the purpose, as Everett alleged, of preventing Ford from selling the stock-in-trade.

On the 19th May an order was made in the action whereby, without prejudice to the power already possessed by him as receiver under the Conveyancing and Law of Property Act 1881, Ford was appointed receiver of the leasehold premises, No. 289, Oxford-street, of the trade marks, and of all moneys to be received by or owing to the defendant in respect of the business of a tobacconist carried on by the defendant on the said premises under the style of Wolff, Phillips, and Co., and to manage the business.

On the 16th June a receiving order was made against the defendant founded on the act of bankruptcy committed by him on the 16th May. The defendant was subsequently adjudicated bankrupt, and on the 24th Oct. 1893 the trustee in the bankruptcy was made a defendant to the action.

Neither the plaintiffs nor the receiver ever gave the debtors of the bankrupt any notice of the assignment of the 31st Dec. 1891. The receiver carried on the business, and in the course of the management received book-debts due to the bankrupt at the commencement of the bankruptcy to the amount of over 400l. Upon the receiver's account being taken into chambers, the trustee in the bankruptcy claimed such amount as representing book-debts in the order and disposition of the bankrupt with the consent of the true owner at the commencement of the bankruptcy. The question of such validity was adjourned into court.

H. T. Eve for the trustee in bankruptcy.—The debtor never received notice of the appointment of a receiver, nor did the receiver give the trustee in bankruptcy notice of his appointment. I am entitled to the book-debts in priority to the mortgagees, for they did not get possession of them before my title accrued. The question is, how far in a deed there would be a power to appoint a receiver of the mortgaged property itself. Book-debts are not income of the mortgaged property. The appointment of the 9th May was altogether inoperative, so far as concerns the book-debts. We rest our title on the order and disposition clause sect. 44, sub-sect. 2 (iii.), of the Bankruptcy Act 1883, "All goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business." Book-debts are "goods" within the meaning of that section. The receiver ought to have given notice to the debtors of the bankrupt: (*Tailby* v. *The Official Receiver*, 13 App. Cas. 523.) See at p. 534, where Lord Watson says that, in the case of book-debts, as in the case of *choses in action* generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. Here there is a good equitable assignment of the book-debts never completed by notice:

Ryall v. *Rowles*, 1 Ves. sen. 348;
Edwards v. *Martin*, 13 L. T. Rep. 326; L. Rep. 1 Eq. 121.

In those cases no receiver had been appointed. There was no completed possession prior to the bankruptcy. [STIRLING, J.—Is there no case in which the duties of the receiver of book-debts has been discussed?] I have not been able to find any.

Cooper Willis, Q.C. and *J. G. Butcher* for the plaintiffs.—The mere fact of an appointment of a receiver by the court clearly takes the goods out of the order and disposition of the bankrupt:

Taylor v. *Eckersley*, 36 L. T. Rep. 442; 5 Ch. Div. 740 (see judgment of Bacon, V.C., 36 L. T. Rep., at p. 443; 5 Ch. Div., at p. 744).

There is no distinction as to the description of the goods. What the court has to determine is, whether the goods were in the order and disposition of the bankrupt with our consent. [STIRLING, J.—But if you do not give notice you must be taken to be consenting.] The receiver is an officer of the court, and his appointment operates as an injunction to the bankrupt not to receive debts due to him. Assuming that the order was made immediately before or at the time that the act of bankruptcy was committed, the fact of the application for a receiver is sufficient to show that we no longer consent. On the 19th May we had obtained an injunction restraining Everett from receiving the goods, and, after that date, they could not, without our consent, be in his order and disposition. The only person to receive these debts was the individual on the premises. They were all received before Jan. 1894. Up to that time the trustee in bankruptcy made no claim, and he gave no notice while these debts were being paid. Our consent really came to an end on the 17th May, and culminated in the appointment of a receiver on the 19th May. Our writ, claiming appointment of a receiver, was issued on the 17th May, at which time we had no notice of an act of bankruptcy. We were, therefore, within sect. 49 (*d*) of the Bankruptcy Act 1883. This was a "dealing." Anything which puts an end to the consent is a dealing within the meaning of that section:

Brewin v. *Short*, 5 E. & B. 227.

A notice to the debtors not to pay is not so strong as an injunction by the court to the bankrupt against receiving. The moment the order is made the goods are not in the disposition of the bankrupt:

Ex parte Ward; Re Couston, 27 L. T. Rep. 502; L. Rep. 8 Ch. App. 144; 42 L. J. 17, Bank.

To prove determination of consent very little need be shown:

Ex parte Kelsall; Re Beattie, De Gex Cas. in Bank. 352.

It is sufficient where, without notice of an act of bankruptcy, a demand is made, or an order obtained, or a writ issued, claiming the goods. The effect of sect. 49 is to place us in the same position as if no act of bankruptcy had been committed.

Eve in reply.—The whole point in issue is whether the receiver in fact ever got possession. These *choses in action* are not possessed until actually paid. In the cases cited against me possession had been obtained. *Ex parte Ward* has nothing to do with the present case. There there was a good custom, which the law would recognise, and that excluded order and disposition. What is the effect of the appointment of an official receiver? Sect. 44 of the Bankruptcy Act 1883 defines the property divisible among creditors, and shows the effect on *choses in action* of the appointment of the official receiver as trustee. Sect. 50, sub-sect. 5, enacts that, "Where any part of the property of the bankrupt consists of things in action such things shall be deemed to have been duly assigned to the trustee." Here there was an assignment to the trustee in bankruptcy of *choses in action* on the 16th May, to which date his title related back. The mere appointment of a receiver under the Conveyancing Act does not complete the possession of the mortgagors unless they give notice. Consequently the assignment to the trustee was not rendered inoperative by the appointment of the receiver:

Wigram v. *Buckley*, 71 L. T. Rep. 287, 290, 291; (1894) 3 Ch. 483, 491, 494.

[STIRLING, J.—That does not cover this case. The point against you is, that the consent was determined, and so the goods are not within the order and disposition clause.] I rely also on

Edwards v. *Martin* (*ubi sup.*).

Was there any withdrawal of consent prior to the act of bankruptcy? The only withdrawal was an ineffectual attempt to appoint a receiver. It was an appointment of a receiver of the income of property. There was no power to appoint a receiver of book-debts. There was no withdrawal before the 16th May, and after that the receiving order being gazetted was notice to all the world. The issue of the writ and the appointment of a receiver is not a dealing for valuable consideration within sect. 49 of the Act. The only dealing for valuable consideration was that of the 31st Dec. 1891, which was not completed.

Cur. adv. vult.

July 24.—STIRLING, J. gave judgment, and after stating the facts of the case as above set out proceeded as follows:—On behalf of the plaintiffs it was not disputed that the debts were at the commencement of the bankruptcy in the order and disposition of the bankrupt, but it was contended that they were not in such order or disposition with the consent of the true owners, the plaintiffs; or that, at all events, they were not in such order or disposition with such consent on or after the 17th May, at which date, as I have found, the plaintiffs had no notice of any act of bankruptcy on the part of Everett. In support of the contention that the debts were not in the order and disposition of the bankrupt with their consent the plaintiffs rely in the first place on the instrument of 9th May 1893. It is objected by the trustee in bankruptcy that this instrument does not in terms include the book-debts, and further that the Conveyancing Act 1881 (see sects. 19 and 24) only enables a mortgagee to appoint a receiver of the "income of the mortgaged property," and that the book-debts are not such income, but constitute the mortgaged property itself. There is certainly weight in these objections; but they do not appear to conclude the case in favour of the trustee in bankruptcy. It may be that the acts of the receiver, although not authorised by the instrument in question ratified by the plaintiffs, amount to or are evidence of a termination of their consent to the receipt of the debts by the bankrupt, and I pause

to consider how the law on this point stands. As a general rule, the assignee of a debt, in order to take it out of the order and disposition of the assignor, is bound to give notice of the assignment to the debtor. This is laid down in *Bartlett* v. *Bartlett* (29 L. T. Rep. O. S. 135; 1 De G. & J. 127). There the subject-matter of the assignment was a reversionary interest in a fund in court, and there had been prior to the case some conflict of opinion as to whether it was necessary in such a case to give notice. Turner, L.J. in the case was dealing with an earlier Bankruptcy Act, but his observations appear to me to be equally applicable to that which is now in force. In the course of his judgment he expressed himself as follows (29 L. T. Rep. O. S., at p. 136; 1 De G. & J., at p. 140): "Looking at the question upon principle, what is the object of the enactment? Clearly to prevent credit being obtained by an apparent ownership assumed with the consent and permission of the true owner. To confine the enactment to cases in which there is a visible ownership would be to subvert decisions without end upon the subject, nor would it be consistent with the object of the enactment, for credit may be got as readily on property in which there is not, as upon property in which there is, visible ownership. Considering, then, the enactment to extend to personal chattels in which there is no visible ownership, when (to adopt the language of the statute) is a bankrupt to be said, by the consent and permission of the true owner, to have had in his possession, order, or disposition goods and chattels of this description, whereof he was the reputed owner, or whereof he has taken upon himself the sole alteration or disposition as owner? How is the true owner to prevent the reputed ownership? How can it be prevented otherwise than by notice to the person who is under liability in respect of the chattels? The law has said this is the mode of preventing reputed ownership as to debts; and is there to be one law as to debts and another as to legacies? The plain object of the statute is that the true owner shall not permit the order and disposition to remain with the bankrupt; and, if he does not take the steps which are necessary to prevent it, surely he must be taken to permit it." It is not, however, to be inferred that it is absolutely necessary, as regards goods, that they should be in the actual possession of the true owner at the commencement of the bankruptcy, or, as regards chattels "in which there is no visible ownership," that notice should be given before the time. In *Smith* v. *Topping* (5 B. & Ad. 674) the true owner of goods permitted them to remain in the possession of the bankrupt until the day before the commencement of the bankruptcy, and then demanded them to be given up, but was met by a refusal; and it was held that, at the commencement of the bankruptcy, the goods were not in the possession of the bankrupt with the consent of the true owner. And this decision was acted upon by the Court of Appeal in *Ex parte Ward; Re Couston* (27 L. T. Rep. 502; L. Rep. 8 Ch. App. 144), where the goods of which possession had been demanded from the bankrupt were not actually in his hands, but in those of a warehouseman to whom no notice was given. The facts of the case were these: In Dec. 1870 W. bought from C. whisky in bond, to remain in bond to C.'s order rent free for twelve months, after which warehouse rent was to be paid. In March 1871 the price was paid. On the 19th Feb. 1872 W. wrote to C., directing him to forward a specified hogshead of the whisky, and inclosing a cheque of sufficient amount to pay duty and clear the whisky. On the 26th C. filed a petition for liquidation, having retained the cheque, but not paid the duty, or in any way complied with W.'s directions. At the time of the sale the whisky had been all carried to W.'s credit in C.'s books, but had throughout been lying to C.'s order at a dock warehouse. The judgment of Mellish, L.J. is in these terms (27 L. T. Rep., at p. 504; L. Rep. 8 Ch. App., at p. 148): "The question then is, was it at the time of the bankruptcy within the order and disposition of the bankrupts with the consent of the true owner? It is clear law, as laid down in *Smith* v. *Topping*, and other cases, that if the true owner *bonâ fide* demands possession with a view of taking possession before the bankruptcy, though, from no fault of his own, he fails to get it, the goods are not within the possession of the bankrupt with his consent. This case is within that rule. There was a demand of possession, and nothing to show that it was not a *bonâ fide* demand. The only difference between this and the ordinary case is, that here the property was not in the actual possession of the bankrupts, but of another warehouseman, and the Chief Judge appears to have gone upon this; but it appears to me to make no difference, for though, in order to take the goods out of the possession of the bankrupts, notice must have been given to the warehouseman, still for the purpose of determining the consent of the true owner the bankrupts were the proper persons to receive the notice. The purchaser cannot be in any worse position because the bankrupts did not keep the goods in their own warehouse." Again, in *Belcher* v. *Bellamy* (2 Ex. 303) the assignees of a debt due to a person in this country from a debtor in Australia posted a letter containing notice of the assignment before his assignor became bankrupt, though it did not reach the debtor until after the bankruptcy, and it was held that the debt did not remain in the order and disposition of the bankrupt with the consent of the true owner. There Pollock, C.B. says in his judgment, at p. 308: "The modern rule is that the goods are not deemed to be in the possession of a trader with the consent of the true owner if the latter takes every possible pains to obtain possession of them. The question, then, is whether the true owner in this case consented to the goods remaining in the possession of the bankrupt. He certainly did not; for, immediately he became owner, he took every possible step to give effect to the assignment, namely, by sending notice to the debtor; but before the notice arrived the assignor of the debt became bankrupt. It is urged that because the plaintiff took an assignment of the debt he consented to its remaining with the bankrupt; I cannot agree to that. The assignee took the debt with a right to claim it *instanter*, and he does so as far as time and space will permit." In the same case Parke, B. says, at p. 310: "The real owner was the defendant to whom the debt was assigned. The assignment bound the assignor in equity. When the defendant had taken all proper steps to obtain possession of the debt he became entitled to it, both at law and in equity; and the bankrupt's assignees

could not claim it, unless the defendant had unconscientiously permitted it to remain in the possession of the bankrupt. It appears, however, that he could not prevent it, and everything was done that could be done, so that it is impossible to say that the real owner consented to the bankrupt retaining possession. In *Load* v. *Green* (15 Mee. & W. 216) trover was brought for goods obtained by a party, afterwards bankrupt, with the fraudulent intention of never paying for them, and that was held sufficient to prevent the operation of the statute. According to Mr. Bramwell's argument, in all cases where there is a purchase of goods under such circumstances that the vendee cannot possibly have immediate possession, he consents to their remaining in the possession of the vendor. If that argument were correct the effect would be to prevent any assignment of goods abroad, and all commerce with respect to such goods must be at an end. The case suggested of an assignee of a debt binding himself not to give notice to the debtor within a certain period, might be a case of possession by the debtor with the consent of the true owner, because during the stipulated time he absolutely precludes himself from taking any steps to prevent the debt from remaining in the order and disposition of the bankrupt." And Rolfe, B. also says (at p. 311): "A person purchasing a *chose in action* is considered to leave it in the possession of the debtor unless he is active and gives notice, although, if he takes every possible step to give notice, and the debt nevertheless remains in the possession of the bankrupt, it does not so remain with the consent and permission of the purchaser." The conclusion from these authorities appears to be that, although from absence of motive consent on the part of the true owner to the debt remaining in the order and disposition of the bankrupt is *primâ facie* to be inferred, still the inference may be rebutted by the facts, and will be rebutted if, in the language of the judges of the Court of Exchequer, the true owner takes every possible step to obtain possession of the debt, or if, in the language of Mellish, L.J., the failure to obtain possession is not attributable to any fault of his own. I may add to these the cases of *Re Styan*; *Pennell* v. *Smith* (2 M. D. & De G. 219), *Young* v. *Hope* (2 Ex. 105), and *Brewin* v. *Short* (5 E. & B. 227), which appear to me to establish that, if the proper steps are taken while the assignee has no notice of any act of bankruptcy, the assignee will be entitled to the benefit of the protection conferred by sect. 49 of the Bankruptcy Act 1883. This being my view of the state of the law, I have next to apply it in the present case. If the bankruptcy had occurred within a short time after the 9th or 10th May 1893, I should have thought that the doctrines laid down in *Smith* v. *Topping*, *Ex parte Ward*, and *Bellamy* v. *Belcher* applied. In point of fact, however, the receiving order in bankruptcy was not made until 10th June 1893, a month later than the receivership order. In the interval there was ample time to give the usual notice to the debtors of the bankrupt. The question arises, Why was not this notice given? Now, the bankrupt says this: "No notice was given to the said debtors to my business of any assignment of the said debts to the plaintiffs prior to the said act of bankruptcy committed by me on or about the 16th May, nor was any notice given within one month after the date of such act of bankruptcy." I understood from the receiver's conversations that such notice was not given because the same would injure the business. There was a challenge to the receiver, who, in his affidavit in reply, simply says (par. 6): "No formal notice of the assignment of the said book-debts was given to the debtors, but I am advised and believe that my appointment on May 9th and my subsequent appointment by the court on May 17th took the said book-debts out of the order and disposition of the said Everett, and that as such receiver I am entitled to receive and am justified in retaining the said book-debts." In my judgment the receiver's view of the law was not well founded. I think that neither the appointment on the 9th May nor the subsequent appointment by the court was sufficient to take the debts out of the order and disposition of the bankrupt with the consent and permission of the true owner, unless followed within a reasonable time by the appropriate step of obtaining possession of the debts by giving notice to the debtor. This was not done, and the failure appears to me to be attributable to a default on the part of the plaintiffs. I think, therefore, the trustee in bankruptcy is entitled to these book-debts.

Solicitors for the plaintiffs, *Morten, Cutler*, and *Co.*

Solicitors for the trustee in bankruptcy, *West, King, Adams*, and *Co.*

June 25, 26, *and July* 6.

(Before ROMER, J.)

BEIGHTON *v.* BEIGHTON. (*a*)

Copyholds—Admittance—Proclamations—Right of lord to seize quousque*—Possession—Statute of Limitations* (3 *&* 4 *Will.* 4, *c.* 27)*—Real Property Limitation Act* 1874 (37 *&* 38 *Vict. c.* 57).

By the custom of a manor, on the death of a tenant intestate, the tenement descended to all his male children equally. For more than twenty years before the death of his father the defendant had been in possession of certain copyhold fields of this manor as tenant to his father. Neither the defendant nor his father, who had been in possession before him, had ever been admitted tenants on the rolls, nor had any admission in fact taken place since 1786. *In* 1876 *and* 1877 *proclamations had been made by the lord for the heir to come in, but owing to a difficulty in the title no admission took place, and no third proclamation was ever made. On the death of the father, intestate, in* 1891, *the defendant claimed a possessory title to the property as freehold. He pleaded the Statute of Limitations as a defence to an action against him by his two younger brothers, who claimed to be entitled equally with him, under the custom of the manor.*

Held, that the defendant could not, under the circumstances, rely upon the Statute of Limitations as against his father, and those claiming under him. And also, that, as there had not been three proclamations or a special notice to the heir to come in, followed by a refusal, the lord's title to seize quousque *had not arisen, and the Statute of Limitations did not run so as to bar the lord's rights. The property therefore re-*

(*a*) Reported by G. MACAN, Esq., Barrister-at-Law.

mained copyhold and descended according to the custom of the manor.

The Ecclesiastical Commissioners for England *v.* Parr (71 *L. T. Rep.* 65; (1894) 2 *Q. B.* 420) *followed.*

THE plaintiffs were two brothers, George and William Beighton; and the defendant, Thomas Morley Beighton, was their eldest brother, who resided at Skegby, Nottinghamshire. The claim was for a declaration that the plaintiffs were entitled, upon the intestacy of their father, Richard Beighton, as his customary heirs, in equal shares with the defendant, to certain copyhold land in the manor of Skegby; for an account of the rents; and for a partition. The land which was the subject of the action consisted of four fields in Skegby, called Fullsicks; and the question was whether they were still copyhold or had become freehold, either by presumption of enfranchisement, or by the right of the lord of the manor to seize *quousque* having become barred by the operation of the Statute of Limitations. The title to the greater part of the lands in question was under the will of one Thomas Morley in Sept. 1784, who devised the same to Ann Morley for life; and after the determination of that estate, to the use of trustees and their heirs, during the life of Ann Morley, in trust to preserve contingent remainders; and after the death of Ann Morley, to the use of the first son of the body of Ann Morley, and the heirs male of such first son, with remainders over. This will was duly enrolled in the manor court of Skegby. Ann Morley married Richard Beighton (No. 1); and in 1786 she was admitted tenant on the rolls. At the same time she surrendered to uses in accordance with those contained in the will of Thomas Morley, and the trustees to preserve contingent remainders were admitted tenants on the rolls. In 1796 Ann Beighton died. Richard Beighton (No. 1) died in 1821. Their only son, Richard Beighton (No. 2), entered into possession of the rents and profits of these copyhold fields, but was not admitted tenant on the rolls. No disentailing deed was ever executed.

By an award of April 1823 the Skegby Inclosure Commissioners awarded to Richard Beighton (No. 2) a small piece of land (which made up the whole of what was in dispute) in lieu of and full satisfaction for his share and interest in the commonable and waste land then directed to be inclosed. In 1859, in the lifetime of Richard Beighton (No. 2), his son Richard Beighton (No. 3) was let into possession of all the copyhold hereditaments by a family arrangement between his father, his two brothers, and himself.

By an agreement dated the 6th Feb. 1866, between Richard Beighton (No. 3) and his eldest son, the defendant Thomas Morley Beighton, it was witnessed that Richard Beighton, having in his own right, title, and occupation four fields, containing twelve acres or thereabouts, called Fullsicks, did bargain and agree with Thomas Beighton, his son, to surrender and give up the possession, and all right and title of two of the four fields, containing about six acres, unto his son, Thomas Beighton, "to have and to hold the same without any lawful let, suit, trouble, molestation, or denial of the said Richard Beighton, or any other person or persons acting under him, for his natural life," in consideration that his son, the said Thomas Beighton, should from the date of this agreement pay all the poor rates, taxes, and tithes chargeable upon the said twelve acres of land, but should not be responsible for any debts that Richard Beighton had contracted before the date of the agreement, or should contract after. And it was also agreed that, if Thomas Beighton failed in the performance of any part of the obligations to be performed, the agreement was to be absolutely void and of none effect. This document was stamped as an agreement, and signed by both parties thereto, and witnessed. Thomas Beighton entered into possession under it, and continued in possession until the trial of this action. He also became possessed of the other two fields, and built a house on one of them in the year 1873. Richard Beighton (No. 2) died in Sept. 1869, leaving three sons.

It appeared by the court-rolls that in April 1876 a first proclamation was made at the court of the manor of Skegley, for the heir or successor (Richard Beighton No. 3) to come in and take admittance, otherwise the same would be seized into the hands of the lord until such admittance. A second proclamation was made at a court held in April 1877. At a court held in 1878 Richard Beighton (No. 3) attended, but not having the will under which he claimed with him, nothing was done. No third proclamation was made.

In May 1878 the steward of the manor wrote, calling the attention of Richard Beighton (No. 3) to the fact that he had not yet been admitted. In Feb. 1879 the solicitor of Richard Beighton (No. 3) submitted an abstract of title, and requested admittance, but as there was a difficulty about the title the matter dropped, and he was never admitted. No admittance had taken place since 1786. The fine on an admittance was 2*s.*

In Oct. 1891 Richard Beighton (No. 3) died intestate and a widower, leaving three sons, the defendant and the two plaintiffs. By the custom of the manor, on the death intestate of a tenant seized to himself and his heirs, or the heirs of his body, and leaving children, the copyhold tenement descended to all male children of the deceased tenant equally.

In Nov. 1891 the defendant, through his solicitor, applied to be admitted, and to surrender to uses to bar the customary entail. In July 1894 the plaintiffs began their action, and claimed as above stated.

The defendant claimed as heir-at-law of Richard Beighton (No. 3), and denied the plaintiffs' title, and the custom of the manor; and pleaded that if the premises were ever copyhold of the manor they had become freehold by presumption of enfranchisement. He also pleaded that, under the Real Property Limitation Act 1874, and the Statute of Limitations, all the claims of the lord of the manor had been barred, and the premises had become freehold. There was evidence that the defendant had made payments to the amount of about 14*l.* a year to his father in respect of two of the fields. The result of the evidence on this and other points sufficiently appears in the judgment.

Ingpen for the plaintiffs.—This land has always been treated as copyhold, and was so considered by the defendant himself and his solicitor down to 1891, when it was desired to get rid of the

customary entail. No admittance on the rolls was necessary until 1869, on the death of Richard Beighton (No. 2). Richard Beighton (No. 3) had two other brothers, but being in possession under a family arrangement he acquired a good statutory title. The plaintiffs and the defendants all claim through Richard Beighton (No. 3), and the property, on his death, descended according to the custom of the manor to his three sons in equal shares. As to the lord's rights being barred, the statute will only run after three proclamations have been made, or a special notice has been given to the tenant to come in. On a refusal, the lord would be entitled to seize *quousque*. There having been only two proclamations, and no special notice, and no refusal to come in, the Statute of Limitations does not begin to run:

The Ecclesiastical Commissioners for England v. *Parr*, 71 L. T. Rep. 65; (1894) 2 Q. B. 420.

In this case Kay, L.J., practically withdrew his remarks made in the case of *Re Lidiard and Jackson's and Broadley's Contract* (61 L. T. Rep. 322; 42 Ch. Div. 254), where he held that the lord must make proclamations within a reasonable time after the tenant's death, or his right of entry would be barred by the statute. Failure to come in after the three proclamations, or notice, works a forfeiture, and the statute would run from the time when the right to seize arose. Here it never arose at all. Nor can there be, under the circumstances, any presumption of enfranchisement:

Turner v. *The Guardians of the Poor of the West Bromwich Union*, 3 L. T. Rep. 662; 9 W. R. 155; *Roe* d. *Johnson* v. *Ireland*, 11 East, 280.

The negligence of the lord to enforce his right to fines, &c., is not enough.

W. H. Stevenson for the defendant.—I do not rely upon any presumption of enfranchisement. Notice to attend at the court, served upon the heir, is sufficient to entitle the lord to seize in default of the heir appearing:

Doe d. *Bover* v. *Trueman*, 1 B. & Ad. 736, 746.

If there is no such notice given, then the proclamations are required. Here the letters to Richard Beighton (No. 3) or his solicitor, requiring him to come in, are a sufficient notice. [ROMER, J.—Richard Beighton (No. 3) was only one of several coheirs, and the notice was never served upon him.] I submit it is sufficient notice, and he promised to do what was necessary. The lord's right having arisen, the statute applies, and the land is now freehold. There can be a freehold title acquired by adverse possession of what has been treated as copyhold:

Attorney-General v. *Tomline*, 42 L. T. Rep. 880; 15 Ch. Div. 150, 158.

A quit rent payable for copyholds can be barred by nonpayment for twelve years:

Howitt v. *Earl of Harrington*, 68 L. T. Rep. 703; (1893) 2 Ch. 497.

The neglect of the heir or successor to come in is sufficient:

Doe d. *Bover* v. *Trueman* (*ubi sup.*).

The defendant entered under the agreement with his father as to part of the lands, and as to the rest on the condition that he would support his father. On the evidence, there was no rent paid, but small sums were sent as they were required by the father. [ROMER, J.—You entered under a licence.] It is more like entering under a void lease, as in the case of *The President and Governors of Magdalen Hospital* v. *Knotts* (40 L. T. Rep. 466; 4 App. Cas. 324); *Churcher* v. *Martin* (61 L. T. Rep. 113; 42 Ch. Div. 312).

Ingpen in reply.—The agreement of 1866 enabled the defendant to hold the two acres during the life of his father. It was a letting, and, moreover, a voidable agreement quite inconsistent with the possession of the fee simple, as claimed.

Cur. adv. vult.

July 6.—ROMER, J.—The first question is whether, as between the defendant and his father's heirs, the defendant has acquired a title to the fields, the subject of this action, as against the heirs, by the Statute of Limitations. With regard to two of the fields in dispute I have fortunately in writing the agreement come to between the defendant and his father, under which the defendant obtained possession, and under which he retained possession until the father's death. It is dated the 6th Feb. 1866, and is a very informal and badly worded document, but I think, on full consideration, its meaning is sufficiently clear; and seeing that the defendant obtained possession on the footing of it, and that it has been acted upon by both parties for so long, it is the duty of the court to give effect to it if that can be done. And I myself see no sufficient reason why that agreement is not to be regarded as a valid one, enforceable during the lifetime of the father by a court of equity. The agreement is in substance one for a lease by the father to the defendant of the two fields for the life of the father, on the terms that the son shall, during the tenancy, pay all outgoings for rates, taxes, and tithes, payable in respect, not only of the two fields, but of two other of the fields in dispute, which then belonged to the father. And there is a provision, in effect, for determining the tenancy, if the defendant shall not make the payments above mentioned. That agreement was acted on during the father's life, and until it determined by the death of the father, the position of the son was as tenant of the father under the agreement, which was one that a court of equity would decree to be specifically enforced. Now, at law, not considering the equitable rights, the position of the defendant was that of tenant at will. I say tenant at will, because the payments to be made by the defendant during the tenancy not being to the father direct, there was no payment of rent to the father under the agreement proved before me that could be laid hold of as constituting a tenancy from year to year. But, in equity, the defendant was tenant for the lifetime of the father, and if the father had attempted by action to recover possession against the son, the latter could have relied on the agreement, and the court would have had regard to it, and specifically enforced it, if necessary; and the father must have failed in his action. Under these circumstances the son could not, under the Statute of Limitations, up to the death of the father, have acquired a title to the two fields, as against the father and those claiming under him. The father's equitable title in reversion was not barred: (*Archibald* v. *Scully*, 5 L. T. Rep. 160; 9 H. of L. 360; *Drummond* v. *Sant*, 25 L. T.

Rep. 419; L. Rep. 6 Q. B. 763; *Walsh* v. *Lonsdale*, 46 L. T. Rep. 858; 21 Ch. Div. 9; *Lowther* v. *Heaver*, 60 L. T. Rep. 310; 41 Ch. Div. 248, 264.) The defence, therefore, of the Statute of Limitation, so far as it concerns these two fields, fails as against the plaintiffs' claiming under the father. With regard to the remaining land, the subject of this action, the evidence is very conflicting, but on consideration I have come to the conclusion that, in fact, the defendant acquired the land, not (as he states) as a gift from the father, but as tenant to the father on terms of paying rent for it, and that the sums which are proved to have been paid by the defendant to his father, extending down to shortly before the father's death, were paid in respect of this land and as rent for it. And, in considering the evidence, I have thought it safer, in favour of the defendant, to disregard so much of the evidence of the plaintiffs as depended on statements made by the father not in the presence of the defendant. I need not go through the evidence in detail to show how it is I have arrived at this conclusion, but I wish to point out the noticeable fact that until the defence in this action the defendant never claimed to be owner of the land as against his father. On the contrary, shortly before the death of the father he was taking advice as to how he could acquire the land by obtaining a will of it from the father, and spoke of making an arrangement with his father by which he might obtain the property; and after the father's death he was seeking to obtain admission to the land as copyhold on the footing of the land being his father's, and of his being entitled as heir to the father. Upon the above findings of fact the Statute of Limitations is not available to the defendant, for his payments on account of the rent have been made within the statutory period. This being so, I have now to consider whether the land was copyhold of the manor of Skegley at the father's death. If it was, then the plaintiffs are entitled, as claimed by them, for the custom of the manor as pleaded by them has been proved. But before I consider this question I must first deal with a point taken on behalf of the defendant. It was said that the father, Richard Beighton (No. 3), was not entitled to the land, inasmuch as he was only one of several sons living at the death of his father, Richard Beighton (No. 2), who died in Sept. 1869. But, as between Richard Beighton (No. 3) and his brothers, and those claiming under the brothers, the former (under a family arrangement) had been in possession as owner of the property, by himself and his tenant, the defendant, for so many years that a perfectly good title had been acquired by possession. And, moreover, the defendant, having acquired and held possession as tenant of the father, cannot set up that possession as giving him a title against the father, or those claiming under the father. At the father's death the father was entitled to the property as against the defendant; and those claiming as customary heirs of the father (if the property be copyhold) are entitled, in right of the father, to enforce his title as against the defendant. I therefore proceed to consider the question whether the land is really copyhold. That it was originally copyhold is not in dispute. And it is admitted that, under the circumstances, no enfranchisement can be presumed, so that I need not give my reasons for holding that no enfranchisement can be presumed, and that this case is quite distinguishable from *Re Lidiard and Jackson's and Broadley's Contract* (61 L. T. Rep. 322; 42 Ch. Div. 254). But the defendant says that, by the Statute of Limitations the lord is barred from asserting his rights, and the land must therefore be regarded as freehold. But down to the commencement of this action the land has been regarded and treated as copyhold, both by the lord and by the defendant and his father, and within recent times the defendant and the father in the father's lifetime, and the defendant since his death, have recognised the lord's title, and sought to obtain admission on the rolls as copyhold tenants of the manor of this land. And the lord is no party to this action, and has not seized and is not seeking to seize the land *quousque*, or for any forfeiture, but is willing to admit a tenant on the rolls for this land on being satisfied of the title of the tenant. And, under these circumstances, I do not see how I could in this action well decide, on the ground of the Statute of Limitations, that the lord's rights were all barred at the father's death, and that the land must therefore be treated as descending by the common law as ordinary freehold. But assume that I have now to consider the question of the statute, how does the matter stand? Before the case of *The Ecclesiastical Commissioners for England* v. *Parr* (71 L. T. Rep. 65; (1894) 2 Q. B. 420), it was supposed by some that in a case like the present the statute ran from the time when the lord might have perfected the right to seize after he knew of the death of the last admitted tenant; but by the Court of Appeal in that case it was decided that the time ran only from the time when the tenant, who ought to take admittance, refused to come in after the lord had made the necessary three proclamations, or given notice to the tenant to come in. The Master of the Rolls in that case says, at page 431: "In other words, it seems to me that there is no forfeiture, nothing upon which an action of ejectment against the right heir can be maintained unless there have been three proclamations; or unless, as it is afterwards put, there is express notice to the heir to come in. If that is so, it is the refusal to come in which works a forfeiture. Even after the proclamations or notice, as the case goes on to point out, there is no forfeiture unless it be shown that the heir has refused to come in. It is the refusal to come which works the forfeiture, and thus there is no cause of action until such refusal. If so, the Statute of Limitations against a right of entry, or against a right to bring the action, only lies between the time when the cause of action arises and the time when the action is brought; that is to say, between the time when, after proclamation or notice, the heir has refused to come in, and the time when the action for ejectment is brought." And Kay, L.J. says at p. 433: "The question is when the right to make an entry or bring an action first accrued. It has been argued, and I suppose that is the view which impressed me on the former occasion, that the right to make an entry, at any rate, accrued when the copyhold tenancy became vacant, and that the making of proclamations, or giving notice, are only machinery to obtain entry. Is that so? As to an action, it could not be brought until after notice given or proclamations

made, and the tenant has refused or declined to come in. The passage read by the Master of the Rolls is, I think, conclusive upon this point. Until such refusal there is no forfeiture; and, therefore, upon further consideration, I have come to the conclusion that until such refusal there is no right of entry or right of action on the part of the lord to seize the land *quousque* in order to compel the tenant to come in to be admitted." I think that when Kay, L.J. spoke of neglect on the part of the tenant in coming in he meant such a neglect as amounted to a refusal, something that put the lord at arm's length and fairly gave him notice that the tenant was challenging his right as lord. And, if I may respectfully say so, there are cogent grounds for this. It ought not to be that a lord should be bound to seize, or be bound to bring an action in a case where the tenant in no way challenges the lord's rights, and the lord has no desire to seize, or to bring a hostile action against the tenant. Now, in the present case, clearly the statute did not run. For not only were there no three proclamations, but if and so far as any of the letters written to Richard Beighton (No. 3), or his solicitors, are to be regarded as formal notices by the lord to him to come in, they were met, not by a refusal, but by a recognition on his part of the lord's rights, and were followed by proceedings having as their object his admittance on the rolls, which proceedings have hitherto not been followed by admittance because of the difficulty attending the title to admittance of Richard Beighton (No. 3). Therefore, in my opinion, the defence of the statute fails. It follows that as between the parties to this action the plaintiffs are entitled to two-thirds of the lands, and the defendants to the remaining third, for the estate in them of Richard Beighton (No. 3) at the time of his death. And as the defendant has substantially failed in the action, he must pay the costs so far as increased by his denying the plaintiffs' title.

Solicitors for the plaintiffs, *Johnson, Weatherall,* and *Sturt,* for *W. G. Eking,* Nottingham.

Solicitors for the defendant, *Swann* and *Co.,* for *James Wearing,* Mansfield.

April 4, 5, 6, 8, *May* 11, *and July* 26.

(Before WRIGHT, J.)

SIMPSON *v.* THE CORPORATION OF GODMANCHESTER. (*a*)

Easement—Opening river locks—Grant or licence by deed—Notice—Prescription—Presumption of lost grant—Prescription Act 1832 (2 *&* 3 *Will.* 4, *c.* 71), *s.* 2.

For a long series of years the Corporation of G. had exercised the uninterrupted right, in times of flood, of opening the gates of three locks on the river O., which belonged to the plaintiff and his predecessors. This right was traceable to a deed of 1689, *by which the plaintiff's predecessor took from the Corporation of G. a conveyance of the site of one of the locks, and by the same deed granted that in case of default by the miller of G., it should be lawful for the bailiffs of G., for the time being, for ever thereafter, upon every likelihood of flood, to open and keep open the gates of the sluices at the three locks in question, until the waters had fallen. The plaintiff was a purchaser for value of the three locks, and also owner of the navigation rights on this part of the river, and had no notice, actual or constructive, of the deed of* 1689. *He claimed to restrain by injunction the exercise of the right in question.*

The defendants were the owners of the manor of G. and of various specified pieces of land at G., including the "Freeman's Fen" and certain common allotments, and they claimed this right on behalf of themselves and their tenants, and those entitled to rights of common.

Held, that the defendants' claim could be supported on the presumption of a lost grant, apart from the grant contained in the deed of 1689, *which was bad as a grant of an easement in gross.*

Held also, that the primâ facie *prescription from uninterrupted enjoyment was not defeated by the deed of* 1689, *which could not be treated as a "consent or agreement expressly given by deed" within the meaning of sect.* 2 *of the Prescription Act of* 1832.

THE plaintiff, Leonard Taylor Simpson, was the owner of, and in possession of, three locks on the river Ouse, in the county of Huntingdon, known as Godmanchester lock, Houghton lock, and Hemingford lock, and of the ground on which these locks were erected. Each of these locks had two pairs of gates. He was also the owner of certain navigation and other rights over that part of the river Ouse in which these locks were situated, by virtue of certain letters patent, of the 11th Dec. 1638, granted by King Charles I. to one Arnold Spencer, his heirs and assigns. On the 12th Nov. 1894 the defendants entered upon the Godmanchester lock and forced open all the gates, and kept the same open for two hours. On the 16th Nov. the defendants prevented the plaintiff and his servants, for the whole of the afternoon, from closing the gates of the Godmanchester and Houghton locks, which were kept open during that period. And on the 17th Nov. 1894, when the plaintiff had closed one pair of the gates of the Godmanchester and Houghton locks respectively, the officers of the corporation forced them open and kept them open until the 19th Nov. 1894, when the writ in the action was issued. There was a considerable flood in the river Ouse on all these occasions. The plaintiff alleged injury to the foundations and gates of the Godmanchester and Houghton locks, and claimed an injunction to restrain the defendants from trespassing upon, forcing open, or otherwise interfering with the three locks above mentioned, and damages.

In their statement of defence the defendants referred to various charters, dating from the time of King John, and (*inter alia*) to a decree of 1515, that certain works should be performed by the Abbot of Ramsey, who had erected sluices on the river Ouse, and that in time of flood the abbot and his successors, their tenants and farmers of the mills, should in all convenient and goodly haste, for the speedy and hasty avoiding of the said waters, from time to time "pull up all the floodgates," and in case the abbot and his successors, &c., should be remiss in so doing, then it should be lawful for the King's tenants to pull

(*a*) Reported by G. MACAN, Esq., Barrister-at-Law.

up the floodgates, without interruption of the abbot, &c., and keep them up until the floods were abated.

The defendants, in the last amendment of their pleading, stated that for many years before the date of the letters patent of the 11th Dec. 1638 the Corporation of Godmanchester were, and had ever since been, the owners of the manor of Godmanchester, and various specified lands and hereditaments, including one called the Freeman's Fen, and two commons. They were also the owners of the bed of the river Ouse within the borough of Godmanchester, and of the back streams and public drains, and also of the soil of the public roads within the borough.

In Nov. 1689 one moiety of the navigation and all rights under various charters and Acts had become vested in one Henry Ashley.

By an indenture of the 3rd Dec. 1689, made between the bailiffs, assistants, and commonalty of the borough of Godmanchester of the one part, and the said Henry Ashley of the other part, in consideration of 120*l.* paid by Ashley to the bailiffs, &c., of Godmanchester, they granted and confirmed to Ashley in fee a piece of ground in Godmanchester called Milne Holt, being in breadth two poles and in length seven poles, and likewise all those sluices on the said piece of ground built; and Ashley by the same deed promised and granted to and with the said bailiffs, assistants, and commonalty of the said borough that he would repair the said sluices and piece of ground, "and moreover that it should be lawful to and for the miller of the said Godmanchester mills for the time being, and in his default or omission for such person or persons, officer or officers, as should be thereupon appointed by the bailiffs of Godmanchester for the time being, for ever thereafter, upon every likelihood and appearance of any flood or outrage of water, to set open, and keep open, or else to take off the gates of the aforesaid sluices, and also all the gates of the sluices in or near Houghton, and also the gates of the sluices in or near the Milnes at or near Hemingford Grey in the said county of Huntingdon, and lay them upon the land by the side of the said sluices until the waters should be fallen and the floods well abated." Ashley subsequently acquired the entirety of the said navigation. By an Act of the 6 Geo. 1, empowering Ashley to repair and improve the navigation, there was a proviso safeguarding the rights, privileges, and usages of the ancient Corporation of Godmanchester for preventing the overflowing of the meadow grounds belonging to the inhabitants; and it was also enacted that the Corporation of Godmanchester should have power to open the gates at the stanch of St. Ives in times of flood in default of the same being done by the owner or keeper of the gates.

The defendants claimed that the acts complained of were necessary for the preservation of their property in Godmanchester; that they had, as such owners on their own behalf, or as trustees or agents for and on behalf of their tenants and occupiers of the hereditaments mentioned, or on behalf of the persons entitled to rights of common on the East and West Common allotments, or in all such capacities, and in fact for 250 years—or for much more than forty years before the acts complained of by the plaintiff—enjoyed as of right, and without interruption, the right of opening and keeping open the gates of the sluices or locks at Godmanchester, Houghton, and Hemingford in time of flood, and upon every likelihood or appearance of flood, in order to prevent damage or injury to the several hereditaments, and they claimed the easement or right to cause the waters of the river Ouse to pass through the sluices or locks in time of flood for the benefit of the borough of Godmanchester, and as a protection for the hereditaments, and the occupiers thereof, and they claimed to be entitled to the said easement or right as well by virtue of the Act of 2 & 3 Will. 4, c. 71, as under the indenture of the 3rd Dec. 1689, or under some lost grant or lost grants. It was also alleged by the defendants that the plaintiff had notice of the rights and easements of the defendants when he purchased the navigation on the 3rd Feb. 1893. In his re-amended reply, the plaintiff said that the right exercised was by permission of the owners of the locks, that it was destructive to the locks, and a nuisance to the navigation.

The various charters and Acts in the title of the plaintiff and of the defendants, and the result of the evidence adduced, sufficiently appear from the judgment.

Cozens-Hardy, Q.C., *Hopkinson*, Q.C., and *E. R. Simpson* for the plaintiff.—Unless the defendants can justify under the deed of 1689, or by prescription their entry is a trespass which the plaintiff can restrain. He had no notice whatever of the deed of 1689, which was practically forgotten by all parties. Nor can constructive notice be implied:

Bailey v. *Barnes*, 69 L. T. Rep. 542; (1894) 1 Ch. 25;

Austerberry v. *The Corporation of Oldham*, 53 L. T. Rep. 543; 29 Ch. Div. 750.

What was conferred by the deed was more in the nature of a licence:

Heap v. *Hartley*, 42 Ch. Div. 461.

If, upon a true construction of the deed, it amounts to a grant of an easement, then it is bad being a grant of an easement in gross. An easement must be granted in respect of a dominant tenement, and the grant to the corporation was not made to them as owners of any dominant tenement, nor are the alleged rights claimed in respect of any particular tenement. In addition to this objection there was no power for Ashley, as tenant in common of two of these locks, to grant an easement over them which affected the rights of the other tenant in common:

The Durham and Sunderland Railway Company v. *Wawn*, 3 Beav. 119.

No claim can also be established by prescription, as this deed of 1689 was a deed in writing expressly made for the purpose of giving a consent to the enjoyment of this easement, within the concluding words of the second section of the Prescription Act 1832. (*a*)

(*a*) Prescription Act (2 & 3 Will. 4, c. 71), s. 2: And be it further enacted that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel

Neville, Q.C., and *Methold* for the defendants.—There is evidence of uninterrupted user of this right to open the gates, going back to at least as far as 1748. It can be supported by the presumption of a lost grant, as such a user could not have existed for so long without any question, except under a grant. The deed of 1689 is in our favour; the grant of the easement there can be supported; it has been acted upon ever since. But, if bad as a grant of an easement in gross, a presumption of a lost grant can be made, as the court will seek to discover a legal origin for a user which has continued uninterruptedly for so long.

Cozens-Hardy, Q.C., in reply.

Cur. adv. vult.

July 26.—WRIGHT, J.—The question in this case is whether the defendant corporation can justify their ancient practice of opening in times of flood certain locks belonging to the plaintiff as proprietor of the navigation of the river Ouse. They have for centuries exercised, and in 1515 they finally established (by a decree of the Duchy Court which is recited in letters patent of 1524), as against owners of mills, a similar right to open the mill-gates, and that right is not in question. It will be necessary to consider in detail the history of the plaintiff's navigation; but the result may be summarised as follows: From St. Neots, above Godmanchester, to St. Ives, below it, the lands on the banks of the Ouse have always been subject to floods. The embankments or mill-dams of ancient mills dating from about 1280 are at Godmanchester, belonging to the corporation, and others at Houghton and Hemingford, lower down the river, belonging to other persons, increased the destructiveness of the floods by penning back the water. The plaintiff's navigation includes the whole of this part of the Ouse. His locks are cut through the embankments of or near the mills, and do not, even when closed, increase the obstruction caused by the embankments, but when opened give additional outlet to the waters. They were constructed, in a different form probably about 1660, and reconstructed in their present form about 1834. So far back as living memory goes, the defendants have without opposition and as of right opened them, or ordered the servants of the plaintiff's predecessors to open them in times of flood, and the defendants' records carry back unbroken evidence of the practice at least to 1748, and, although in one instance in 1766 there is some appearance of leave having been asked, I think that the proper conclusion is that the practice was followed as of right as far back as any evidence extends. The acquiescence of the plaintiff's predecessors is the more remarkable inasmuch as it is proved that the practice is highly injurious to the locks as constructed about 1834, and as since then maintained. The actual origin of the right as claimed is no doubt to be traced to a document on which both sides rely in different ways. In 1689 Ashley, one of the plaintiff's predecessors in title, was engaged in the completion of the navigation, and locks seem to have then been only recently constructed. He, being the lessee of the site of the lock at Godmanchester, and being or acting as the owner of the sites of the locks at Houghton and Hemingford, took from the corporation a conveyance in fee of the site of the lock at Godmanchester, and by the same conveyance granted to them "that it should be lawful for the miller of the said Godmanchester mills for the time being, and in his default or omission for such person or persons, officer or officers, as shall be thereupon appointed by the bailiffs of Godmanchester for the time being for ever hereafter, upon every likelihood and appearance of any flood or outrage of water, to set open and keep open or else to take off the gates of the aforesaid (Godmanchester) sluices, and also the gates of the sluices in and near Houghton, and also the gates of the sluices in and near the mill of Hemingford in the said county of Huntingdon, and lay them upon the lands by the side of the said sluices until the water be fallen and the flood well abated." These "sluices" are the locks now in question. More in detail the history of this deed seems to be as follows: In 1638 one Spencer obtained letters patent purporting to authorise him to improve the navigation of the Ouse. In 1664 (16 & 17 Car. 2.) an Act was passed authorising an undertaking for the same purpose, but the authorities under that Act did not interfere with Spencer, who made locks and other works and mortgaged the undertaking. Spencer's son Robert inherited subject to the mortgage, and, after Robert, Robert's daughters Anne and Elizabeth, who married respectively John and Nathaniel Jemmatt, sons of one Samuel Jemmatt, who had become assignee of the mortgage. Samuel Jemmatt in 1674 leased the navigation to one Ashley for twenty-one years. Ashley, so being lessee, bought Elizabeth's moiety of the reversion, and then obtained appointment as an undertaker under the Act of 1664, took a lease from the corporation of the site of or for the lock at Godmanchester with a reservation to them of a right to open it in time of flood as above set forth, and then claimed the whole benefit of the navigation to the exclusion of Anne. Anne's husband filed a bill, and obtained in 1690 a declaration, which was afterwards affirmed in the House of Lords, that she was entitled to the reversion of one moiety. Pending the bill, Ashley's son, who was then acting as his father's counsel, had (possibly with a view to embarrass the plaintiff) obtained in 1689 from the corporation the conveyance of the site at Godmanchester, an extract from which is above set out, and which contains the grant of the right now in question. In 1696 Elizabeth Jemmatt's husband obtained a decree against the younger Ashley reciting much of this history, and in substance declaring her equally interested with

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of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Ashley in the benefit of the undertaking on her contributing half the cost of the land conveyed by the deed of 1689. Elizabeth and her husband took the benefit of this judgment, and must be taken to have affirmed the grant or covenant in the deed which was part of the consideration for the conveyance. By a public Act (6 Geo. 1), passed in 1719 "for preserving and improving the navigation of the river Ouse, in the county of Huntingdon," further powers for these purposes were conferred on Ashley, in particular for the construction of a new lock or stanch at St. Ives below Hemingford, but also generally for the maintaining and improving the navigation from St. Ives below Hemingford to St. Neots above Godmanchester. This Act contains the following section: "Provided always that this Act or anything herein contained shall not extend, or be construed to extend, to impeach, or make void any of the rights, privileges, or usages of the ancient Corporation of Godmanchester, in the said county of Huntingdon, or the inhabitants thereof heretofore used or accustomed for prevention of the overflowing of the meadow grounds of or belonging to the said inhabitants, and for carrying off the waters from the same by cutting of banks, making of gulls, removing of obstructions, or otherwise making or opening a more free or easy passage for the waters. Provided always that nothing herein contained shall in any sort extend to hinder or obstruct the said H. Ashley from making and erecting a stanch or works according to the direction and intention of the Act; and it is hereby further enacted that, from time to time and at all times hereafter, as often as need shall require, the bailiffs and assistants of the said Corporation of Godmanchester for the time being, or any four or more of them, by warrant under their hands directed to the keeper of the said stanch or works" (that is at St. Ives) "for the time being shall and may require him to take up and remove the said stanch and works so as the waters may have a more free and easy passage, which warrant for the better notice of all persons concerned shall be publicly set up and affixed at the stanch or works, or upon the great bridge in St. Ives, in the said county of Huntingdon, of which warrant so set up and affixed all persons concerned are to take immediate notice, and in case the said proprietor, owner, or occupier of the said stanch or works for the time being shall not, within half an hour after such warrant be set up and affixed as aforesaid, take up and remove the said stanch and works as aforesaid, that then and in such case it shall and may be lawful for the said bailiffs and assistants and commonalty of the said borough of Godmanchester, or any other person or persons authorised as aforesaid, to take up and remove the same as aforesaid, and so to remain and continue until the said meadows shall be out of danger of being overflowed by the said waters, doing as little damage to the said works as may be, the charge or expense thereof to be repaid and reimbursed by the proprietor, or owner of the said works for the time being to such person or persons who shall bear or pay the same before the said stanch or works shall be set down again." This Act does not refer to the locks now in question, but it seems to indicate that a right similar to that which it creates at St. Ives was recognised as existing at the other locks from there up to Godmanchester. In point of fact, if those other locks could not be opened it would be worse than useless to open the lock at Godmanchester. The plaintiff is the privy of both the parties to the decree of 1696, whose interests became vested in persons from whom the entire interest passed to one Kirkham in 1869 under a decree in Chancery, and from him in 1892 to Bendall, from whom the plaintiff bought in 1893. It is not proved that either Kirkham or Bendall had knowledge or notice of the deed of 1689. Certainly no actual notice or knowledge is proved, though Bendall's solicitors in 1892 received the old papers including this deed. The plaintiff's solicitors received the deed in a parcel two or three months after the conveyance to him, and never opened the parcel. Having regard to these facts, and to the Conveyancing Act of 1881, and the Vendor and Purchaser Act of 1874, I think that notice of the deed of 1689 cannot be imputed to the plaintiff, nor, I think, is the Act of George I. notice of that deed, or of a right to open the sluices now in question. It remains to add that Godmanchester, though a very ancient town, appears not to have been in ancient times called a borough. King John in 1213 granted to "our men of Godmanchester" the Royal manor of Godmanchester in fee farm, but they did not receive any charter of incorporation until 1604. That charter vested in the corporation the manor and all the rights and privileges of the "men of Godmanchester, by whatever name heretofore incorporated." It is not known what sort of incorporation these words presuppose, unless it be the limited incorporation implied in the grant of the manor in fee farm. Nor is it known with any certainty what lands were vested in the men of Godmanchester as lords of the manor or otherwise. There are, however, some documents which throw light on the character in which their ancient rights as against the millowners were exercised, and in particular the decree of 1515, as set out in the letters patent of 7 Hen. VIII. (1524) and an Act of 6 Geo. 1. The decree of 1515 recites a complaint by the King's tenants and inhabitants of his town of Godmanchester, which is built upon his high stream or river called Ouse, that the millowners' banks and dams cause the water to overflow the meadows, pastures, and arable fields of his said town, to the damage of the town and its inhabitants, and orders (*inter alia*) that the millowners shall draw their gates in times of flood, and in their default it shall be lawful for the King's tenants and every of them to draw the gates. The Act of Geo. I., already cited, contains a saving of "the rights, privileges, or usages of the ancient corporation of Godmanchester, or the inhabitants thereof, heretofore used or accustomed for prevention of the overflowing of the meadow grounds of or belonging to the said inhabitants." There is nothing in any of the documents to show that the right claimed by the corporation, either as against the millowners or as against the navigation, was ever claimed as incident or appurtenant to the ownership or occupation of the lands owned by the corporation, or to any particular closes. The corporation are in fact the owners, no doubt in succession to the men of Godmanchester, of a considerable extent of land in the manor, and in particular of the soil of a large tract called Freeman's Fen; but the

evidence leads to the conclusion that the right claimed was in fact claimed on behalf of the King's tenants generally or the inhabitants generally for the protection of their meadows and other lands in the manor, and was exercised on their behalf by the bailiffs of the "men of Godmanchester" in ancient times, and later by the corporation. In the present action the plaintiff challenges the right claimed by the corporation. He does not in his pleadings allege negligence or excess in the manner of its exercise, nor on the evidence could he have done so with success. Nor does he allege, nor on the evidence could he have alleged with success, that the exercise of the right is necessarily destructive of the navigation. It does not appear that the serious damage which undoubtedly now results might not be obviated wholly or in part by different construction or adjustment of the sluice gates and locks. Nor was it very strenuously denied that the evidence of user was sufficient. The real question is whether, on the defendants' own case, the right can be sustained in law either by prescription at common law in either of its forms, or under the statute, or by virtue of the deed of 1689. The plaintiff says that the easement as claimed is one which cannot exist in law, that it cannot be vested in the corporation as an easement in gross, and is not and cannot in fact be claimed as incident to any particular lands; that it cannot be claimed by prescription at common law, because it cannot have existed before the locks were made, and is to be referred to the deed of 1689; nor under the Act, because its origin is traced to a contract or agreement in writing—viz., the deed of 1689. I see nothing in the nature of the easement as claimed to make it impossible in law, viewing it as a right claimed by or on behalf of owners of lands for the protection of those lands, to enter on lands of other persons and remove impediments which pen back water on to their own lands. It seems not dissimilar in nature from the easement claimed in *Beeston* v. *Weate* (5 E. & B. 996). Again, I see no impossibility in the way of such an easement being vested in the corporation by prescription, either in respect of their own lands or as trustees for the King's tenants or inhabitants in respect of their meadow and other lands in the manor, just as in law the lord of a manor can prescribe on behalf of himself and his tenants for common in another manor. And possibly the easement might in the present case be regarded as incident to the manor of the corporation for the benefit of the lands in the manor. Then, if the easement is one which can exist, and if it can have become vested in the corporation, either as owners of the Marsh Fen or as lords of the manor, or as representing the King's tenants or inhabitants in respect of their lands, is it so vested either by the deed of 1689, or by prescriptive title? If the matter depended only or directly on that deed there would be much difficulty in sustaining the right of the defendants. As against the plaintiff, who is a purchaser without notice, I apprehend that it would be necessary to show that the grant of the right was made in respect of and for the benefit of some dominant tenement or tenements, though not necessarily tenements of the corporation, nor necessarily any one or more particular tenement or tenements in the manor or borough. It might, as it seems to me, be sufficient if the grant could be construed as made to the corporation as trustees for the benefit of their tenants of the manor or inhabitants holding lands in the manor or borough liable to the floods. The earlier part of the deed does appear to grant certain other rights to the corporation for the benefit of the freemen and burgesses, but not in respect of any lands, and I think the true construction is that the grant of the right now in question is made to the corporation for the benefit of the borough and its inhabitants generally, for the prevention of floods which might affect the town or any lands in the town or manor. This seems to be a grant of an easement in gross, and therefore bad as a grant (*Rangeley* v. *The Midland Railway Company*, 18 L. T. Rep. 69; L. Rep. 3 Ch. 306), although it might operate by way of contract or licence as against persons parties to the contract or bound by notice of it. It may, indeed, be contended that, since the plaintiff undoubtedly held the site of the Godmanchester lock under that deed, and since part of the consideration for which the site was so given to his predecessors was the concession by them of the right to open that and the other locks, he cannot keep the land and repudiate the burden. But I apprehend that this doctrine is not applicable in the present case, where a complete title has been obtained by long exclusive possession, and there is no necessity for the plaintiff to rely on or refer to the deed. And even if it was otherwise in the case of the Godmanchester lock, the site of which was acquired under the deed, the title to the sites of the other locks never depended on the deed. But, in my opinion, the right claimed by the defendants is *primâ facie* established by prescription, both at common law by the fiction of a lost grant, and under the statute. There has been uninterrupted enjoyment *nec vi, nec clam, nec precario* for much more than the requisite time, and *Dalton* v. *Angus* (44 L. T. Rep. 844; 6 App. Cas. 798) is a clear authority that even at common law twenty years enjoyment of an easement which could have been granted establishes it through the legal fiction of a lost grant, even though the enjoyment was clearly shown to be of recent origin, and though it be certain that the supposed grant never was made. And as the enjoyment here continued till action, the case is the same under the 2nd section of the statute, which, according to Lord Selborne's opinion in *Dalton* v. *Angus* (*ubi sup.*), and to the decisions in *Lemaitre* v. *Davis* (46 L. T. Rep. 407; 19 Ch. Div. 281); and *Bass* v. *Gregory* (25 Q. B. Div. 483), is not confined to rights of way and water. I think that a grant of the right as exercised could have been made to the corporation as incident to and for the benefit of their common and other lands, or of the lands of their tenants of the manor. And if such a grant could have been made it must now be presumed for the purpose of prescription at common law, and the statute also takes effect, dispensing with the direction to the jury to find a lost grant. The real question seems to me to be whether the *primâ facie* prescription is not defeated by reason of the deed of 1689. Under the 2nd section of the statute the forty years' enjoyment down to action gives an absolute and indefeasible title, "unless it shall appear that the same was enjoyed by some consent or agreement

expressly given or made for the purpose by deed or writing;" and it is contended that the deed of 1689 is such a consent or agreement, and that no better right can be claimed under the section than that deed confers, and that if that deed does not bind the plaintiff the defendants are not helped by the statute, and a similar objection is or might be made to a prescription by lost grant at common law or by twenty years' enjoyment under the statute. I think, however, that this contention fails, for two reasons: the first is, that the section, in my opinion, refers to a deed or writing purporting to give consent to an enjoyment as a matter of revocable leave and licence, and not to one which gives consent to it as a matter of irrevocable right. See per Thesiger, L.J., in *Bewley* v. *Atkinson* (41 L. T. Rep. 603; 13 Ch. Div., at p. 298), and per James, L.J. at p. 292. The second is, that on the evidence I come to the conclusion that, whatever may have been the case for a time after 1689, the enjoyment, as far back as living memory extends, was not in fact under the deed of 1689, which seems to have been wholly forgotten, but was adverse and of the same kind of right as that which was exercised against the millowners; and if this view of the facts is correct the right was not during the forty years "enjoyed by" the deed of 1689. The case of *Campbell* v. *Wilson* (3 East, 294) is to some extent analogous. There there was no doubt that the way in question had in fact at first been claimed under an inclosure award, which, however, on examination turned out not to have authorised the use of but to have extinguished this way only twenty-five years before the trial. Nevertheless, upon proof of twenty years' user, without reference to the award, the right was allowed. Lord Ellenborough said: "On the evidence given, nothing appears to show that they referred their acts to the award, and therefore it comes to the common case of adverse enjoyment of a way for upwards of twenty years, without anything to qualify that adverse enjoyment." For these reasons it seems to me that the right claimed by the defendants ought to be supported, even by presuming, if necessary, an effectual lost grant of a date subsequent to the deed of 1689. The acts done were, if not justified, trespasses of a gross and injurious kind, and it is incredible that in the course of 200 years they should not have been challenged, as in earlier time the similar trespasses against the millowners were challenged if their rightfulness was not admitted. "If," the courts said, in *Bedle* v. *Beard* (12 Rep. p. 5), "those objections or exceptions had been made in the lives of the parties, without any question they had been answered, or otherwise in so many successions of ages it would have been impeached or impugned." In *Halliday* v. *Phillips* (23 Q. B. Div. 48), although there was every reason to suppose that the use of the pew had an illegal origin 200 years ago, the Court of Appeal presumed a subsequent faculty. "The time," the Master of the Rolls said, at p. 5, "in this case is 200 years, and it seems to me that under these circumstances there is *primâ facie* evidence of proprietary possession, and that the court should presume in favour of so long and continuous possession that a faculty has at some time existed, and for this reason, that it is almost impossible that such facts could exist not founded on a right without being challenged;" and Fry, L.J. said: "That possession is nine points of the law is a very common but very true saying, and it summarises a very considerable body of legal doctrine. One of the ways in which that doctrine appears is this, that the courts are under an obligation, which has been insisted upon over and over again, wherever they can, to clothe with legal right long-continued and undisputed enjoyment; and in my judgment that obligation rests upon the court, although enjoyment may be shown to have had, *de facto*, an invalid, or illegal, or insufficient origin. I think where there has been long usage, long possession, or long enjoyment, even although there may be an original infirmity in the *de facto* commencement, the court is bound to presume, if it can, that that illegal origin has been altered by something which has occurred in the course of time." The ground of the different conclusions arrived at in *Attorney-General* v. *Horner* (14 Q. B. Div. 245) was that there the user, although carried back for 200 years, had, in fact, been always referred to and exercised as by virtue of two charters, one of which was held invalid and the other of which did not purport to give the right as claimed, and the Court of Appeal thought that, under the special circumstances of the case, they were not obliged to presume, and ought not to presume, another subsequent charter. It remains to notice a minor contention on either side. The corporation set up that the acts complained of were justified by necessity for the preservation of property in the town. Even if such a justification could be possible in point of law, no case for it is made out in fact. The plaintiff, again, contended that the defendants' acts amounted to a nuisance to public navigation, and could not be justified by prescription or otherwise. But, as has already been stated, the defendants' acts were not necessarily destructive of the navigation, and most, if not all, of the injurious effect might be avoided by altered construction of the locks and gates; and whatever is done is either done under the provisions of the deed of 1689, which was part of the consideration on which alone the right to make one of these locks was ever conceded, or must be presumed to have been done under a grant made for a similar consideration. As regards costs, these have been considerably increased, and an adjournment was made necessary by the defendants' failure to state with precision the ground and nature of their right, and the plaintiff must have the costs of the last two days of the hearing, and of all amendments of pleadings. The defendants have the other costs, subject to a set-off.

Solicitors for the plaintiff, *Batten*, *Proffit*, and *Scott*.

Solicitors for the defendants, *Grubbe* and *Co.*, for *Hunnybun* and *Sons*, Huntingdon.

QUEEN'S BENCH DIVISION.

June 14 *and* 15.

(Before MATHEW, J.)

RAYNER v. REDERIAKTIEBOLAGET CONDOR

(Owners of the Steamship *Ornen*). (*a*)

Shipping — Charter-party—Demurrage—Calculation of—Bills of lading, refusal of master to sign—Clause imposing specific sum for refusal—Penalty or liquidated damages.

A charter-party contained a clause that the cargo was to be loaded in seventy-two hours (from 5 p.m. Saturdays to 7 a.m. Mondays, and holidays excepted), and "if longer detained charterers to pay steamer 16s. 8d. per like hour demurrage."

Held, that, in calculating the hours for demurrage under this clause, the demurrage does not run continuously, but that the hours of demurrage must be calculated with the same exceptions as the lay hours.

The charter-party also contained a clause that "the captain shall sign charterer's bills of lading as presented, without qualification except by adding weight unknown, within twenty-four hours after being loaded, or pay 10l. for every day's delay, as and for liquidated damages, until the ship is totally lost or the cargo delivered."

Held, that the clause imposed a penalty only, and did not confer a right to liquidated damages for the refusal of the captain to sign bills of lading, and that, as the charterer had in fact suffered no damage by such refusal, he was entitled to nominal damages only.

COMMERCIAL cause tried before Mathew, J., the action being brought to recover in respect of a breach of a contract by charter-party.

The plaintiff is a coal merchant in Liverpool, trading under the firm of J. E. Rayner and Co., and he deals in coal wholesale direct from collieries to ships, and the defendants are a Swedish company carrying on business at Stockholm, and are the owners of the steamship *Ornen*.

A charter-party, dated the 10th Aug. 1894, was entered into between the plaintiff and the defendants, as owners of the *Ornen*. By the terms of the charter it was provided that the *Ornen* should sail and proceed to Grimsby Royal Dock and there load, as customary, in the dock ordered by charterers, on arrival, or when they receive notice of steamer's readiness, a full and complete cargo of coals, and being so loaded should forthwith proceed to Cronstadt, and there deliver the same on being paid freight at 4*s.* per ton.

The charter-party contained these clauses, out of which the questions in this action arise:

The cargo to be loaded in seventy-two hours (from 5 p.m. Saturdays to 7 a.m. Mondays, colliery holidays, play days, and general holidays excepted), the time to count from 6 a.m. following the receipt of notice in writing of readiness to load after steamer is wholly unballasted and ready in dock to receive her entire cargo, and to be discharged as fast as steamer can deliver as customary; and if longer detained charterers to pay steamer 16*s.* 8*d.* per like hour demurrage; strikes of pitmen, workmen, locks-out, floods, frosts and storms, delays at spouts or cranes caused by stormy weather, or any accidents stopping the working, loading, carriage, or shipping of the said cargo always excepted.

The captain shall sign charterer's bills of lading as presented, without qualification, except by adding weight unknown, within twenty-four hours after being loaded, or pay 10*l.* for every day's delay, as and for liquidated damages, until the ship is totally lost or the cargo delivered.

There was no stipulation with the shipowners that the coals should be supplied from any particular colliery, nor was there any colliery guarantee.

The *Ornen* arrived at Grimsby Royal Dock on the afternoon of the 27th Aug., unballasted or ready to load in every respect, unless not being in a loading berth constituted unreadiness of the ship to load.

Notice of the arrival of the vessel and of her readiness to load was given by the captain to the colliery company, from whom the plaintiff was to get the coals. This notice was given after 5 p.m., and after office hours, on the 27th Aug.; but, according to the custom at Grimsby, such notice delivered after office hours was to be considered as delivered on the following day, and a notice was given on the 28th to the charterer by telegram.

The *Ornen* was booked for a loading berth on her arrival, but, owing to the number of vessels then in Grimsby waiting their turn to load, she was not able to obtain a loading berth, but lay in the middle of the dock from the 27th Aug. until the 7th Sept., and she was not in fact in a loading berth until the afternoon of the 7th Sept., and loading then commenced and continued without interruption, except between Saturday and Monday, and her loading was finished at 11 a.m. on the 10th Sept.

On the 10th Sept. the plaintiff's agents presented to the captain for signature clean bills of lading; but, asserting that there was a claim for demurrage, he refused to sign these bills of lading, and made out fresh bills of lading, in which he inserted in the body of the bills of lading the words, "together with demurrage, protest, and consular expenses as per margin, two hundred and four pounds, to be paid at the port of discharge before breaking bulk;" and in the margin were inserted these words: "Demurrage, 239 hours at 16*s.* 8*d.* per hour—199*l.* 3*s.* 4*d.*; protest expenses, 2*l.* 13*s.* 8*d.*; consular charges, 2*l.* 3*s.*—Total, 204*l.*"

The loading was completed on the morning of the 10th Sept., and the vessel arrived at Cronstadt on the 21st Sept.; but the captain refused delivery of the cargo unless and until he had obtained the sum of 204*l.* from the plaintiff, which the plaintiff has been compelled to pay, and has paid.

The plaintiff now claims the return of the said sum of 204*l.*, and 10*l.* a day as and for liquidated damages for every day's delay in signing the charterer's bills of lading from the 10th Sept., when the cargo was loaded, to the 24th Sept., when the cargo was delivered.

Joseph Walton, Q.C. and *A. D. Bateson* for the plaintiff.

Witt, Q.C. and *Scrutton* for the defendants.

The arguments sufficiently appear in the judgment, and in addition to the cases referred to therein the following cases were cited on the

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

question as to whether the sum of 10*l.* a day was a penalty or liquidated damages:

Sparrow v. *Paris*, 5 L. T. Rep. 799; 31 L. J. 137, Ex.;

Wallis v. *Smith*, 47 L. T. Rep. 389; 21 Ch. Div. 243.

MATHEW, J.—[After stating the facts his Lordship proceeded:] It was said for the defendants that the notice delivered on the 27th Aug. after five o'clock was a good notice for the following day, the 28th. The contention of the plaintiff was, that it was a good notice for the 29th, and that a notice delivered after five p.m. according to the custom and course of business at Grimsby was to be considered as a notice given on the next day. I am clearly of opinion on the evidence offered by both parties that that notice was a notice for the 29th and not for the 28th. Being delivered after office hours according to the ordinary course of business, and what is understood, it was to be taken as a notice delivered on the following day. A point was made for the plaintiff that the notice ought to have been given direct to the charterers. There was a notice to the charterers on the 28th by telegram, and that certainly would be good for the 29th, but I am satisfied upon the evidence that no objection would have been made to the notice if it had been served on the colliery proprietors and not upon the charterers, assuming it to have been served on the 28th. The point is material because the demurrage for one day, and the right of the plaintiff to recover that demurrage as having been wrongly exacted, depends upon the question of what time the notice was delivered. The next question is how the demurrage is to calculated. The defendants contended that, the lay days being exhausted and the demurrage once begun, the time ran on continuously, and according to their calculation on that basis the amount that they claim. 204*l.*, would be due. But attention was called on the part of the plaintiff to the peculiar terms of the clause as to demurrage which runs: "The cargo to be loaded in seventy-two hours;" then come the exceptions, and among the periods excepted are the periods from 5 p.m. on Saturdays to 7 a.m. on Mondays, &c., the time to count from 6 a.m. following the receipt of notice in writing of readiness to load. Then "if longer detained charterers to pay steamer 16*s.* 8*d.* per like hour demurrage." It was said by Mr. Walton that it is clear that the demurrage does not run on continuously; that there must be the same exception from the period of demurrage that there would be on the lay days, and I am of opinion that that construction is right. Mr. Witt, however, for the defendants, protested against that view, and said that the invariable rule was that demurrage once begun runs on continuously. That may be so in a different charter from the present, but I cannot reject the clear terms of the charter, and the terms of the charter in this respect appear to me to be perfectly reasonable, the object being to make the charterer responsible for what he might do but failed to do. According to the terms of the charter it is plain that the charterer might be wholly unable to obtain the loading of the ship at the periods mentioned in the charter-party and excepted in this clause. The word "like" cannot be rejected. The meaning and intention of inserting it is obvious and most reasonable, and full effect must be given to it. In that respect, therefore, the calculation of the plaintiff must be accepted in lieu of the calculation by the defendants. A table has been put before me, and according to that table the period of demurrage is 145 hours, and 145 hours at 16*s.* 8*d.* per hour amounts to 120*l.* 16*s.* 8*d.* instead of the sum demanded by the defendants. The defendants say that that calculation ought to be modified, because, although the calculation is made in the terms of the charter-party, in point of fact the loading went on continuously on Saturday, the 8th, up to 10.30 p.m. or 11 p.m. at night, and that it began on the Monday morning much earlier than it need have begun according to the terms of the charter, at three a.m. instead of seven a.m. I am of opinion that the defendants cannot claim any advantage from that. It seems to me that the terms of the contract are perfectly clear, that the demurrage must be calculated in accordance with the terms of the contract; and if in order to expedite matters the charterers did load in a shorter space of time and worked, as they might have done, all night, it is not a matter for which the shipowners can claim any advantage. We must go to the contract, and by the contract the demurrage is clearly defined. In that respect, therefore, I do not think that the criticism applied by the defendants to the figures of the plaintiff can be allowed. The amount paid under compulsion at Cronstadt was 199*l.* 3*s.* 4*d.* (the captain having rightly taken off six hours for bunkering). The true amount for 145 hours would be 120*l.* 16*s.* 8*d.*, leaving a balance of 78*l.* 6*s.* 8*d.*, which is further reduced by 10*l.* paid into court by the defendants, thus leaving a final balance of 68*l.* 6*s.* 8*d.* There remains another claim of the plaintiff. He asserts that under the charter-party he is entitled to liquidated damages for every day during which the bill of lading was not delivered to him by the captain duly signed. What occurred was this: The bill of lading was taken to the captain. It was without qualification of any sort: it contained nothing on the face of it except what the charter-party provided for, "except by adding weight unknown." The captain declined to sign that bill of lading and insisted upon inserting a certain clause. The captain in point of fact determined, and determined inaccurately, in his judicial capacity what the amount of demurrage and charges was that would have to be paid by the consignee, and he insisted upon inserting that amount in the bill of lading. Naturally enough the representatives of the charterers at Grimsby declined to accept the bill of lading in that form. They protested against the figures, and as it turns out they rightly protested. The captain declined to give any other bill of lading, and so no bill of lading was given, and the ship sailed and reached her destination and no bill of lading was ever forwarded to the charterers in respect of the cargo. It is said that on the terms of the charter the captain was bound to sign the bill of lading presented "without qualification, except by adding weight unknown, within twenty-four hours after being loaded," and having failed to do so that the clause as to the payment of liquidated damages applies; and under that clause a claim is made for that 10*l.* a day amounting to 140*l.* The question at once arises whether that amount could be recovered as liquidated damages, or whether that clause imposes a penalty

and a penalty only. Inasmuch as it is to be taken that the plaintiff is not in a position to prove that he sustained any loss whatever, or that in point of fact any damage was done him by reason of the conduct of the captain, it certainly is a startling proposition to say that, by reason of this clause inserted in the charter, he is to be paid this large sum of 140*l.*, to cover no loss which he has sustained. For the plaintiff two cases were relied upon—*Jones* v. *Hough* (42 L. T. Rep. 108; 5 Ex. Div. 115) and *The Princess* (70 L. T. Rep. 388)—where a clause resembling this clause was construed by Sir Francis Jeune. As to *Jones* v. *Hough* (*ubi sup.*), the only difference between the two clauses was this: The words "until the ship is totally lost or cargo delivered," which are in the present charter, were not inserted in the charter-party in that case, and it is said that that made all the difference. In that case it was held that the clause imposed the penalty without any right to recover the liquidated damages—that the damages were only nominal. That was the view of Lindley, J., who tried the case; and, upon appeal, the Court of Appeal, consisting of the Lord Chief Justice, and Bramwell, Cotton, and Thesiger, L.JJ., upheld that decision, and came to the conclusion that the clause only entitled the shipowners to actual damages—damages that they could prove that they had actually incurred—and not to the amount mentioned. The only member of the court who gave reasons for the decision was Bramwell, L.J., and he pointed out two objections to the construction sought to be placed upon the clause in that case by the shipowners. In the first place, he pointed out that the clause gave, in the case before him, no *terminus ad quem*—prescribed no limit upon which the penalty should cease to be payable. Therefore, he said, the literal construction of the clause would create an annuity to the shipowners in the amount of the penalty which would run on indefinitely. With the greatest deference, that reason does not seem to me to be entirely satisfactory. But in this charter-party, curiously enough, there is inserted a clause giving a definite *terminus ad quem*, because the clause runs, "until the ship is totally lost or the cargo delivered." That, it is said, was inserted in deference to the opinion of Bramwell, L.J., and converted what would otherwise be a penalty into liquidated damages with all the consequences. With regard to that observation of the Lord Justice it seems to me that probably he was commenting upon the argument of counsel upon the matter, and was not giving what really ought to be treated as a *ratio decidendi*. But he made another observation which is entirely applicable to this case, and which did appear to be the reason for his decision, and a reason in which I must take it the other members of the court acquiesced. He pointed out that the clause applied only to delay in signing the bill of lading, and not to an absolute refusal to sign the bill of lading. That I thought a highly technical view of the matter, but that is the view of a most eminent judge, acquiesced in by other equally eminent judges, and I must act upon their view. I quite agree with the observation pointed out for the plaintiff that here there was but one event contemplated between the parties, namely, the refusal to give the bill of lading, and a graduated scale of damages in respect of a refusal upon that one occasion to give the bill of lading. On the other hand much may be said in favour of the view that this penalty covered a multitude of transgressions of varying importance, because the qualification which the captain might introduce might be of the utmost insignificance and such that very little damage could possibly be done by reason of his insistence upon that qualification. In such a case it would be an extremely strong conclusion to come to that it was intended by the parties that the penalty should be paid for every day during which the dispute lasted as to whether this qualification should be inserted or not, and if the charterer chose to refuse to acquiesce in a qualification of the most trifling importance, and the captain sailed away refusing to give a bill of lading in any other form, that this penalty should be imposed for the whole course of the voyage. I therefore come to the conclusion that this is a penalty and not liquidated damages, and that, therefore, all that the plaintiffs are entitled to in respect of that part of their claim are nominal damages. Judgment, therefore, will be for the other amount mentioned, namely, 68*l.* 6*s.* 8*d.*, together with the 10*l.* paid into court.

Judgment for plaintiff, with costs.

Solicitors for the plaintiff, *Field, Roscoe*, and *Co.*, for *Yates, Johnson*, and *Leach*, Liverpool.

Solicitors for the defendants, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

Judicial Committee of the Privy Council.

March 21, 22, 27, *and July* 27.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords WATSON, HOBHOUSE, MACNAGHTEN, and MORRIS, and Sir R. COUCH.)

MANLEY *v.* PALACHE. (*a*)

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Practice — Appealable amount — Counter-claim — Action against a solicitor for negligence — Evidence—Admissibility—Jamaica Civil Code, sect. 428*—New trial.*

Where the claim on a counter-claim is below the appealable amount, an appeal will nevertheless lie if the whole amount of the claim in the action exceeds that amount.

In an action against a solicitor for negligence in not taking the proofs of the witnesses before the trial, it was proposed to call the witnesses to show what evidence they would have given if proofs had been taken.

Held (reversing the judgment of the majority of the court below on this point), that the evidence was admissible; but (affirming the judgment of the court below), as sect. 428 *of the Jamaica Civil Code enacts that "a new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence . . . unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned," a new trial should not be granted, it appearing that the evidence, if admitted, could have had no legitimate effect on the verdict.*

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

THIS was an appeal from a judgment of the Supreme Court of Jamaica (Ellis, C.J., Lumb and Jones, JJ.), who had refused a new trial, in an action brought by the appellant against the respondent, on the ground that the verdict was against the weight of evidence, and for improper rejection of evidence, and for misdirection. The action was brought by the appellant against the respondent, who was a solicitor, for negligence and misconduct in the conduct of certain litigation in which he had acted for the appellant, and he claimed 5000*l.* damages. The facts are fully set out in the judgment of their Lordships.

The case was tried before Lumb, J. and a jury, who found a verdict for the defendant on the claim, and also on a counter-claim in respect of costs alleged to be due.

Finlay, Q.C. and *Loehnis* appeared for the appellant, and argued that there were two points in the case: first, the question of misdirection and the improper rejection of evidence at the trial; and, secondly, whether the respondent, having improperly thrown up his retainer, was entitled to anything on his counter-claim beyond costs out of pocket.

Safford, for the respondent, objected that the appeal was not competent on the second point, as the amount in question was below the appealable amount.

Lord WATSON referred to *Allan* v. *Pratt* (13 App. Cas. 780; 59 L. T. Rep. 674).

The LORD CHANCELLOR (Herschell). — The total amount must be looked at; it cannot be split up into separate items.

Finlay, Q.C. (*Loehnis* with him) argued that the evidence was admissible, and there had been misdirection, and that a new trial should be ordered. He cited

Hatch v. *Lewis*, 2 F. & F. 407;
Godfroy v. *Jay*, 7 Bing. 413;
Underwood v. *Lewis*, 70 L. T. Rep. 833; (1894) 2 Q. B. 306;
Fray v. *Voules*, 1 E. & E. 839;
Whiteman v. *Hawkins*, 39 L. T. Rep. 629; 4 C. P. Div. 13.

Sir *E. Clarke*, Q.C., *Safford*, and *Spencer* maintained that the evidence was properly rejected, and in any case no substantial wrong or miscarriage had occurred within sect. 428 of the Jamaica Civil Code, so there should not be a new trial. The verdict was right.

Finlay, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 27.—Their Lordships' judgment was delivered by

Lord WATSON.—The appellant, who was a pen-keeper and produce dealer at Roxburgh, Jamaica, appears to have been involved in a considerable amount of litigation. Before June or July 1891, the respondent, who was a solicitor and advocate in practice at Mandeville, acted for many years as his law adviser, agent, and counsel. On the 10th June 1892 the appellant brought the present action, in which he claimed 5000*l.* as damages for injury alleged to have been sustained through the professional negligence of the respondent. In his statement of claim the appellant charged the respondent—first, with failure to exercise due care, diligence, and professional skill in the conduct of three litigations, in all of which the appellant was unsuccessful, and was condemned in costs, these being (1) *Nias* v. *Manley*, before the Supreme Court, in which the appellant was defendant; (2) *Manley* v. *Bourke*, also in the Supreme Court, in which he was plaintiff; and (3) *Atkinson* v. *Manley*, which was brought against him in the Magistrate's Court at Clarendon; secondly, with having, unlawfully and without cause, withdrawn from his agency for the appellant on the 11th July 1891; and, thirdly, with having improperly refused to deliver up certain papers and documents. In his defence, the respondent denied all allegations of negligence and breach of professional duty; and counter-claimed for 84*l.* 9*s.* 4*d.* as the balance due to him on account by the appellant. The case was tried before Lumb, J. and a special jury. It occupied nine days, and all the questions were submitted to the jury, who returned a verdict for the respondent upon the claim, and for 38*l.* 5*s.* 7*d.* upon his counter-claim, with costs. Against that order the appellant appealed, and moved the court either to enter judgment in his favour or allow a new trial. The appeal was heard before a full Appeal Court, consisting of the late Ellis, C.J., and Lumb and Jones, JJ. The two latter were of opinion that the motion for a new trial ought to be dismissed, subject to these qualifications:—(1) That a verdict should be entered for the appellant for 5*l.* 5*s.* upon his claim in relation to *Manley* v. *Bourke*; (2) for 4*l.* 11*s.* 6*d.* upon his claim in respect of the respondent withdrawing from his agency: and that the appellant should have his costs of those issues. The Chief Justice did not altogether concur in the order, being of opinion that a new trial ought to be allowed on the alleged negligence of the respondent in conducting the defence in *Nias* v. *Manley*. The appellant now maintains that the case ought to be sent back for new trial. In *Nias* v. *Manley* the plaintiff was an elderly widow to whom her husband at his death in 1875 had bequeathed a small property called Breadland Pen, which she occupied personally. The appellant on the 7th Oct. 1887 recorded a deed, dated the 22nd Sept. 1887, by which, in consideration of 400*l.* paid to her, she conveyed the property absolutely to him. On that document there was indorsed an acknowledgment of her receipt of the 400*l.*, signed by her and one Thomas Peterson. The appellant founded a claim to the property on a second deed, dated the 16th May 1889, by which he agreed to pay Mrs. Nias 6 per cent. per annum on the 400*l.* for her life and to allow her to live on the property and run her own stock without molestation, and on her death the property was to be his. In June 1890 Mrs. Nias, who had remained in possession, brought an action against Manley to set aside both documents on the grounds that she had no independent advice, and did not understand their purport and effect, and had received no consideration for them, and that she signed them in reliance on misrepresentations of the appellant. The case was tried before the Chief Justice, who found that the deeds were entered into on the faith of such misrepresentations, and declared them void. It is a material circumstance that the whole facts of the case were necessarily within the appellant's personal knowledge. The negligence charged is that Mr. Palache omitted to examine any of the plaintiff's witnesses, and that in consequence his counsel

were unprovided with the means of cross-examining Mrs. Nias and calling those witnesses. But the respondent himself acted as counsel for Manley, and did examine him and the other witnesses whom Manley desired to call. In order to make out the charge of negligence, it is necessary to establish that it was the duty of the respondent to examine the witnesses personally and to take notes of what they were prepared to state on oath, and that such duty was not fulfilled. Unless the duty was incumbent on the respondent the fact that he did not examine the witnesses and take down their statements cannot constitute negligence. At the trial of this suit counsel proposed to call the witnesses who were called in *Nias* v. *Manley*, but not examined beforehand by Mr. Palache, to show what evidence they would have given if notes had been taken. The Judge held such evidence to be inadmissible. Their Lordships entertain no doubt that in that ruling the judge was erroneous, and that the evidence was wrongly excluded, but its does not necessarily follow that there must be a new trial, because sect. 428 of the Jamaica Civil Code (Law 40 of 1888) enacts that "a new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a point which the judge at the trial was not asked to leave to them, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial." The evidence rejected afforded the only means of proving part of the averments upon which the action was founded. But, if it had been admitted, it could only have gone to establish that the respondent had failed in the performance of the duty which he was said to have owed to the appellant, and to show the extent to which that duty, if it existed, had been violated. It could have thrown no light either upon the existence or the nature of the duty. It therefore becomes necessary to consider whether the jury came to the conclusion, and, if so, whether they were justified by the evidence in so doing, that the respondent owed no such duty to the appellant. That the point was submitted for their consideration does not admit of doubt. Lumb, J. states that he directed their attention to two questions: (1) Had the defendant an opportunity of taking proofs of the witnesses before the trial? (2) Did the plaintiff's conduct contribute to the non-taking of proofs?" The verdict was, in effect, a negative answer to the first, and an affirmative reply to the second of those questions. What is the evidence bearing on the respondent's duty? From the nature of the case the appellant must have known what the material witnesses could state, and it is not surprising that he not only selected his own witnesses, but examined them himself and furnished to the respondent written notes of what they were expected to say in the witness-box. The appellant was present and sat beside the respondent during the trial without making any complaint of the respondent's conduct. The latter constantly referred to the notes, and sometimes inquired of Manley what else he could ask. It is not pretended that the respondent was charged with the duty of finding and citing the witnesses for the appellant's defence. That duty was undertaken and performed by the appellant himself. Their Lordships have come to the conclusion that the verdict which negatived the existence of any such duty on the part of the respondent, as the appellant has alleged, was fully warranted by the evidence before the jury, and they are also satisfied that the evidence rejected by the judge could, if admitted, have had no legitimate effect upon their verdict. Upon the second point urged for the appellant their Lordships are unable to concur in the view taken by the Appeal Court. On the 27th June 1891 the appellant wrote to the respondent, who was at that time his agent and counsel, charging him with various gross breaches of professional duty, "the result of which," he said, "has wrecked my whole future prospects, and to-day I am deprived of my good name and truthfulness on which my business was hitherto carried on." The letter concluded with an intimation that, as the writer felt he required "reliable counsel on some points," he would be obliged by the respondent returning the papers in Mrs. Nias's case and sending in his bill of costs. Their Lordships cannot conceive that any respectable lawyer would continue to act for the writer of such a letter; nor could they suppose that the latter could reasonably expect him to do so. In their Lordships' opinion the appellant has failed to show reasonable cause for disturbing the verdict upon the third point, viz., the respondent's counter-claim. They will accordingly humbly advise Her Majesty to affirm the order appealed from. The appellant must pay to the respondent his costs of this appeal.

Solicitors for the appellant, *Pennington* and *Son*.

Solicitors for the respondent, *Tippetts* and *Son*.

July 18 *and* 27.

(Present: The Right Hons. Lords WATSON, HOBHOUSE, and MACNAGHTEN, and SIR R. COUCH.)

ROSS v. EDWARDS AND CO. (a)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Bailment—Estoppel—Title of bailor—Eviction by title paramount.

In ordinary circumstances a bailee is estopped from disputing the title of the bailor; but, if there is an eviction by title paramount, the bailee is, in the absence of any special contract, discharged from all liability.

Biddle *v.* Bond (6 *B. & S.* 225) *approved.*

Judgment of the Court below affirmed.

THIS was an appeal from a judgment of the Court of Appeal for Ontario (Hagarty, C.J., Burton. Osler, and Maclennan, JJ.), who had affirmed a judgment of Meredith, J., at the trial.

The facts are very fully set out in the judgment of their Lordships.

Osler, Q.C. and *Ferguson*, Q.C. (both of the Canadian Bar) appeared for the appellant, and contended that the respondents as bailees were estopped as against the appellant from denying that the timber in question was the property of Little; and having attorned to the appellant in

(a) Reported by C. E. MALDEN Esq. Barrister-at-Law

respect of it, were further estopped from denying that they held the timber for him. They cited

Gibson v. *Carruthers*, 8 M. & W. 321;
Blackburn on Sale, 2nd edit., p. 452;
Simm v. *Anglo-American Telegraph Company*, 42 L. T. Rep. 37; 5 Q. B. Div. 188;
Stonard v. *Dunkin*, 2 Camp. 344;
Woodley v. *Coventry*, 2 H. & C. 164;
Attenborough v. *London and St. Katharine's Dock Company*, 38 L. T. Rep. 404; 3 C. P. Div. 450;
Gillett v. *Hill*, 2 Cr. & M. 536;
Merchant Banking Company v. *Phœnix Bessemer Steel Company*, 36 L. T. Rep. 395; 5 Ch. Div. 205, where *Farmiloe* v. *Bain* (34 L. T. Rep. 324; 1 C. P. Div. 445), which was relied on in the court below, was distinguished.

Robinson, Q.C. (of the Canadian Bar), who appeared for the respondents, was not called upon.

At the conclusion of the argument for the appellant their Lordships took time to consider their judgment.

July 27.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—The respondents, Messrs. W. C. Edwards and Co., who were manufacturers of lumber at Rockland, sold to Messrs. Hurteau et Frère about four million feet of deals stored in their yard. On the 12th Jan. 1888 Hurteau et Frère sold to William Little about a million and a half of these deals. The sale was at six months' credit, and on the 20th Jan. the respondents accepted a delivery order in favour of W. Little or order. On the 28th Feb. Little arranged with Ross and Co. for an advance to him of 7500 dols., pledging that delivery order as collateral security, he endorsing it, "Please hold the within-mentioned quantity of deals subject to the order of Ross and Co., Quebec." Little then drew on Ross and Co. drafts for 7500 dols., which were accepted. On the 10th March Ross and Co. wrote to the respondents inclosing the order and stating that Little had transferred the deals to them. The respondents indorsed the order, "Will hold within deals subject to order of Ross and Co. as above authorised," and returned it to Ross and Co. in a letter, in which they accepted the transfer of the deals from Little to themselves. In June 1888, after a small portion of the deals had been delivered to Ross and Co., Little suspended payment without having paid Hurteau et Frère. The latter immediately gave notice to the respondents, requiring them not to make any further delivery to Little's order. Ross and Co., on the other hand, insisted on delivery of the rest of the deals. Thereupon the respondents brought an interpleader action making both Hurteau et Frère and Ross and Co. defendants. Judgment was given in favour of Hurteau et Frère as unpaid vendors. Ross, the present appellant, as representing Ross and Co., then brought this action against Messrs. Edwards, alleging that the 7500 dollars were advanced to Little on their undertaking, which led them to believe that the deals were Little's property and would be delivered to Ross and Co. when demanded. The suit was dismissed with costs, and the Court of Appeal unanimously affirmed that decision. In the opinion of their Lordships there is no foundation for the appeal. In a bailment such as that upon which the appellant founds his claim the bailor represents to the bailee that he may safely accept the bailment. On that representation the bailee promises to redeliver. It is clear that the bailee after acknowledging that he holds the goods on account of the bailor cannot say to the bailor, "The goods are not yours"; but it is equally clear that if there is that which amounts to eviction by title paramount the bailee is discharged from his promise. In that event he is under no liability to the bailor unless he has made a special contract with him or is in some way to blame for his loss: (*Biddle* v. *Bond*, 6 B. & S. 225.) In the present case Edwards and Co. did not dispute the title of the bailor while they were bailees. But there was eviction by title paramount. The goods were adjudged to belong not to Ross and Co. but to Hurteau et Frère. The counsel for the appellant contended that Edwards and Co. were in fault, and that there was something special in the terms of their acceptance which was equivalent to an undertaking to deliver the lumber to Ross and Co. in any event, whoever might be the true owner at the time. In their Lordships' opinion that is an extravagant proposition. Edwards and Co. acted with strict propriety throughout the transaction. The delivery order and acceptance were in common form. There was nothing special or unusual about the one or the other. It is not suggested that there was any agreement or undertaking on the part of Edwards and Co., except what is to be found in the documents. On the documents the appellant's case fails. If the oral evidence is looked at, it is plain that the appellant's claim was not only unfounded but absurd. It was proved or admitted that Ross and Co. knew that Little had not paid for the goods, while Edwards and Co. knew nothing about the matter. It is found by the courts below that Ross and Co. did not accept Little's drafts on the faith of Edwards and Co. accepting the delivery order in their favour. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Solicitors: for the appellant, *Bompas, Bischoff, and Co.*; for the respondents, *Norton, Rose, Norton, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 19 *and* 22.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

ALLEN *v.* THE LONDON COUNTY COUNCIL. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Metropolis—General line of buildings—Certificate of superintending architect—House at corner of two streets—Metropolis Management Amendment Act 1862 (25 *&* 26 *Vict. c.* 102), *s.* 75—*London Council* (*General Powers*) *Act* 1890 (53 *&* 54 *Vict. c. ccxliii.*)

Where a house is built at the corner of two streets it is for the superintending architect of the London County Council to decide in which street the house is situate, and not for the magistrate

(*a*) Reported by W. C. BISS and W. H. HORSFALL, Esqrs., Barristers-at-Law.

before whom proceedings are taken to obtain an order for the demolition of the house on the ground that it has been built beyond the general line of buildings.

THIS was a case stated by one of the magistrates of the police-courts of the metropolis.

On the 26th April 1895 there was heard and determined by him a summons which was issued upon a complaint made on the 2nd March 1895 by the London County Council (hereinafter called the respondents), that John Edward Allen and Charles James Allen (hereinafter called the appellants) did on or about the 13th Nov. 1894 unlawfully begin to erect a certain building beyond the general line of buildings on the north-western side of Birchington-road without the consent in writing of the London County Council, contrary to sect. 75 of 25 & 26 Vict. c. 102; 45 Vict. c. 14, s. 10; and 51 & 52 Vict. c. 41.

It was proved that the appellants on or about the 13th Nov. 1894 commenced to erect four shops and dwelling-houses upon the land at the corner of Birchington-road and Kilburn High-road. The shop and dwelling-house had a frontage of about 58 feet to Birchington-road and 22 feet to the Kilburn High-road, and more than half of the said frontage in Birchington-road was intended to be occupied by the shop front. At the time when the appellants so began to erect the building, as first contemplated, the door of the shop was intended to face the corner between the two roads, and the erection was commenced so as to carry out that intention, but afterwards in or about the month of Feb. 1895 the appellants proposed to alter the construction of the shop and dwelling-house so as to make the shop door face towards the Kilburn High-road. No consent was given by the respondents to the erection of the building.

The certificate of the superintending architect of the London County Council, dated the 11th Dec. 1894, and the decision on appeal therefrom of the tribunal of appeal constituted under sect. 28 of the London Council (General Powers) Act 1890 (53 & 54 Vict. c. ccxliii.) were proved. The building extended 16 feet beyond the general line of buildings as determined by such certificate and decision in that part of Birchington-road in which the building was situate.

It was contended, on behalf of the appellants, that the superintending architect had not, by his certificate, found that the appellants' building was situate in the street, place, or row of houses described in the certificate as a row of houses on the north-western side of Birchington-road; and that, if he had by his certificate so found, he had placed the building in a street, place, or row of houses in which the same was not situate, within the meaning of sect. 75 of the Metropolis Management Act 1862, and had exceeded his jurisdiction.

It was contended, on behalf of the appellants, that the situation of the appellants' building in relation to the Kilburn High-road and the Birchington-road respectively was identical with, and could not be distinguished from, the situation of the building in question in the case of *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (55 L. T. Rep. 221; 11 App. Cas. 257), in relation to the Kensington High-road and the street called De Vere-gardens, unless the fact that the building in this case is to be used as a shop, and the building in that case was a private house, makes a difference; but it was contended, on behalf of the respondents, that the form of the certificate of the superintending architect in this case, being different from the form of the certificate in the case of *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*), the magistrate was not bound by that case.

It was contended, on behalf of the respondents, (1) that the certificate and decision had determined that the building was situate in the Birchington-road, and (2) that such determination was binding on the magistrate.

It was also proved that, after the date of the certificate of the architect and award of the appeal tribunal, the appellants had set back to the general line a portion of their building.

The magistrate was of opinion that the contentions of the respondents were, having regard to the case of the *London County Council* v. *Cross* (66 L. T. Rep. 731), well founded; and he therefore found the complaint proved, and ordered that the appellants should, within twenty-eight days from the service of the order, demolish so much of the building so erected by the appellants as was beyond the general line of buildings on the north-western side of Birchington-road, as defined by the certificate, and duly confirmed by the decision.

The questions for the opinion of the court are: (1) Whether the certificate of the superintending architect decides that the appellants' house is situate in the street, place, or row of houses in and for which the general line of buildings is determined by the certificate. (2) Whether it was the duty of the superintending architect, under sect. 75 of the said Act, to decide and find by his certificate the situation of the appellants' building within the meaning of the said section, and, if so, whether his decision and finding were binding on the magistrate.

The certificate of the superintending architect above referred to, after reciting sect. 75 of the Metropolis Management Amendment Act 1862 stated that the parties interested

Have severally appeared before me and been heard regarding the erection of a building in Birchington-road, Hampstead, and beyond the face or front of the buildings forming a row of houses on the north-western side of Birchington-road aforesaid, and I have been required to decide the general line of buildings in such road as provided in the said statute.

Now, therefore, having considered the matter, I, the undersigned, being the superintending architect to the London County Council, do hereby, pursuant to the said Act, decide that the main fronts of the buildings in the row of houses aforesaid, and tinted pink on the plan hereto annexed and signed by me, form the general line of buildings on the north-western side of Birchington-road aforesaid, in which road the building in question is situate, and that the prolongation of the general line of buildings across such building is as shown by the pink dotted lines on the annexed plan.

The case came before the Divisional Court on the 24th June and the 1st July.

Channell, Q.C. for the appellants.—The magistrate should have himself decided whether the building was in Birchington-road; instead of doing so, he held that the superintending architect had by his certificate found that the building was in that road, and that he, the magistrate, was bound

by that finding. The question is one of fact for the magistrate to decide:

Barlow v. *Vestry of St. Mary Abbotts, Kensington*, 55 L. T. Rep. 221; 11 App. Cas. 257.

Avory and *Daldy* for the respondents.—This question was decided in *London County Council* v. *Cross* (66 L. T. Rep. 731). There were two points in that case, both of which in the Queen's Bench Division were decided in favour of the present respondents, but the Court of Appeal reversed that decision on the second point only, and therefore the judgment of the court below on the first point, which is identical with that in the present case, still remains. That decision is in favour of the view that this question has to be decided by the superintending architect. The House of Lords took the same view in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*).

Channell in reply.

WILLS, J.—The question which is raised by this case has been frequently discussed, and we have now to say whether it has been actually decided. It is whether the certificate of the superintending architect of the London County Council decides not only the general line of buildings in a street, but also whether a particular building is in a particular street or not. Or, to state it very shortly in another way, whether the function bestowed on the superintending architect of deciding the general line of buildings in any street in which a house is situated incidentally carries with it the decision as to what street the house is in. If I had looked only at the Act of Parliament I should have said that this was one of those matters of fact which was essential to the decision of the tribunal before which the case was brought, and I should have held that the magistrate ought to have decided this question of fact in the same way as he decided other questions of fact coming before him. This question has been discussed in several cases, and the result up to the present time seems to me to be anything but satisfactory. We heard a somewhat lengthy argument upon the relative convenience of the two tribunals, as to whether it were better that the superintending architect or the magistrate should decide the point, and certainly it seems to me that, so far as convenience goes, the superintending architect could decide it better than other people. The only objection that can be raised to that view is, that the tribunal of appeal is not a proper court to decide such a question, because one of the members is a party to the appeal. But that anomaly will not occur in the future, because it is done away with under the provisions of the London Building Act 1894. The state of the authorities on this question is this: In 1886 the question was incidentally discussed before the House of Lords in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (55 L. T. Rep. 221; 11 App. Cas. 257), in which case it was not necessary to decide the exact point, but a good deal was said upon it. Lord Watson expresses an opinion to the effect that the decision of the point whether a building is in a particular street has been intrusted by the Legislature to the superintending architect. On the other hand, Lord Bramwell vigorously criticises that view and gives his reasons for thinking that it is a matter for the decision of the magistrate before whom the case is heard. Lord Fitzgerald agreed with the opinion of Lord Watson. Then there is also the judgment of Lord Herschell, which Smith, J., in *London County Council* v. *Cross* (66 L. T. Rep. 731), said was to the same effect as Lord Watson's, but in which I think the question is so carefully wrapped up that it is difficult to say what his view was, though it seems to me that it was really in favour of the opinion expressed by Lord Bramwell. After that we have the decision of Denman and Smith, JJ., in *London County Council* v. *Cross*, who came to the conclusion that the question was one for the decision of the superintending architect. That decision was reversed by the Court of Appeal upon another point, and the present question was left untouched. I need hardly say that the decision of Denman and Smith, JJ. has great weight with us, though it is not binding upon us, and I feel bound to express my own opinion upon the point. I take the same view as the two noble Lords and the two judges whose opinions I have referred to, and I have come to the conclusion that the question is one for the decision of the superintending architect, and not for the magistrate before whom the case is heard. The London Council (General Powers) Act 1890 (53 & 54 Vict. c. ccxliii.) was passed before the decision in *London County Council* v. *Cross* (*ubi sup.*) was given, and therefore does not affect the weight of that judgment. Since the passing of the London Building Act 1894 (57 & 58 Vict. c. ccxiii.) this question cannot arise, as by sect. 29 of that Act the superintending architect may be required to determine in what street a building is situated. For the reasons which I have given I think that our judgment must be for the London County Council.

WRIGHT, J.—I agree, and do so entirely out of deference to the judgments of Denman and Smith, JJ. in *London County Council* v. *Cross* (*ubi sup.*), although I do not think that Lord Watson in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington*, went the length that those judges say that he did.

WILLS, J.—There are two questions asked us in this case. If our view is correct I think that the superintending architect must be taken to have decided that the appellants' house was situate in the street for which the general line of buildings is determined by his certificate, though the certificate is not very happily worded. If he did not mean to decide that point, then it is not a proper certificate.

From this decision Messrs. Allen appealed.

Channell, Q.C. (*A. Macmorran* with him) for the appellants.—The certificate of the superintending architect does not state that this house is in the Birchington-road, and shows that he did not apply his mind to that point, and therefore the certificate is defective as the certificate was in *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (55 L. T. Rep. 221; 11 App. Cas. 257). The house here is in the same position as the house in that case. On the true construction of sect. 75 of the Metropolis Management Amendment Act 1862 the magistrate is not bound by the decision of the superintending architect as to the street in which a building stands. It is a question of fact for the magistrate to decide. In *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington*, Lord Bramwell was of opinion (55 L. T.

Rep. 224; 11 App. Cas. 269) that the question was not to be dealt with by the architect only, although Lord Watson was of a contrary opinion (55 L. T. Rep. 223; 11 App. Cas. 265). The point, however, was not before the House of Lords for decision, and it is not dealt with in the other judgments. In *London County Council* v. *Cross* (66 L. T. Rep. 731) the Divisional Court held that the magistrate was bound by the architect's certificate, but Smith, J. misunderstood the judgment of Lord Herschell in *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington*, and Denman, J. merely expressed his concurrence on that point. On appeal the judgment was reversed on another point, and this one was not considered.

Horace Avory and *F. F. Daldy* for the County Council.—The decision of the superintending architect as to the general line of buildings involves the decision as to the street in which a particular house is situated, for in order to decide it he must consider what houses are in the street. He may decide the general line of buildings after a building has been erected, and the magistrate cannot review his decision:

Spackman v. *The Plumstead District Board of Works*, 53 L. T. Rep. 157; 10 App. Cas. 229.

But the case of *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*) is a further authority in favour of the council, for Lord Herschell really agreed with Lord Watson on this point, and Lord Fitzgerald said he had read both their judgments and entirely agreed with them. The decision in favour of the builder in that case was in consequence of the certificate being defective, as the architect did not certify that the house was in the particular street, and as appears from the order the injunction granted by Bacon, V.C. was varied by being limited to restraining the vestry from proceeding on that certificate, so that fresh proceedings might have been commenced on a fresh certificate. If the House of Lords had not thought that this was a point for the architect to decide they would have said so, and not have altered the order of Bacon, V.C. This certificate does find that the building is in Birchington-road. This point was actually decided in favour of the county council by the Divisional Court in *London County Council* v. *Cross* (*ubi sup.*), and that decision was not affected by the judgment of the Court of Appeal. [LOPES, L.J. referred to *Gilbart* v. *The Wandsworth District Board of Works* (60 L. T. Rep. 149).]

Channell, Q.C. in reply.

Cur. adv. vult.

July 22.—LINDLEY, L.J.—This is an appeal from a decision of the Divisional Court in one of those cases of a building projecting beyond the general line of buildings, and it turns upon the true construction of sect. 75 of the Metropolis Management Amendment Act of 1862. The difficulty arises with reference to a house which is situate at the corner of two roads or streets. The superintending architect has granted a certificate which contains a recital that the parties interested have appeared before him with regard to "the erection of a building in Birchington-road, Hampstead, and beyond the face or front of the buildings forming a row of houses on the north-western side of Birchington-road aforesaid, and I have been required to decide the general line of buildings in such road as provided in the said statute." Then he says that he decides "that the main fronts of the buildings in the row of houses aforesaid, and tinted pink on the plan hereto annexed and signed by me, form the general line of buildings on the north-western side of Birchington-road aforesaid, in which road the building in question is situate." Now, with reference to the point made by Mr. Channell turning on the construction of that certificate, and having regard to the terms of it and to the plan to which it refers, I have not the slightest doubt that the true construction of it is that the building in question is certified to be not only in Birchington-road but in the road delineated on the plan. That being so, I turn to the question which is in controversy, and which turns upon the construction of the Act. The question is whether this building projects beyond the buildings—the row of houses—in Birchington-road, and whether that question is to be decided under this statute by the superintending architect or by the magistrate. The following circumstances must co-exist in order to justify an order for demolition, under sect. 75, viz.: (1) There must be a building, structure, or erection of some sort. (2) Such building, structure, or erection must be erected without the written consent of the Metropolitan Board of Works, or now of the county council. (3) Such building, structure, or erection must be in some street, place, or row of houses. (4) Such street, place, or row of houses must have a general line of buildings. (5) Such line of buildings, *i.e.*, the line of buildings of the street, place, or row of houses in which the building complained of is situate must be decided by the superintending architect appointed by the Metropolitan Board of Works, or now by the county council. (6) Lastly, the building, structure, or erection must be erected beyond the line so decided. What is left to the decision of the architect is the existence and exact position of the general line of buildings of the street, place, or row of houses (if any) in which the building, &c., complained of has been erected. In case of dispute the magistrate must decide all the other matters referred to; *e.g.*, whether the building, &c., complained of is one to which sect. 75 applies, especially having regard to sect. 74; whether the necessary consent has been given; whether the building, &c., is in a street, place, or row of houses, "street" being interpreted as directed in sect. 112; whether the building, &c., has been erected beyond the general line of buildings for that street, &c., as decided by the superintending architect. Such is, in my opinion, the true construction of the section, and of the decision in *Spackman* v. *The Plumstead District Board of Works* (*ubi sup.*), which set at rest the doubt whether the magistrate could review the architect's decision as to the general line of buildings. So far the interpretation of the statute is reasonably plain. But then it is said that the question still remains, who is to determine whether the building complained of is in the particular street, place, or row of houses to which the architect's certificate is applicable. This is the point on which Lords Watson and Bramwell differed in *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*). A careful perusal of Lord Herschell's judgment in that case has led me to the conclusion that he agreed with Lord Watson, and that Lord Fitzgerald took the same view. There is much to be said for this interpretation

of the Act, for, the object of the Act being to regulate lines of buildings, the architect, rather than the magistrate, seems naturally to be the person to say to what line of buildings a particular house should conform. The general line of buildings which the architect is to decide is "such general line," and by "such" is meant the general line for the street, place, or row of houses in which the house in question is. The architect might, no doubt, assume, without deciding, that the building complained of was in a particular street, place, or row of houses, and simply certify the general line of buildings of that street, &c., leaving the magistrate to determine whether, after all, the building was in the street, &c., to which the certificate applied. But this would be to deprive the architect's certificate of half its value, and the interpretation which leaves him to decide what building line is to be conformed to seems to be preferable to an interpretation which leaves that question to the magistrate. For these reasons, and thinking, as I do, that this view of the section is more in conformity with the decision of the House of Lords in *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*) than the interpretation contended for by the appellants, I have come to the conclusion that this appeal ought to be dismissed. The architect's certificate here, taken with the plan, supplies the omission which led to the decision in that case, and does certify, with sufficient clearness, that the appellants' house is not only in Birchington-road, but is in the row of houses the building line of which is defined.

Lopes, L.J.—I am of the same opinion. Five questions are asked in this special case. The first is, "Whether the certificate of the superintending architect decides that the appellants' house is situate in the street, place, or row of houses in and for which the general line of buildings is determined by the certificate?" Now I do not mean to say that the certificate is as clear as it might be, but I have come to the conclusion that it does mean to decide that the appellants' house is situate in the street, place, or row of houses in and for which the general line of buildings is determined by the certificate. Therefore I answer that question in the affirmative. Then a further question is asked, "Whether it was the duty of the superintending architect under section 75 of the said Act to decide and find by his certificate the situation of the appellants' building within the meaning of the said section, and if so, whether his decision and finding were binding on the magistrate?" I have come to the conclusion that that question also ought to be answered in the affirmative. That question depends on the construction of the 75th section of the Metropolis Management Amendment Act 1862. In that section are these words: "Such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works." "Such" general line of buildings refers you back to the earlier part of the section, which says that "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate." It seems to me impossible that the superintending architect can determine the building line which is to be conformed to without determining in what street the house complained of is. I think, if I had to decide it for the first time, upon the true construction of the section, I should so hold; but the case in the House of Lords (I think it unnecessary to refer to other cases) of *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*) is to my mind a clear authority in that direction. I think the judgment of Lord Watson in that case is right when he says (55 L. T. Rep. 223; 11 App. Cas. 265): "In my opinion the function assigned to the superintending architect is not merely to lay down the general line of buildings in a street, place, or row of houses in which the building or erection complained of is alleged to be situated, but to fix and determine the general building line of the street, place, or row in which according to his professional judgment such building or erection is actually situate. The question whether a building is or is not within the meaning of the Act situate in a particular street, place, or row may involve considerations of the same character with those upon which the determination of a general line of buildings must often depend, and it appears to me to have been the intention of the Legislature" (these are the important words) "to entrust the decision of both points to the architect, and not to the justice before whom the complaint is brought." That judgment of Lord Watson is absolutely clear, and if the judgment of Lord Herschell, who delivered the first speech in the House of Lords, is looked at it will be found that what he says is not inconsistent with anything Lord Watson says, but in my opinion is consistent with it; and in his judgment Lord Fitzgerald said (55 L. T. Rep. 224; 11 App. Cas. 269): "I have had the advantage of reading the judgment which has been delivered by the noble and learned Lord on the woolsack, and also the judgment which has been delivered by my noble and learned friend opposite (Lord Watson), and I entirely agree in the conclusion at which they have arrived, and in their reasoning." Now, Lord Bramwell took a different view. Lord Fitzgerald says nothing about the judgment of Lord Bramwell, but he says he agrees with Lord Herschell and Lord Watson. That case therefore, to my mind, concludes the question we now have to decide, and if that is so I answer the second question in the affirmative. It seems to me, as I have already said, not only is that in accordance with the case in the House of Lords, but, in my mind, it is in accordance with the true construction of the statute, and also what I conceive to be the general convenience of the matter; because there can be no doubt that the architect, who goes on the spot and thoroughly considers the position of the house and has to determine the building line, is the person who is best able to form a skilled opinion as to the particular street in which a particular house is situated. I come to the conclusion, therefore, that the decision of the magistrate is right, and answer both questions in the affirmative.

Rigby, L.J.—I am of the same opinion. As to the first question I do not think the superintending architect's certificate is really open to doubt. In that certificate he speaks of a road called Birchington-road, and on the plan to which he refers Birchington-road is shown to be a road extending all the way from Kilburn High-road on the one hand to West End-lane on the other.

He decides that the house in question is in Birchington-road, and he decides that the general line of buildings in Birchington-road is the general line for Birchington-road. If there is any doubt about it, it is set at rest by the plan on which we see the general building line indicated, passing through the house in question right up to Kilburn High-road. I have no doubt therefore that his certificate is a good certificate in the very respect in which, in *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*), the certificate was held to be defective. Now I quite agree with what has been said as to the construction of sect. 75, and I will not repeat that. I can only say that personally I consider the matter is absolutely settled and disposed of by the decision in *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*). Bacon, V.C. had granted an absolute injunction restraining the vestry from proceeding to pull down the buildings. That would have left open no possibility of their instituting new proceedings. The House of Lords varied that order by confining it to an injunction against proceeding upon the certificate which had then been made, the order of Bacon, VC. being restored (11 App. Cas. 269), "with the variation that the injunction therein granted should be limited to restraining the respondents, the Kensington Vestry, from demolishing or interfering with the buildings in question, or taking any steps for that purpose in virtue either of the certificate of Mr. Vulliamy or of the complaint and proceedings following thereon." So that in point of law they simply found that the certificate of Mr. Vulliamy and the complaint and proceedings following thereon did not form a ground for demolishing the building. Lord Bramwell no doubt said (55 L. T. Rep. 224; 11 App. Cas. 268): "I find as a fact that the appellants' house is not in the row of houses or line of buildings called De Vere Gardens." Now, if the House of Lords had jurisdiction, or supposed themselves to have had jurisdiction, to determine that point, they ought to have determined it. It would be idle to send back this case when they had all the materials before them; but I do not find that any one of the noble and learned Lords who moved the House or spoke on the motion on that occasion takes upon himself to determine the point other than Lord Bramwell. Now, if it were the magistrate's duty to determine that point the appeal would, and the House of Lords ought, to have determined whether the house was within or without De Vere Gardens. They refrained from doing so, and I think in so refraining they affirmed that they had no jurisdiction to determine that question; in other words, that no appeal to them was possible. So I consider that very affirmatively they decided that it was the architect's duty to ascertain in what line of buildings the house in question was situate, and that his certificate was defective in that he had not so ascertained it. It appears to me a clear decision upon the very point that has been argued before us, and on all the grounds I think that the appeal ought to be dismissed.

Solicitors for the appellants, *Last* and *Son*.

Solicitor for the London County Council, *W. A. Blaxland*.

July 15 *and* 16.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Lavy and Upjohn v. The London County Council. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Metropolis—General line of buildings—"Building, structure, or erection"—Wall erected as advertisement station—Certificate of superintending architect—Appeal from architect's certificate—Issue of summons — Metropolis Management Amendment Act 1862 (25 *&* 26 *Vict. c.* 102), *s.* 75—*Metropolis Management and Building Acts* (*Amendment*) *Act* 1882 (45 *Vict. c.* 14), *s.* 13.

The owners of a dwelling-house in the metropolis, the forecourt of which was bounded towards the highway by a brick wall 3 *feet high, surmounted by iron railings* 5 *feet* 6 *inches high, erected upon the wall a wooden hoarding* 12 *feet high for advertising purposes. Objection being made by the London County Council, under sect.* 13 *of the Metropolis Management and Building Acts* (*Amendment*) *Act* 1882, *to the hoarding as a temporary wooden structure erected without licence, the owners, more than twelve months after its erection, removed it, together with the wall and railings, and erected a brick wall* 11 *feet high and* 14 *inches thick. The wall stood partly upon the footings of the old wall, but its face was set back* 4½ *inches, so as to leave room for studs, to which was fastened a wooden hoarding for advertisements. Complaint was then made by the London County Council against the owners, under sect.* 75 *of the Metropolis Management Amendment Act* 1862, *for erecting a structure beyond the general line of buildings without the consent of the council. Before the complaint came on for hearing, the superintending architect decided the general line of buildings at the point to be further from the highway than the wall; and, on an appeal, for which the hearing of the complaint was adjourned, the appellate tribunal, constituted under sect.* 28 *of the London Council* (*General Powers*) *Act* 1890, *confirmed his decision. The magistrate ordered the demolition of the wall.*

On a case stated, it was decided by the Divisional Court (*Day and Wright, JJ.*) *that, notwithstanding the appeal to the appellate tribunal, the general line of buildings at the point had been decided at the time the complaint came on for hearing; that the old wall and hoarding were not a "building, structure, or erection" within the meaning of the section; that the new wall was such a "building, structure, or erection" erected upon land previously vacant; and that, consequently, the section applied, and the order for demolition must be affirmed* (72 *L. T. Rep.* 600). *On appeal:*

Held, on the authority of The London County Council *v.* Cross (66 *L. T. Rep.* 731), *that it was not a condition precedent that the superintending architect should have determined the general line of buildings.*

Held also, that the wall was a "building, structure, or erection" within sect. 75, *and that there was nothing to the contrary in* Wendon *v.* The London County Council (70 *L. T. Rep.* 94, 440; (1894) 1 *Q. B.* 227, 812).

(a) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

Held also, that the original dwarf wall was not within the Act, and, that being so, the land ought to be regarded as vacant land; and that, therefore, Lord Auckland *v.* The Westminster Local Board of Works (26 *L. T. Rep.* 961; *L. Rep.* 7 *Ch. App.* 597) *had no application.*
Decision of the Divisional Court affirmed.

Appeal by Lavy and Upjohn from a decision of the Divisional Court (Day and Wright, JJ.) (72 L. T. Rep. 600).

M'Call, Q.C. and *R. Cunningham Glen* for the appellants.—Since the decision in the case of *Spackman* v. *The Plumstead District Board of Works* (53 L. T. Rep. 157; 10 App. Cas. 229) the superintending architect decides once for all what the general line of buildings is to be. At the time the summons in the present case first came on for hearing there had not been any final determination of the general line of buildings: (see the Metropolis Management Amendment Act 1862, ss. 74, 75.) Although the London Buildings Act 1894 (57 & 58 Vict. c. cexiii.) repeals the statute of 1862, there is a saving clause as to all things done under the old Act. [Lindley, L.J.—Have you any authority but *Spackman's* case (*ubi sup.*) for your proposition that the certificate of the superintending architect as to the general line of buildings must be granted before the summons is taken out?] There is the case of *Bauman* v. *The Vestry of St. Pancras* (L. Rep. 2 Q. B. 528). [*Channell*, Q.C. referred to the decision of the Court of Appeal in *The London County Council* v. *Cross* (66 L. T. Rep. 731).] Then as to the main point, whether in fact this wall, found to be a boundary wall, is a "building, structure, or erection" within the meaning of sect. 75 of the Metropolis Management Amendment Act 1862. We say that a "building, structure, or erection" means something in its nature habitable as distinguished from something which is not habitable. [Lopes, L.J.—What do you call this wall?] We are content to call it a "wall." [*H. A. Forman* referred to *Ellis* v. *The Plumstead District Board of Works* (68 L. T. Rep. 291).] In *Wendon* v. *The London County Council* (70 L. T. Rep. 94, 440; (1894) 1 Q. B. 227, 812, 816), following Cockburn, C.J., in *Clark* v. *The Vestry of St. Pancras* (34 J. P. 181), it is distinctly laid down that the mere raising of a wall is not a building, even though the wall might be a building when covered over. The appellants were entitled to add to the height of the boundary wall of their forecourt, and an addition to a building is not the erection of a building within the meaning of the section. Lastly, the wall was not built upon vacant ground, but upon the site of a previously existing wall. That being so, the case of *Lord Auckland* v. *The Westminster Local Board of Works* (26 L. T. Rep. 961; L. Rep. 7 Ch. App. 597, 604) applies, and the respondents had no power to proceed under the section.

Channell, Q.C. and *H. A. Forman* (with them *F. F. Daldy* and *F. K. North*) for the respondents. [They were stopped by the Court.]

R. Cunningham Glen replied.

Lindley, L.J.—This case raises a question of some importance as to the power of the London County Council to order a structure to be pulled down under the provisions of the Metropolis Local Management Act 1862. The facts of the case are these: The appellants here are the owners of a house in the City-road, No. 391 it was stated to be. It is quite obvious that long before there was any controversy about what they might do or might not do, there was, to use the language of sect. 75 of the Act, a "general line of buildings." It was an old road, and it is impossible to read the facts stated by the magistrate in the case, especially clause (*c*) of paragraph 3, without seeing that there was then a general line of buildings, although there was no architect's certificate. In 1892 the appellants wanted to build over the garden in front of the house, which house was in the general line of buildings, and the authorities objected. In 1894 the appellants again applied for liberty to erect some kind of building, and again that was objected to. Now the state of things at that time was this: The appellants, as I have said, had a house in a row, and the general line of buildings was obvious to anybody. There was no question at all about it. Their little garden in front was bounded by a dwarf wall two or three feet high and 9 inches in width with a coping, and then iron railings some 5 feet high at the top. That was the state of things. Now, after the authorities had been applied to for consent, and after they had objected, what the appellants did, they did with their eyes open. They have pulled down the dwarf wall, and have built another wall 14 inches thick of a totally different description, 11 feet high, strengthened by piers. Their object is, as the case states, to utilise that wall as a screen for advertisements and so on. Now, on the 11th July 1894, the London County Council took out a summons in order to compel them to pull that wall down. At that time, to my mind, they had clearly erected a new building (I will consider presently the language of the Act) which was in front of the general line of buildings. And, there having been no dispute about it, it appears to me, quite apart from the case, that they had done that which they had no right to do under sect. 75. The summons, as I have said, was taken out on the 11th July 1894. Two days afterwards the architect fixed this line. Whether it was exactly the old line of buildings or not I do not know. However, he fixed the line, I take it for granted that it was at the old line of buildings or very close to it. Then there was a dispute about that, and there was an appeal; nothing turns upon that. Ultimately the summons was heard, and now the magistrate, having heard the summons, finds this as a fact: "The whole of the said wall which I find, so far as it is a question of fact, to be a structure, is in front of the line of fronts of the adjacent houses and of the general line of buildings defined as hereinafter mentioned. And it is situate in City-road at a point where the distance of the general line of buildings from the highway does not exceed 50 feet." Therefore, so far as it is a question of fact, the magistrate finds against the appellants, and the order is made on this summons for the demolition of this wall. Now they appeal, and the points they take on the appeal are these: First of all, they say that the magistrate has no jurisdiction to entertain the summons because, when the summons was taken out, the architect had not defined the line, which is a condition precedent even to the issue of the summons. Reliance is placed upon the judgment of Lord Selborne in the case of *Spackman* v. *The Plumstead District Board*

of Works (53 L. T. Rep. 157; 10 App. Cas. 229) in support of that contention. This is not the first time that I have had to consider the decision of Lord Selborne in that case. It was carefully examined by my brother Kay and myself in the case of *The London County Council* v. *Cross* (66 L. T. Rep. 731), and we came to the conclusion then (as I have certainly come to the same conclusion again, because I read the case last night) that Lord Selborne's judgment does not go anything like the length contended for by the appellants here. The case of *The London County Council* v. *Cross* (*ubi sup.*) is a decision which I not only think is correct, but, as it is a decision of this court, I would point out that I should have to follow it of course whether I thought it right or not. That is a decision to the effect that, where you have, as you have here, a clear general line of buildings, the section is contravened by anybody who, without the consent of the local authority, builds beyond the general line. I agree that it was there held that the penalty cannot be imposed, or an order cannot be made for the demolition of buildings, unless the general line is certified before the penalty is imposed, or the order has been made. That I think does follow, not only from the language of the section, but from the two decisions upon it. Therefore that first point I consider is covered by the decision to which I have referred in the case of *The London County Council* v. *Cross* (*ubi sup.*), which decision I am prepared to abide by and to follow. Now, the next part of the case is this: It is said that this wall (the nature of which I have described) is not a "building, structure, or erection" within the meaning of sect. 75 of the Metropolis Local Management Act 1862. Reliance is placed upon the case of *Wendon* v. *The London County Council* (70 L. T. Rep. 94, 440; (1894) 1 Q. B. 227, 812), in which it was held that a particular wall was not within that section. Now, the position of the matter is this: The magistrate finds as a fact that this is a "building, structure, or erection" erected beyond the general line of buildings. We are asked to say, I suppose as a matter of law, that it cannot be. It seems to me that it would be perfectly absurd to say that. When you know the nature of this erection—this wall—it seems to me that we should be stultifying ourselves if we said as a matter of law that it could not be a "building, structure, or erection." I have not the slightest doubt myself that the finding of the magistrate was perfectly right on the facts. Now, reliance was also placed with reference to this particular part of the case, which is an important one, upon the decision of the Court of Appeal in the case of *Lord Auckland* v. *The Westminster Local Board of Works* (26 L. T. Rep. 961; L. Rep. 7 Ch. App. 597), where a construction was put—I rather think for the first time—upon sect. 75 of the Act. What the Court of Appeal held there was not only good sense, but is obviously correct on the true construction of the Act of Parliament. The decision was to this effect, that the County Council cannot avail themselves of sect. 75 to get out of their obligation under sect. 74; if they are bound to make complaints under sect. 74 they cannot condemn under sect. 75. James and Mellish, L.JJ. pointed out that, in order to avoid such a result as that, the 75th section would have to be read in substance as if it ran thus: "No new building, structure, or erection shall be made," and so on. Then Mr. Glen said, "Well, but if we had only raised the old boundary wall we should not have contravened sect. 75." I do not say that they would. There I think it does become a question in each case of what has been done. In *Wendon's* case (*ubi sup.*) the Court of Appeal found, having regard to the facts of that case, that the wall which was there under consideration did not come within the words "building, structure, or erection." In one sense every wall—everything erected—is a "building, structure, or erection." But of course the section must be construed reasonably and with reference to the object for which it is passed. That is apparent from the case of *Ellis* v. *The Plumstead District Board of Works* (68 L. T. Rep. 291) to which Mr. Forman referred. There it was said (and I have no doubt correctly said) that if a man merely puts up a fence to mark off his boundary and preserve his rights as the owner, although in one sense it may be a "building, structure, or erection," it is not necessarily a building, structure, or erection which falls within the mischief aimed at by the Act and affected by sect. 75. Now we must look at this case, and not at the effect of other cases. In this case we must ask ourselves, as men of the world, whether such a new wall as this is not a building, structure, or erection within the mischief of sect. 75. I have not the slightest hesitation whatever in saying that I think that it is. I do not hesitate to say that I think repairing an old dwarf wall and putting on new rails instead of the old ones, if worn out, would not be an infringement of the section. But this is an entire structure or building of a totally different character from what was there before, and for a totally different purpose. And it is merely an attempt to throw dust in the eyes of the court to say that this is only a boundary wall. It is nothing of the sort; it is a big wall. It is a wall 18 feet high, which answers the purpose of a boundary wall of course, but it is not wanted in that shape, to that extent, and of that height, for the reasonable preservation of that little bit of yard behind it. It is wanted for a totally different purpose, and is erected and is adapted for a totally different purpose. I think, therefore, that this appeal fails on every point, and that it must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. The facts may be shortly stated thus: The forecourt of a house belonging to the appellants in a street in the metropolis has been for many years bounded on the side next the street by a dwarf wall about two or three feet high. The defendants, the owners, pulled down this dwarf wall, and built on its site a wall 11 feet high, intending to use that wall for the purpose of exhibiting advertisements upon it, and also intending it to serve as a boundary wall to their premises, much in the same way, I presume, as the dwarf wall had before. This new wall, beyond all question—and it is not disputed—was in front of the general line of buildings, and so forth; and it is also not disputed that it was erected without the sanction of the London County Council. That being so, two points arise: It is contended by the appellants, in the first place, that no offence has been committed because, at the time that the complaint to the magistrate was made, no general line of buildings had been defined by the architect. It is said that the defining of that line by the architect was a condi-

tion precedent to any proceedings being instituted; and that, therefore, this offence is not made out. Now, in my opinion, the defining of that line is not a condition precedent. I should have said so myself if I had had to construe the Act for the first time. But the point has been considered more than once. It was most carefully considered in the case of *The London County Council* v. *Cross* (*ubi sup.*), and I find that my brother Lindley used these words, which have strong reference to this point. He said, at p. 735 of 66 L. T. Rep.: "But it is contended that that is not the date of the offence, nor the complaint, nor the matter of complaint, because the architect's certificate defining the line of buildings was not then in existence; and we are asked to say that there is no offence until the architect's certificate is made." Then the Lord Justice proceeds: "That appears to me contrary to the construction of the section, if we look at it apart from authority, and contrary to the construction which has always been put on that section by the courts." To my mind, that clearly disposes of that point. I quite agree with what has been said, that, before a conviction is obtained, the building line would have to be defined; but it is not a condition precedent. It has been also suggested that the adoption of that view creates a hardship, inasmuch as the person may not know what the building line may be, and therefore may build, and afterwards find that he is subjected to being convicted and to having his building demolished. Really that is not so when you look at the whole of the statutory provisions. The consent of the London County Council has to be obtained. In this case, so far as I recollect, the plaintiffs had endeavoured to obtain it and failed to obtain it, and it cannot possibly be said that they did what they did with their eyes shut. Their eyes were open, and they knew perfectly well what they were doing. I do not think, therefore, that they are to be commiserated with regard to that which has happened to them. Now, the next point taken, the material point—in fact, the main point—is this. The wall it is said is not a "building, structure, or erection" within sect. 75. Now, when we have to determine that question, it seems to me to be all important to bear in mind what the object of these provisions is. The object of these provisions is this: to maintain in new streets a uniform line of frontage. It cannot, I presume, be said for one moment that all walls, whether high or low, are not buildings, structures, or erections. They obviously are such. But there are walls and walls. There is a wall of a certain height—say, two or three feet high—which would not in any way, I take it, disturb the uniformity of a street. Then there are walls of a greater height—12 feet or 14 feet, or even more—which would absolutely destroy the uniformity of that frontage, and absolutely defeat the purposes of these provisions. The question in every case is a question of fact and a question for the magistrate to decide, namely, whether the wall in question is such a wall as to be a "building, structure, or erection" within the meaning of this Act and within the mischief of this Act. That is a question of fact for the magistrate to determine. It is a question of degree, and I think that that is very well stated indeed by Lord Coleridge in the case of *Ellis* v. *The Plumstead District Board of Works* (*ubi sup.*), where he says (at p. 291 of 68 L. T. Rep.): "I think, however, that the particular thing shown to us in the photographs and plans in this case is such an erection as the section applies to. In saying that, I am not prepared to go the length of saying that every possible 'building, structure, or erection' which a man might put up for the purpose merely of ascertaining and bounding his own property from the public road would necessarily come within the section." Then he goes on to say that it is a question for the magistrate in each case, and concludes thus: "In this case, so far as I can judge, the magistrate had to deal with something which he might very well find, upon the facts before him, to be a building, structure, or erection, such as the section was intended to prevent." In my opinion these words exactly apply to the present case. I think, therefore, that the decision of the court below was right.

RIGBY, L.J.—I am of the same opinion. Long before the acts complained of there was in the City-road, in this part of it, a general line of buildings, apparent to every one who passed through and along the road. Assuming for a moment that the wall which has been built is a "building, structure, or erection" within the meaning of sect. 75, the appellants built that in front of the general line of buildings, and thereby committed an offence. It was quite right, therefore, for the London County Council to take out a summons which they did on the 11th July because an offence had been committed. I do not see that there is anything in Lord Selborne's speech, in the House of Lords, in *Spackman's* case (*ubi sup.*) at all requiring that there should be a certificate by the superintending architect as a condition precedent in regard to the offence committed or proceedings taken. The Act itself provides that he shall finally decide, and I think that that certificate, given two days after the commencement of the taking out of the summons, quite fulfils the requirements of the statute. Well then this is not a case in which there is merely a boundary wall. It appears to be something far different from a boundary wall. We are asked on the strength of the authority of *Wendon's* case (*ubi sup.*) to say that a wall cannot be a structure. That appears to me to be very nearly approaching to an absurdity. I can quite see that the wall that was being built in that case was not a structure. It was only the commencement of a structure. It was not a completed wall; it was a wall that had been left half finished. It was the commencement of a structure; but not a structure which would prevent the building that was actually completed afterwards from being a new structure. As regards the present case I have no doubt at all about it. Ordinary boundary walls may be outside sect. 75, and I think in practice they have been treated as being so; it is a question of degree in every case. If a man has a dwarf wall round a garden or something of that kind outside the general building line, if that be the mere means of marking off his property to keep it private, and not substantially interfering with the general line of buildings, that might very well be outside sect. 75. But if he builds a great wall, which is for that purpose an interference with the uniformity of the street, that is as objectionable as an actual building for the purpose of habitation or use—such a thing, for instance, as a photographer's studio, or

something of that kind. If he builds a wall which is for all purposes as objectionable as that, I do not see why it should not be brought within sect. 75. I have no doubt that this wall does fall within sect. 75, and I think, therefore, that the appeal fails altogether, and ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Morgan* and *Upjohn*.

Solicitor for the respondents, *W. A. Blaxland*.

July 18 *and* 19.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

THE MANCHESTER TRUST LIMITED *v.* FURNESS, WITHY, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—Charter-party—Bill of lading—Liability of owner of chartered ship on bill of lading signed by master—Condition in charter that master shall be agent of charterers.

A charter-party, which was in other respects in the form of an ordinary time charter, contained the following provision: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under the charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities (if any) that may arise from the captain signing bills of lading, or in otherwise complying with the same."

The ship was loaded with a cargo, and bills of lading, in the usual form, were signed by the master, subject to the conditions of the charter-party, and a copy of the charter-party was handed to him. The charterers indorsed the bills of lading to the plaintiffs, but fraudulently induced the master to alter the destination of the ship, and to deliver the cargo to themselves. The plaintiffs sued the owners of the ship for non-delivery of the cargo.

Held, that the special clause in the charter-party did not exonerate the shipowners from liability to the plaintiffs, as indorsees of bills of lading signed by the master which did not contain the clause; but that the plaintiffs were entitled to treat the master as agent of the shipowners and to hold them responsible for the loss of the cargo.

Held also, that the reference to the charter-party in the bills of lading only gave the plaintiffs notice of such clauses as referred to the payment of freight and conditions respecting carriage of the goods, but not of the above special clause.

Decision of Mathew, J. affirmed.

THE facts of the case as stated in the judgment of Mathew, J. were as follows:—

The action was brought to recover damages for the non-delivery of 2200 tons of coal shipped at Cardiff, and deliverable at Rio de Janeiro, under bills of lading signed by the master of the defendants' ship, the *Boston City*.

The defendants denied their liability on the ground that the bills of lading had not been signed by the master as their agent, but as agent for the charterers of the vessel, the firm of Beuchimol and Sobrinho. The loading of the ship was completed on the 27th April 1893, and on that day the master signed bills of lading which were in the following form: "Shipped in good order and condition for account of Messrs. Beuchimol and Sobrinho in and upon the defendants' ship *Boston City*, for the voyage to Rio de Janeiro, so many tons of Cory's Merthyr steam coal by Cory Brothers and Company Limited, to be delivered in like good order and condition at the aforesaid port of Rio (all and every the dangers and accidents of the seas and of navigation of what nature or kind soever excepted) unto order or to assigns, he or they paying freight for the same and other conditions as per charter-party," and in the margin there were added special clauses enumerating perils, and also declaring that the ship was not to be answerable for losses by explosion, bursting of boilers, breaking of shafts, or any latent defect in the machinery or hull not resulting from the want of due diligence by the owners of the ship or by any of them, or by the ship's husband or manager.

After the bills of lading had been signed and delivered to the charterers, who were also the shippers, the master was induced by them to sail to Buenos Ayres instead of to Rio de Janeiro. He did so upon the assurance that the coals belonged to the charterers, and that the bills of lading would be forwarded to that port. There was no doubt at all upon the evidence, and it was admitted, that a fraud was intended to be committed, and that the captain, whose good faith was not questioned, was deliberately imposed upon. The bills of lading were indorsed by Beuchimol and Sobrinho to the plaintiffs, who were bankers at Manchester, as security for an advance of 3217*l.* 10*s.*, and were forwarded to the plaintiffs' agents at Rio, with instructions that the coal should be delivered against payment of the amount to be advanced. When the *Boston City* arrived at Buenos Ayres the master was informed by the representative of Beuchimol and Sobrinho that the bills of lading were in his possession, and the master, without requiring the production of the documents, delivered the coals to the firm. The coals were sold; the proceeds were received by Beuchimol and Sobrinho, who afterwards stopped payment, and the plaintiffs were not paid the money advanced by them. The plaintiffs subsequently applied to the defendants for payment of the amount they had lost by delivery of the coals without production of the bills of lading, and they were met by the defence that under the charter-party the master was the agent of the charterers and not the agent of the owners.

It was not asserted that the plaintiffs had notice of the provisions of the charter-party, or that they were bound by any of its terms in respect of the cargo, except such as concerned them as consignees; and it was clear that the contract to be gathered from the bills of lading was altogether different from that contained in the charter-party.

It was argued for the defendants that the terms of the charter-party transferred from them to the charterers all their obligations as owners under it, and that it was altogether immaterial whether the plaintiffs had notice of its contents.

(*a*) Reported by W. W. ORR and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

The charter-party was dated the 7th April 1893, and was, for the most part, in the ordinary form of a time charter, where possession of the ship is retained by the owners. The owners were to let the ship with a full complement of officers, seamen, engineers, and firemen, and were to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; the freight was to be paid monthly; the charterers were to provide the cash for the disbursements as required by the master; the cargo was to be laden and [or] discharged at any safe dock or place as charterers should direct, and the whole reach of the ship was to be at charterers' disposal, reserving proper space for ship's officers; the owners were not to be responsible for the excepted perils mentioned in the charter-party, and were to have a lien on all cargoes for the charter-money due under the charter. For these provisions, if there were none other, it was conceded that the owners would be responsible; but the charter-party contained the following further provisions, upon which the defendants relied: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under this charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities, if any, that may arise from the captain signing bills of lading, or in otherwise complying with the same."

The action came on for trial before Mathew, J. as a commercial cause.

Joseph Walton, Q.C., *T. G. Carver*, and *A. W. Fletcher* for the plaintiffs.

Finlay, Q.C. and *Holman* for the defendants.

Cur. adv. vult.

May 27.—Mathew, J.—[After stating the facts as above set out his Lordship proceeded:] At the time when the charter-party was signed, the master was undoubtedly the agent of the owners. By his appointment he had undertaken with his owners to act with proper care and skill in the navigation of the ship and with a view to the protection of those whose interests should be placed in his charge, including the owners of goods shipped under his bills of lading. He did not in point of fact enter into any contract with the charterers. He was handed a copy of the charter with directions from his owners to carry it out. Nothing was done to alter his position as master of the defendants' vessel, or to exonerate him from his obligations as their agent and representative. It was argued for the defendants that under the charter-party the master could, with his consent, be made the agent of the charterers, and that the ownership of the vessel with the officers and the crew was for the time to be transferred to the charterers. This, it was admitted, could not be the effect of the charter for all purposes; but it was not denied that as regards third parties, for instance, the owner of a vessel damaged in a collision due to the negligence of the master, the defendants would be liable. But it was attempted to be made out that the effect of the charter was to establish a dual control over the master, leaving him the agent of the owners for the purpose of navigation and the agent of the charterers in respect of the carriage and delivery of the cargo. No authority was cited in support of this view, and this construction of the charter seems to me to be unreasonable. The captain was the captain of the defendants, and the holder of the bill of lading would have a right to assume against the owner that the captain had the ordinary authority of those in his position. It was pointed out for the plaintiffs that in none of the many cases that were cited in the course of the argument was the owner held free from responsibility where he was shown to have retained possession and control of the vessel; and reliance was specially placed on the judgment of the House of Lords in the case of *Baumvoll Manufactur von Carl Scheibler* v. *Furness* (68 L. T. Rep. 1; (1893) A. C. 8), where possession for the use and benefit of the owner was treated as the dominant fact to determine upon whom liability rested for the master's acts. The defendants contended that the extent of the owners' obligations was to be gathered from the charter-party, and that the special agreement that the captain should only sign bills of lading as agent of the charterers exonerated the shipowners from liability to the plaintiffs. The true meaning of the clause seems to me to be, that the charterers undertook as between themselves and the owners to run the risk, as it were, of each voyage under the charter, and that this undertaking did not affect the rights of those who might become the owners of the bills of lading in the belief that the master in signing had exercised his ordinary authority. It is obvious that, if the owner, being still in possession and control of the ship, was enabled to contract himself out of all liability to the holders of bills of lading or their assigns, it would practically destroy the negotiable character of the instrument. In order to guard against fraud, precautions and inquiries might be necessary which would seriously impede and embarrass ordinary mercantile transactions. The object of the shipowners in this case was no doubt to protect themselves against such claims as the present. Their contract with the charterers, for what it was worth, afforded such a protection, but it did no more. Where an owner navigating a ship by his master and crew desires to transfer to another his obligations for the acts of his master, he should do so by an explicit statement to that effect in the bill of lading which his master signs. The mode adopted by the defendants in this case to escape liability seems to me to be insufficient, and I therefore give judgment for the plaintiffs with costs, and the amount of the damages may be settled afterwards.

From that decision the defendants now appealed.

Sir *Walter Phillimore* and *Holman* for the appellants.—On the construction of this charter-party the master was the agent of the charterers, and not of the shipowners, when he signed the bills of lading. The case is very similar to

Baumvoll Manufactur von Carl Scheibler v. *Furness*, 68 L. T. Rep. 1; (1893) A. C. 8.

But, whatever difference there may be between that case and the present, is covered by

Colvin v. *Newberry*, 8 B. & C. 166; 7 Bing. O. S. 190, 199; 1 Cl. & F. 283.

If those two cases, both decisions of the House of Lords, are read together, there is an authority

which governs the present case. It is immaterial whether the plaintiffs had notice of the terms of the charter-party or not. The charter-party, in fact, transferred all liability from the shipowners to the charterers. The master, for the purposes of navigation and the like, may remain the servant of the shipowners. But all liability for his acts, as regards the carriage and delivery of the cargo, was transferred to the charterers. The charterers may be liable under such a provision as appears here, although the shipowners retain rights over the ship:

Schuster v. *McKellar*, 26 L. J. 281, 288, Q. B.

Joseph Walton, Q.C. and *T. G. Carver* for the respondents.—The shipowners are liable for the acts of the master, who is their agent, notwithstanding the provision in the charter-party. The master was not appointed by the charterers; he was engaged and paid, and could only be discharged, by the shipowners. Where, as in this case, the shipowner retains possession and control of the vessel, he is liable for the acts of the master:

Baumvoll Manufactur von Carl Scheibler v. *Furness* (*ubi sup.*).

That case put an end to the difficulty there used to be in cases of this kind in determining whether the master was the servant of the charterers or of the owners. There must be a complete demise of the ship in order to exonerate the shipowner from liability:

Colvin v. *Newberry* (*ubi sup.*).

The plaintiffs had no knowledge of the provisions of the charter-party, and cannot be affected by it:

Serraino and Sons v. *Campbell*, 64 L. T. Rep. 615; (1891) 1 Q. B. 283;

Fry v. *The Chartered Mercantile Bank of India, London, and China*, L. Rep. 1 C. P. 689.

But, even if the plaintiffs had notice of the special clause in the charter-party, it would not alter their claim in tort. The master having committed a tort while in the service of the shipowners, the plaintiffs have a clear case against the shipowners.

Holman replied.

Lindley, L.J.—This is an appeal by the defendants from a decision of Mathew, J., which is in favour of the plaintiffs. The plaintiffs brought their action for non-delivery of a cargo, and being holders for value of the bill of lading they put the case, as is always done, partly on the non-delivery according to contract, and partly in trover, taking their chance, of which is best in the long run. I do not think myself that it matters from which point of view you look at their rights. Now, the bill of lading, under which the plaintiffs claim, is in the ordinary form, so far as I know. It is signed by Mr. Thos. Clark, master, his principal not being disclosed; it may be the shipowners, or it may be someone else. And the bill of lading is to the effect that, the goods shipped are to be delivered to the holder of the bill of lading, "he or they paying freight for the same and other conditions as per charter-party." So there is a distinct reference in the bill of lading to the charterparty to that extent. In the margin there is this, "Perils of the sea," and so on. "Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull not resulting from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager." The charter-party, which was dated the 7th April 1893, is a time charter, and by it the defendants, who are the owners of the ship *Boston City*, agree to let, and the charterers, who are a Spanish firm of Beuchimol and Sobrinho, of Manchester, agree to hire the steamship for the term of six months, and so on; the vessel to be delivered or placed at the disposal of the charterers at Victoria Dock, London, where she then was. Then the ports to which she is to go are specified—nothing turns upon that—"as the charterers or their agents shall direct." Then there is a clause (I will allude shortly to the more important ones) that the owners are to provide and pay for the provisions and wages of the captain, officers, engineers, and so on; that is to say, they are to appoint them and they are to pay them. The owners are to do that much, and they are to maintain the ship in a thoroughly efficient state. Then the charterers are to pay for coals, and so on. The charterers are to pay for the use of the ship 8*s.* per ton per calendar month. Then cash for disbursement as required by the master free of charge. The whole of the ship is to be at the charterers' disposal, reserving only a proper space for ship's officers and so on, and for provisions and stores. There is this clause in it, which I suppose is a common form, "The captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. All salvages and derelicts for owners' and charterers' mutual benefit." Then comes a clause which is unusual, and which I confess I never saw before, and which I am told has given rise to this controversy. The real question we have to determine is this: What is the effect of the clause which I am about to read, as between the holder of such a bill of lading as I have read and the shipowners? The clause, I repeat, is a very unusual one. It is this, "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes whether of navigation or otherwise under this charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities (if any) that may arise from the captain signing bills of lading, or in otherwise complying with the same." I do not pause to comment upon that for the moment; I will pass on. Then comes this clause: "If the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointment." Then the master is to be furnished from time to time with the requisite instructions, and so on, and to keep a log which is to be patent to the charterers. Then there is a clause to the effect that, in the event of loss of time from deficiency of men or stores, and so on, the payment of hire shall cease until the ship be again in an efficient state to resume her service. That is relied upon, and that is not unimportant. Then there are some exceptions, so far as the same can apply—the act of God, perils of the sea, and so on—and "not answerable for any loss or damage arising from improper stowage, explosions, bursting of boilers,"

and so on. Then there is a clause of lien, which is a common one: "The owners shall have a lien upon all cargoes, all sub-freights, for freight or charter money due under this charter; and charterers to have a lien on the ship for moneys paid in advance and not earned." Now, upon the true construction of that document, and having regard to the circumstances to which I have alluded, the question arises whether the shipowners are liable for the non delivery of this cargo by the captain. The story of the trick played upon the captain, and how he fell into the trap which was laid for him was stated at the bar, and I need not go through it. But the long and the short of it is that, having signed bills of lading for delivery of the coal at Rio, he was deceived and misled, and he took the coals to Buenos Ayres, and there they were stolen. That is what it comes to, and the question now is, who is to bear the loss? The plaintiffs, who are holders of the bill of lading, rely upon the general rule of law that, *primâ facie* at all events, a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner. Of course, in the ordinary course of business, that is so. But it may not be; it may turn out that the master is not the servant or agent of the shipowner, and, in the case to which we were referred, of *Baumvoll Manufactur von Carl Scheibler* v. *Furness* (68 L. T. Rep. 1; (1893) A. C. 8), the charter was such that the master was not the servant of the shipowner, but was the servant of the charterer. The peculiarity of that case was this, that, although the charter-party there contained a great many clauses similar to those which we find in the charter-party in this case, the hiring of the master was by the charterer and not by the shipowner. The charterer employed him, paid him, and dismissed him. Upon the strength of that clause, the House of Lords held, affirming the decision of this court, that the master was in fact the servant of the charterer, and was not in fact the servant of the shipowner. Well, of course, when you get to that, all the rest follows. Now, it is said that, notwithstanding that case, the peculiar clause to which I have alluded shows that in truth the master here had ceased to be or was not the servant of the owners, but had become the servant of the charterers. And the real question we have to consider is what is the effect of that clause as between the holders of the bill of lading and the shipowners. Let us look first of all at the true construction of the clause as between the shipowners and the charterers. They are the persons who make that bargain and, as between them, the captain and crew, although paid by the owners, are to be the agents and servants of the charterers. Then the clause is very significant, because it does not stop there by any means, but it contains an indemnity clause, which to my mind is extremely important. It seems as if these parties felt that notwithstanding this clause the owners might be held liable for the acts of the master, and they stipulated in that event, notwithstanding the previous bargain, that the captain was to be the agent and servant of the charterers. The clause says that the charterers shall indemnify the shipowners. The view taken by Mathew, J. is, that that is a stipulation which is valid enough as between the charterers and the owners, but which does not affect the true position of the captain and the crew, and has no effect at all upon the holders of the bill of lading, although the bill of lading refers in terms to this charter-party. Upon reflection I am of opinion that that is the true and correct view. I cannot regard all these clauses taken together without coming to the conclusion that the true view is that the master was and continued to be in fact the servant of the owners, subject to a stipulation that as between the owners and the charterers the charterers should treat him as their servant and indemnify the owners from the consequences of what the captain might do as regards signing bills of lading and so on. Now, if that is the true view to take, that ends the question. But then we are pressed with the fact that in this case the bill of lading referred to the charter-party, and it is said that the holders of the bill of lading took it with notice, at all events of the charter-party, and with notice therefore of this contract, and with notice that the master was the servant of the charterers. That argument appears to me to be pushing the doctrine of constructive notice a great deal too far. It is quite true that the bill of lading refers to the charter-party to the extent which I have mentioned. The effect of that reference has been considered more than once. It has been considered in *Serraino* and *Sons* v. *Campbell* (64 L. T. Rep. 615; (1891) 1 Q. B. 283), which was referred to yesterday, and also in *Fry* v. *The Chartered Mercantile Bank of India, London, and China* (L. Rep. 1 C. P. 689). The effect of it is to incorporate so much of the charter-party as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for carrying that doctrine to the extent necessary in this case. What is wanted in this case is to say that, by reason of that reference to the charter-party, the holder of the bill of lading, and the person who takes it in the ordinary course of business, is to be treated as having notice of all the contents of the charter-party. There is no doctrine that goes to anything like that extent. And, as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealings with landed estate, with which the court is familiar. But there have been protests over and over again against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with landed estate, title is everything; in commercial transactions possession is everything, and title is comparatively nothing. And if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief, and paralysing the trade of the country. That I am not going too far in making these observations will be found by turning to what Lord Herschell said in that well-known case in the House of Lords of *The London Joint Stock Bank* v. *Simmons* (66 L. T. Rep. 625, 632; (1892) A. C. 201, 221) about constructive notice. It had reference there to a notice in respect of debentures, but whether commercial documents are negotiable instruments, or whether they are more or less like them, is a matter to my mind of very little importance. Lord Herschell said in the case of *The London Joint Stock Bank* v. *Simmons*:

"I should be sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments." He did not pause to inquire there whether those debentures were negotiable instruments or not. But, as regards debentures and everything of that kind, and other commercial documents, the protest which I have been making has been made before, and I do not think it is likely to be made in vain. Now, having got thus far, we come back to the question, whose servant was the master in signing the bill of lading? Sir Walter Phillimore and Mr. Holman have exerted themselves very ingeniously to persuade us, on the strength of the case of *Colvin* v. *Newberry* (8 B. & C. 166; 7 Bing. O. S. 190; 1 Cl. & F. 283), that we ought to hold that the master is the servant of the charterers. I do not think that we ought. In the first place, the facts of the two cases are totally different. The case of *Colvin* v. *Newberry* (*ubi sup.*) was a very curious case. The master there, so far as I understand it, had no principal at all. He was the charterer, although he was the shipowner; he was the person navigating the ship; he was the master, and he was doing everything on his own account, subject to some payment by the shipowner. But the true view, I think, to take is this: Although there is a great difficulty in reconciling all the earlier cases about demises of ships and so on, the test in each case is that which was applied by the House of Lords in the case of *The Baumvoll Manufactur von Carl Scheibler* v. *Furness* (*ubi sup.*)—Whose servant is the master, who is his undisclosed principal when he signs the bill of lading? My answer here to that question is that, upon the true construction of these documents, he was the servant of the shipowners. If there be any doubt about it, it appears to me that the letter which has been read removes all possible doubt on the subject. I do not know how far that is legitimately put before us, but, when we see the shipowners bargaining for a share of profits with the charterers, it is plainer than it is even without the document. There is one other case to which I desire to refer on the question of constructive notice. It is *The English and Scottish Mercantile Investment Trust Limited* v. *Brunton* (66 L. T. Rep. 406; (1892) 2 Q. B. 700). It has nothing to do with this case, but it has a good deal to do with the extension of the equitable doctrine of constructive notice to commercial transactions. The appeal will be dismissed with costs.

Lopes, L.J.—On consideration, I am clearly of opinion that the learned judge in the court below was right. The question which we have to decide and which determines everything is this, whose servant was the master when he signed the bill of lading? Was he the servant of the charterers or of the owners? I have no doubt that, as regards third parties, the master was the servant of the owners. They had hired him, they paid him, they alone could dismiss him. I will illustrate it by a case of this kind. Suppose the *Boston City* had come into collision with another ship through the negligence of the master, could it be said that the owners would not be liable? In my opinion such a contention would be impossible. It is conceded that, if there was no such clause as that novel and unusual one to which my brother Lindley has referred there would be no difficulty in this case. Therefore, the important matter to consider is, what is the true meaning of that clause? Now, in my opinion, the meaning of that clause is this, that it protected the owners so far as the charterers are concerned, but it did not protect them against third parties. But then it is said in this case that a notice was conveyed to the indorsees of the bill of lading for value—that notice was conveyed to them of what was contained in the charter-party by means of the reference to it contained in the bill of lading. The words relied on in the bill of lading are these, "other conditions as per charter-party," and that is all. Now these words in my judgment are not sufficient to give notice to the indorsees of a bill of lading for value of any such special provision as the one relied upon in the charter-party. It would require very clear and very explicit words contained in the bill of lading to exonerate the owners from liability to third parties, such as the holders of a bill of lading—to exonerate the owners from the liability attaching to them by the acts of their master. The holders of the bill of lading, in the absence of any such explicit words as I have mentioned, would naturally believe and imagine that the master when he signed the bill of lading was exercising the ordinary authority which attaches to him in his capacity of master. Now, I think that that disposes of the case. I would only wish to add this, that I entirely agree with every word that has been said by my brother Lindley with regard to constructive notice. If I am correct in the view I have taken, it is perfectly clear that the judgment of the court below was right; that the master was the servant of the owners so far as regards the plaintiffs in this action; and that there was nothing in that clause which relieved them from the liability which in ordinary circumstances would attach to them owing to the act of their master.

Rigby, L.J.—I am of the same opinion, and I have very little to add. I think the real question here may be said to be, have the shipowners—by which, of course, I mean the permanent owners, the absolute owners—given up altogether the possession and control of the ship to the charterers? I think it is impossible to read the charter without seeing that they had in many cases, at any rate, reserved to themselves the possession and control through the master—cases that may occur almost at any moment during the whole of this time charter. I will not go through the matters in particular. But with the exception of these lines, "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under the charter," I do not think that there is anything at all in substance that could lead to the conclusion that the possession and control were given up substantially and entirely to the charterers. I quite agree that the clauses that we find here are not to be taken to be conclusive in a case where the master is actually and *de facto*, and for all purposes, the agent of the charterer. That was decided in the *Baumvoll* case (*ubi sup.*) in the House of Lords, and it only illustrates the point. Who is the person in control, and in what capacity is he? With regard to that, I agree with Mr. Carver. For a moment or two I rather misapprehended Mr. Carver's position. I thought he was replying in the case, but I soon found I was wrong. I addressed some observations to him that rather surprised him, but it was under that misappre-

hension, and, of course, it was only a momentary misapprehension on my part. But I agree with Mr. Carver that throughout the possession and control are entirely reserved, for many important purposes, to the actual shipowners, whether it be for the maintenance of the ship or withdrawing the steamer from the services of the charterers if they will not make to the master the proper advances, or for the reservation of proper and sufficient space for ship's officers and crew, and tackle. That seems to me to have some bearing, because, if the ship were given up entirely with the officers and crew, this reservation would be absurd; the charterers would do just as they pleased in the matter. That is clearly not within their power. All the other clauses about the customary assistance of the ship's crew to be given to the charterers, point to a retaining of control through the master for the actual shipowners. Then we have to consider a clause which undoubtedly is an important one: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under the charter." Can that mean that for all errors of navigation the shipowners, as between themselves and third parties, shall be free from responsibility? It cannot mean that. I think the fair meaning is: A captain and crew are placed at your disposal, to be under your orders for all purposes where there is not a reservation of the right of the master, acting on behalf of the shipowners; and that comes to this, that, as regards the liability between the shipowners and the charterers, that shall be the state of things. The acts of the officers, the master and others, shall be the acts of the charterers as between the shipowners and the charterers themselves. Then it is a very strong thing to say that that went the entire distance of giving up absolute possession and control, because we find that clause without indemnity from all consequences and liabilities, if any. No doubt the words are cautiously put in, because it cannot be supposed that there will ordinarily be any such consequences. But still it contradicts the idea to a certain extent—I do not say absolutely—but it goes a long way to contradict the idea that the shipowners had no responsibility as between themselves and third parties for the acts of the master. I will say nothing about the question of constructive notice, because Lindley, L.J. has already expressed, in language which I will not weaken by any repetition, my entire feeling upon the matter, and my judgment upon the matter as regards the introduction into commercial transactions of the doctrine of constructive notice. I will say so much for the doctrine, that I am satisfied that this would be the extreme of the doctrine of equity as regards constructive notice.

Appeal dismissed.

Solicitors for the appellants, *Downing, Holman, and Co.*

Solicitor for the respondents, *George Trenam*, agent for *Addleshaw* and *Warburton*, Manchester.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 30 and 31.

(Before NORTH, J.)

Re DEBENHAM AND WALKER. (*a*)

Solicitor and client—Costs—Order for taxation on solicitors' petition—No direction for payment by client—Amount found due from client—Mode of enforcing payment—Summons—Action.

A firm of solicitors obtained a common order for taxation of their costs in the Chancery Division, which order, according to the present practice, contained no direction for payment by the client of the amount which might be certified to be due from the client to the solicitors. The result of the taxation, at which the client was represented, was that a sum was found to be due from the client to the solicitors. Upon a summons by the solicitors to enforce payment of the amount found due to them:

Held, that payment of that amount could not be enforced by summons, but that an action must be brought for that purpose.

THIS was a summons by Messrs. Debenham and Walker for an order that Mary Louisa Dodd should within four days pay to the applicants the sum of 72*l.* 4*s.* 1*d.*, the amount of costs certified by the taxing master's certificate, dated the 17th Dec. 1894, to be due to them.

Messrs. Debenham and Walker acted as solicitors for Miss Dodd, from about Aug. 1889 to Sept. 1893, in various legal matters.

By an order dated the 7th July 1894 made upon the petition of Messrs. Debenham and Walker, it was referred to the taxing master to tax three bills of costs of the petitioners in respect of such matters. The order was in the common form, and directed the taxing master to certify the amount due from Miss Dodd to the petitioners, or from the petitioners to Miss Dodd as the case might be; and ordered that the amount (if any) so to be certified to be due from the petitioners be paid by them to Miss Dodd within twenty-one days after service of that order and of the taxing master's certificate to be made in pursuance thereof. But there was no order that Miss Dodd should pay to the petitioners the amount (if any) so to be certified to be due from her to them.

By the taxing master's certificate, dated the 17th Dec. 1894, and made in pursuance of the order of the 7th July 1894, it was certified that the sum of 72*l.* 4*s.* 1*d.* was due from Miss Dodd to Messrs. Debenham and Walker.

Miss Dodd, who had changed her solicitors, and desired to set up a counter-claim for negligence against the claim of Messrs. Debenham and Walker for their costs, did not pay the amount so found due from her, and hence the present summons.

Mulligan for the summons.—The payment of the amount found due from Miss Dodd to the applicants upon the taxation of their bill of costs can be enforced by summons. There is no necessity for an action. The jurisdiction given by sect. 37 of the Solicitors Act 1843 (6 & 7 Vict. c. 73), has been transferred to the High Court of

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Justice, by sect. 16 of the Judicature Act 1873 (36 & 37 Vict. c. 66):

Re Pollard; Ex parte Stevens, 59 L. T. Rep. 96; 20 Q. B. Div. 656.

This decision must also apply to sect. 43 of the Solicitors Act 1843. It was formerly the practice in the Chancery Division to insert in an order for taxation made on the petition of a solicitor a direction for payment of the amount found due "by the party from whom to the party to whom" it should be certified to be due: (Seton on Judgments, 4th edit., vol. 2, p. 605.) When the form of order was altered in 1883 by omitting that direction, it was not done to compel the solicitor to bring an action against the client for the amount found due. Since that time the direction has not been inserted, and this has been held to be right:

Re Harcourt, 32 Sol. J. 92.

In the present case the order for taxation omits that direction. But Miss Dodd was represented upon the taxation, and the applicants are right in making the present application to enforce payment of what has been found due to them:

Frits v. *Hobson*, 42 L. T. Rep. 225, 677; 14 Ch. Div. 542.

Swinfen Eady, Q.C. and *Method*, for Miss Dodd, were not called upon.

NORTH, J.—In my opinion this application is entirely misconceived. When a client petitions to tax his solicitor's bill of costs, his petition contains an undertaking by him to pay the amount (if any) which may be certified to be due from him to his solicitor; and the order for taxation proceeds on that undertaking, and contains an order for payment by the client of that amount. Payment of the amount found due can then be enforced either against the solicitor or against the client, the court having jurisdiction over the solicitor as its own officer, and over the client by reason of his undertaking. When the petition for taxation is by the solicitor, no such undertaking is given by the client. The solicitor is bound to pay the amount which may be found due from him, whether he does or does not give an undertaking to do so; but no order is made for payment of the amount which may be found due from the client, because in the absence of his undertaking the court has no jurisdiction over him. Under the old practice of the Court of Chancery an order for taxation made on the petition of the solicitor did not contain any order for payment by the client. But it was necessary that the taxing master should certify the amount (if any) due from the client to the solicitor, because the order directed that, upon payment by the client to the solicitor of what should be found due to him, the solicitor should deliver up to the client all documents in the solicitor's possession belonging to the client. It seems that for a short time this original practice was departed from, and it became the practice to insert in an order for taxation on the petition of a solicitor a direction that the amount certified to be due should be paid "by the party from whom to the party to whom" the same should be certified to be due. But this form of order was found inconvenient, and the old practice was restored in 1883. In *Re Harcourt* (*ubi sup.*) the question came before Stirling, J., who said that an order for taxation made on the petition of a solicitor, which did not contain any order for payment by the client to the solicitor of the amount which might be certified to be due from the client, was right; and I think so too. This practice has been followed ever since; and the solicitor, to enforce payment of what is certified to be due to him from his client, must bring an action against the client under Order XIV. Such actions are common. For a time, no doubt, it was the practice to insert in the order for taxation on the petition of a solicitor a direction to the effect that the client should pay to the solicitor the amount (if any) certified to be due from the client. Why should that practice have been altered and that direction have been omitted from the order, if it is right now after the taxation has taken place, and a sum has been certified to be due from the client, to make another order to the same effect as that direction which has been omitted? The alteration was, in my opinion, made because it was regarded as right that payment by the client should not be enforced in a summary way. If it could be enforced summarily the client would be deprived of the right to set up any defence which he might have to the payment of the solicitor's bill of costs. If the client has no defence to an action under Order XIV. for payment of the bill, a speedy judgment can be obtained under that order. I must dismiss the summons.

Solicitors: *Debenham* and *Walker*; *Vizard* and *Nicholson*; *George Castle*.

Friday, July 26.

(Before NORTH, J.)

LORD BATTERSEA AND OTHERS v. THE COMMISSIONERS OF SEWERS. (a)

Ancient lights—Enjoyment for more than nineteen years—Inchoate right—Injunction—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 3 *and* 4.

The plaintiffs were lessees of Weavers' Hall, Basinghall-street, in the city of London. They brought this action to restrain the interference with their lights by the defendants building upon the vacant sites of four old houses which had been pulled down in 1875. *These houses had been known as Nos.* 72, 73, 74, *and* 75. *No.* 75 *had been pulled down before the end of June* 1875, *the others in October of the same year. This action was commenced in July* 1895. *The enjoyment of light on which it was founded was that which the plaintiffs had enjoyed since the pulling down of the houses respectively. The plaintiffs claimed that they were entitled to an injunction with respect to the buildings on the sites of all the old houses.*

Held, that the court could not grant an injunction to protect the inchoate right. The injunction was granted as to the site of No. 75, *in which case the full twenty years had elapsed, but as to Nos.* 72, 73, *and* 74, *the defendants were only restrained from building above the height of the buildings pulled down in* 1875.

Governors of Bridewell Hospital v. Ward, Lock. and Co. (68 *L. T. Rep.* 212; 62 *L. J.* 270, *Ch.*) *followed.*

THIS was an action to restrain the defendants from building so as to obstruct the access of light

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

to the plaintiffs' windows. The plaintiffs were lessees of a building known as Weavers' Hall, in Basinghall-street, in the city of London. The windows were admittedly ancient, but up to the year 1875 there had been certain old houses known as Nos. 72, 73, 74, and 75, Basinghall-street, standing on the site on which the defendants proposed to build. The evidence showed that No. 75 was pulled down in June 1875, but the other three houses were not pulled down till October in the same year.

The plaintiffs' writ was issued on the 16th July 1895. The period of enjoyment on which the plaintiffs relied was the time which had elapsed since the pulling down of the houses.

A similar action had been commenced at the same time by the freeholder of the plaintiffs' building.

The plaintiffs now moved for an injunction.

The sections of the Prescription Act (2 & 3 Will. 4, c. 71) on which the argument turned are as follows:

Sect. 3. When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Sect. 4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.

Swinfen Eady, Q.C. and *J. G. Wood* for the plaintiffs.—As to the site of No. 75, the right to an injunction is perfectly clear; the plaintiffs have enjoyed the access of light over that site for the full period of twenty years without any interruption. As to the sites of the other houses, the plaintiffs have also acquired an indefeasible right; it cannot now be interrupted for a whole year, and *Flight* v. *Thomas* (11 A. & E. 688; 8 Cl. & F. 231) is a direct authority that by force of the definition of interruption in sect. 4 uninterrupted enjoyment for 19¾ years gives an indefeasible right. [NORTH, J. referred to *Governors of Bridewell Hospital* v. *Ward, Lock, Bowden, and Co.* (68 L. T. Rep. 212; 62 L. J. 274, Ch.).] That case is distinguishable. The windows there had not existed for twenty years, and Kekewich, J. held that no action could be commenced until the twenty years was complete. In this case our windows have been in existence for more than twenty years, and have enjoyed the access of light for that period with an interruption of less than a year at the beginning of it. *Flight* v. *Thomas* (*ubi sup.*) is therefore exactly in point. In any case, we are entitled to an injunction restraining the defendants from raising their building on the sites of Nos. 72, 73, 74 above the height of the old houses when they were pulled down.

S. Hall, Q.C. and *J. Henderson* for the defendants.—*The Governors of Bridewell Hospital* v. *Ward, Lock, and Co.* (*ubi sup.*) is directly in point and is right in principle. There is no distinction in the fact that the windows here have existed more than twenty years. The access of light only began when the old houses were pulled down. In *Flight* v. *Thomas* (*ubi sup.*) and *Glover* v. *Colman* (31 L. T. Rep. 684; L. Rep. 10 C. P. 108) the action was not commenced till after the end of the twenty years. There is no evidence that raising the new buildings above the height of the old houses will have any material effect on the access of light.

Swinfen Eady, Q.C. in reply.

NORTH, J.—As regards the houses which were pulled down by the defendants there is a difference. No. 75 was pulled down more than twenty years before the commencement of this action. On the evidence I think it is clear that that house was pulled down before the end of June 1875. As to the others, there is no exact proof when they were pulled down, but I think it must clearly have been either in October or November 1875. That is not twenty years before the commencement of the action. The action is to restrain the interruption of the access of light and air to the plaintiffs' buildings as enjoyed for twenty years past. The question is whether it has been so enjoyed. Under the 3rd section of the Act an action cannot be brought in respect of a prescriptive right to light unless the access and use of the light has been actually enjoyed therewith for the full period of twenty years without interruption, and in that case the right is to be deemed absolute and indefeasible, and the subsequent section (sect. 4) goes on to say what interruption means. In this case, if the plaintiffs waited till twenty years had expired before bringing their action, the defendants would say that it had not been twenty years without interruption because their building had existed for a certain period. Then sect. 4 comes into play and says what an interruption within the meaning of sect. 3 is. [His Lordship read sect. 4 and continued:] That section to my mind strongly bears out on this point what sect. 3 says, because the period of years (in this case twenty years) is to be "next before the suit or action wherein the claim is made." What I am asked to do now is to say that it is quite sufficient if you have a period of twenty years, not complete before action, but of which nineteen years and rather more was before action, and the rest during the continuance of the action. It seems to me that that is directly contrary to the meaning of these two sections. I think therefore that the action can only be brought after the period of twenty years has elapsed. That was the view taken by Kekewich, J., and I know of no case which is in any way at variance with it. No doubt it does not follow that because he refused to grant an interlocutory injunction I should necessarily do so too; but the reason he gives seems to me to be right, and therefore I must act on that view. As to Nos. 72 and 73 (I think we may leave No. 74 out of the question, for it was behind the others) there remains the question whether an injunction may not be granted on this ground: that, even allowing the right of the defendants to build up to the height of their old buildings, what they are threatening is really to go a great deal higher. Mr. Hall's answer to that is, that there

is no evidence that the carrying the building to the greater height now proposed will cause any material injury to the plaintiffs. As a matter of fact that is so. The plaintiffs' evidence has not been addressed to the point. But the defendants have produced a model of what they propose, and the height of the old buildings is marked upon it. And I think that there is sufficient evidence in the defendants' model to enable me to say that the defendants ought not to be allowed to carry up the buildings on the site of Nos. 72, 73, and 74, to a greater height than that of the old buildings which were pulled down in 1875.

C. E. E. Jenkins, for the freeholder, asked for a similar order in the freeholder's action. But after some discussion it was agreed that, on the defendants undertaking not to make any arrangement with the plaintiffs without notice to the freeholder, his motion should stand till the trial.

Solicitors: *Flowers, Nussey*, and *Fellowes*; *E. A. Baylis.*

Friday. July 12.

(Before KEKEWICH, J.)

BEAN *v.* FLOWER. (*a*)

Practice—Bankruptcy of plaintiff in action—Election of trustee not to proceed—Stay of proceedings—Assignment of interest by trustee—Fresh action by assignee.

The plaintiff in an action having become bankrupt, his trustee in bankruptcy elected not to continue the action, and thereupon an unconditional order was obtained by the defendants staying further proceedings. B. having purchased the trustee's interest, commenced a second action for the same relief as that asked by the former action. Upon motion to dismiss the second action:

Held, that it must be dismissed; the trustee, who alone had the right of action in him, having by his election barred anybody subsequently becoming entitled through him to the same cause of action

IN Sept. 1894 Joshua Jones brought an action against Wickham Flower and Charles Hopkinson in respect of an estate in New Zealand called Mokau. In this action the plaintiff asked for a declaration that, upon payment by him to the defendants of money advanced by them to him, the defendant Flower was a trustee of the estate for the plaintiff; and prayed that, on payment to the defendants of what should be found due to them on taking an account, the defendant Flower might be ordered to reconvey the estate to the plaintiff; and for costs and damages. On the 6th. Dec. 1894 Joshua Jones was adjudicated a bankrupt. His trustee in bankruptcy, the official receiver, elected not to continue the action, which was upon the application of the defendants unconditionally stayed by an order of the court dated March 15, 1895. On the 9th. July 1895 another action in respect of the same estate was commenced against the same defendants by a Mr. Bean, who had purchased the official receiver's interest for 50*l.* The relief asked by this second action was precisely the same as that asked for by the former action, but in addition an injunction was prayed to restrain the defendants from selling or otherwise disposing of the estate.

This was a motion on behalf of the defendants that the second action might be dismissed as an abuse of the process of the court, and as being frivolous and vexatious.

Renshaw, Q.C. and *J. G. Wood* for the motion.—The trustee's election not to continue the action bars anybody who subsequently becomes entitled through him to the same cause of action. We rely on

Selig v. *Lion*, 64 L. T. Rep. 796; (1891) 1. Q. B. 513.

John Chester for the plaintiff Bean.—The interest of the plaintiff Bean is independent of the interest of the former plaintiff Joshua Jones. This case is therefore within

Bennett v. *Gamges*, 35 L. T. Rep. 764; L. Rep. 2 Ex. Div. 11;

and is not within *Selig* v. *Lion* (*ubi sup.*). The motion ought therefore to be refused.

KEKEWICH, J.—The law, as it appears to me, is put in a nutshell by Wright, J. in the action of *Selig* v. *Lion* (*ubi sup.*), where he says this: "The cause of action passed to the trustee in bankruptcy; after it so passed the trustee alone had the right of action in him, and if he elected not to go on with the action his election barred anybody who subsequently became entitled through him to the same cause of action." That, of course, is without prejudice to the more elaborate, though not long statement of Wills, J. If it be necessary (about which I express no opinion) to determine between the authority of that case and the case of *Bennett* v. *Gamgee* (*ubi sup.*), I should have no hesitation in following the statement of Wills and Wright, JJ. in *Selig* v. *Lion*. The action will be dismissed with costs.

Solicitors: *John M. Mitchell; Flower, Nussey*, and *Fellows.*

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

QUEEN'S BENCH DIVISION.

Friday, June 21.

(Before CHARLES, J.)

BARFF AND OTHERS *v.* PROBYN. (*a*)

Landlord and tenant—Tenant's fixtures—Expiration of tenancy—Removal of fixtures after such expiration—Measure of damages.

A tenant whose term has expired, and who has been required by the landlord to give up possession, cannot, after the determination of his tenancy, remove fixtures, although he is still in possession of the premises.

The tenant of a public-house whose lease had expired, but who remained on in possession, although required by the landlord to give up the same, removed his trade fixtures after his tenancy had come to an end and a writ for possession had been served upon him, but before he had actually given up possession of the premises which were not going to be carried on as a public-house.

Held, that the tenant had no right to remove the fixtures at the time he so removed them, and that the landlord was entitled to damages in respect of such wrongful removal.

Held also, that the measure of the damages was the value of the fixtures as chattels only, and not their value as fixtures if the premises were carried on as a going concern.

Penton *v.* Robart (2 *East*, 88) *considered.*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

ACTION tried before Charles, J. without a jury.

The plaintiffs were the freeholders and landlords of a certain public-house, the Five Bells, in Moorfields, Cripplegate, and the action was brought for damages for wrongful removal and conversion by the defendant of certain fixtures on the premises, the defendant being the tenant of the public-house.

The defendant was the assignee of a lease for twenty-one years from the 29th Sept. 1872, granted by the plaintiffs' predecessors in title to one M., which lease expired on the 29th Sept. 1893.

In May 1893 the plaintiffs agreed with one Cosh to grant him a building lease of the premises together with some adjoining property, as from the 29th Sept. following, when the defendant's tenancy expired. Cosh was to take down the buildings on possession being given to him on the expiration of the defendant's term, and adapt them to other purposes. Negotiations took place between the defendant and Cosh (the incoming tenant) as to the purchase by Cosh of the fixtures of the public-house, and on the 27th Sept. a valuation of the fixtures was made. They were valued at 148*l.* 9*s.* if the premises were going to be carried on as part of a going concern, and at 26*l.* 17*s.* for breaking-up price. Cosh, however, in October, agreed to pay the defendant 90*l.* for these fixtures, but failed to do so.

The defendant's tenancy having expired on the 29th Sept., the plaintiffs then required him to give up possession, but he declined to do so, and remained on in possession, as Cosh had not paid him the 90*l.* for the fixtures.

On the 27th Oct. a writ in an action of ejectment was served by the plaintiffs upon the defendant, and the defendant then took up the position that he was entitled to remain in possession until Cosh paid him for the fixtures. That action terminated in possession being given up, before judgment, on the 16th March 1894, but the defendant had in the meantime removed the fixtures.

The tenant therefore removed the fixtures—which were taken to be "tenant's fixtures"—after the expiration of his tenancy on the 29th Sept. 1893, but before he had given up possession on the 16th March 1894, and the question now was whether he was entitled so to remove the fixtures.

Robson, Q.C. and *Corrie Grant* for the plaintiffs.—The question is whether the defendant, retaining possession after his tenancy had come to an end, can remove these trade fixtures. We contend that he cannot, and that any arrangement that was made between the defendant and Cosh as to the sale of the fixtures cannot affect the landlord's rights.

Shakespeare (*Jelf*, Q.C. with him) for the defendant.—Though the tenancy expired on the 29th Sept., the defendant was in possession after that date, and it was while the defendant was in possession that the fixtures were removed by him. That is sufficient to justify him although the tenancy had expired:

Penton v. *Robart*, 2 East, 88.

In that case judgment in ejectment had been obtained, and the fixtures were afterwards removed, and it was held that the tenant had a right to remove them. Here judgment for possession had not been obtained when the fixtures were removed, and *à fortiori* the tenant had the right to remove them. The tenant's right to remove fixtures continues during his original term and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant:

Weeton v. *Woodcock*, 7 M. & W. 14;
Leader v. *Homewood*, 5 C. B. N. S. 546.

With regard to the damages the utmost the plaintiffs can recover—if the defendant is liable at all—is the value of the fixtures as chattels, that is, their breaking-up price, which in this case was 26*l.* 17*s.*:

Clarke v. *Holford*, 2 C. & K. 540.

[CHARLES, J. referred to Mayne on Damages, 5th edit., p. 387, where it is said that the plaintiff suing in trover for fixtures which have been wrongfully removed, can only recover the value of the fixtures as chattels; and he also referred to *Joyner* v. *Weeks* (65 L. T. Rep. 16; (1891) 2 Q. B. 31).]

Robson, Q.C. in reply.—The defendant's term came to an end on the 29th Sept., and there was no agreement that the defendant should remain in possession after that date as tenant. In any event, when the writ in the action of ejectment was served on the 27th Oct., the defendant was holding over without any right to do so, and with full knowledge that he had no right to remain in as tenant, and it was after that date that he removed the fixtures. The cases therefore show that he had no right to remove the fixtures at the time when he did remove them:

Weeton v. *Woodcock* (*ubi sup.*);
Leader v. *Homewood* (*ubi sup.*).

These cases are later than *Penton* v. *Robart* (*ubi sup.*), and must be taken as having very considerably limited, if not altogether overruled, that decision. *Penton* v. *Robart* (*ubi sup.*) is also dissented from in the Irish case of *Deeble* v. *McMullen* (8 Ir. C. L. Rep. 355), where the principle was laid down that a tenant who wrongfully remains in possession after the determination of his tenancy cannot, by such his tortious and illegal overholding, acquire a right as against his landlord to remove fixtures. That exactly covers this case; but there are many other cases which may usefully be referred to as to the respective rights of landlord and tenant with regard to the right to remove fixtures, such as

Lyde v. *Russell*, 1 B. & Ad. 394;
Mackintosh v. *Trotter*, 3 M. & W. 184;
Meux v. *Jacobs*, 32 L. T. Rep. 171; L. Rep. 7 H. of L. 481;
Ex parte Brook, 39 L. T. Rep. 458; 10 Ch. Div. 100.

With regard to the second point as to the measure of damages, we submit that the true measure of such damages is the sum which an incoming tenant would pay the outgoing tenant for the fixtures, assuming that the business was going to be carried on as a going concern (*Thompson* v. *Pettitt*, 10 Q. B. 101; *Moore* v. *Drinkwater*, 1 F. & F. 134); and on this basis the plaintiffs would be entitled to recover 148*l.* 9*s.*

CHARLES, J.—The defendant's term had expired on the 29th Sept., and the fact that the plaintiffs brought an ejectment against him showed their intention of no longer treating him as tenant. Yet the defendant had removed the

fixtures after his tenancy had come to an end. The case of *Penton* v. *Robart* (*ubi sup.*) was relied on as an authority which enabled the tenant to do so, and if that case is looked at by itself it is difficult to distinguish it from the present. There the plaintiff had recovered judgment in ejectment against the tenant for the premises in question, yet, as the tenant was still in fact in possession, the court held that he had not abandoned his right to the fixtures. I was at first disposed to think that I ought to act upon that decision and leave the matter to the Court of Appeal; but, on reading the notes to the case of *Elwes* v. *Maws* (3 East, 38) in 2 Smith L. C. 182, I find that the decision in *Penton* v. *Robart* (*ubi sup.*) has been modified by the decision of the court as delivered by Alderson, B. in *Weeton* v. *Woodcock* (*ubi sup.*), where it was held that the tenant's right to remove the fixtures continues only during the original term, and during such further term as he has a right to consider himself tenant, and then ceases, although the possession of the tenant continues; and a similar view of *Penton* v. *Robart* (*ubi sup.*) was taken by Willes, J. in delivering the considered judgment of the court in *Leader* v. *Homewood* (*ubi sup.*), though during the course of the argument in that case Williams, J. seems to have thought that the court in *Weeton* v. *Woodcock* (*ubi sup.*) did not qualify *Penton* v. *Robart*, and on reading the judgment of Willes, J. it seems clear to me that that learned judge thought it necessary that some tenancy, although a tenancy at sufferance, should subsist. In the present case the inference of fact which I draw is, that at the time the defendant removed these fixtures the relation of landlord and tenant did not exist, and that he was in fact a trespasser, and was so treated by the landlords when they served upon him the writ of ejectment on the 27th Oct. After that date certainly the defendant could not consider himself as tenant, and therefore his case would come within the limitation laid down by Alderson, B. in *Weeton* v. *Woodcock* (*ubi sup.*) "during such further period of possession by the tenant as he holds the premises under a right still to consider himself as tenant." *Penton* v. *Robart* (*ubi sup.*) has been commented upon with but qualified approval in the cases I have referred to, and has been altogether dissented from in the Irish case of *Deeble* v. *M'Mullen* (*ubi sup.*). Under these circumstances I reluctantly feel it my duty to follow the general course of authority in favour of the plaintiffs, in preference to the view expressed in *Penton* v. *Robart* (*ubi sup.*), and to hold that at the time the defendant removed the fixtures he was a trespasser, and that no tenancy, even at sufferance, existed between the defendant and the plaintiffs. I take this view reluctantly, as there is some hardship in the tenant losing the value of his fixtures; but I think on the whole that the plaintiffs' case has been established, and that they are entitled to judgment. As to the measure of damages, the passage in Mayne (5th edit. p. 387) was cited that, "in trover for fixtures which have been wrongfully removed, the plaintiff can only recover their value as chattels, though it may be less than their value was as fixtures." The authority cited for that proposition is *Clarke* v. *Holford* (*ubi sup.*). That was a case where the tenant was complaining of the wrongful removal of fixtures by the landlord; but it is obvious that the measure of damages which the defendant is entitled to in the present case, where the action is against the tenant, must be the same. As the premises were coming down and could not be used as a public-house, an incoming tenant would not have given more than the breaking-up or sale price. I think therefore the judgment should be for the plaintiffs for breaking-up price, that is, for 26*l.* 17*s.*, and I give judgment for that sum, with costs on the High Court scale.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Baylis* and *Pearce*.
Solicitors for the defendant, *Timbrell* and *Deighton*.

June 12 *and* 13.

(Before MATHEW, J.)

THE EXCHANGE TELEGRAPH COMPANY LIMITED v. GREGORY AND CO. (*a*)

Copyright — Information as to prices on Stock Exchange—Compilation of—Inducing persons to break their contracts — Special damage — Injunction—Copyright Act 1842 (5 *&* 6 *Vict. c.* 45), *ss.* 18, 19.

Under a contract made by the plaintiffs with the committee of the London Stock Exchange, information as to prices and quotations on the Exchange was collected from hour to hour by a member, and transmitted by telegraph to the plaintiffs, who paid for the same. As the information was received by the plaintiffs, it was telegraphed by them to their subscribers, who pay a large sum to the plaintiffs and contract with them not to disclose or supply the information to non-subscribers. The information was also printed upon sheets, which were compiled each day and issued by the plaintiffs as a newspaper, and registered as copyright:

Held, that this compilation or newspaper, although without literary interest, was within the Copyright Act, and was entitled to protection as copyright.

The defendants, who had formerly been subscribers of the plaintiffs, but who had ceased to be so, printed copies of the said compilation, and copied the information contained in the telegraphic messages to the plaintiffs, and went to the plaintiffs' subscribers and induced them—in breach of their contracts with the plaintiffs—to supply the information which the defendants could no longer obtain from the plaintiffs, as the plaintiffs were prohibited by their contract with the committee from supplying the same to the defendants:

Held, (1) *that the defendants had infringed the plaintiffs' copyright in the newspaper;* (2) *that they had no right to appropriate the information contained in the telegraphic messages from the Stock Exchange to the plaintiffs, as such information was the plaintiffs' property;* (3) *that the act of the defendants in inducing the plaintiffs' subscribers to give the information was an improper and malicious interference with the plaintiffs' business, and was actionable; and* (4) *that such interference was actionable without proof of special damage.*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

ACTION tried by Mathew, J. without a jury.

The action was brought by the plaintiffs for an injunction to restrain the defendants from printing or otherwise multiplying copies of the plaintiffs' periodical or book entitled *The Exchange Telegraph Company's Stock Exchange News*, without the consent of the plaintiffs, and for damages.

The plaintiffs alleged that they were the proprietors of copyright in certain information as to prices and quotations on the London Stock Exchange, collected and composed for them from day to day on the Stock Exchange, and that such information was published each day in a newspaper or periodical entitled *The Exchange Telegraph Company's Stock Exchange News*, and on tapes or sheets of letterpress under the same title communicated to the plaintiffs' subscribers, and has been duly registered as copyright at Stationers' Hall; that the defendants have printed and otherwise multiplied copies of the said copyright information on the 5th, 7th, and 14th Dec. 1894; that such copies were manufactured or obtained from the plaintiffs' tapes or sheets of letterpress.

In the alternative the plaintiffs said they were the proprietors of the said information, which they communicated in a printed form to their subscribers on the terms that such information was to be used only in the office in which it was delivered, and was not to be sold or communicated to non-subscribers for a pecuniary consideration or otherwise; that on the three days specified the plaintiffs communicated certain information to their subscribers on the above conditions, and that the defendants copied such information at their various offices and exhibited it to persons frequenting their offices without the consent of the plaintiffs.

The plaintiffs also alleged that the defendants well knowing the terms of the contracts entered into between the plaintiffs and their subscribers, maliciously and for the purpose of injuring the plaintiffs and of benefiting the defendants at the expense of the plaintiffs, induced various subscribers to break their contracts by supplying the defendants, who were not subscribers, with the Stock Exchange prices communicated to subscribers under their contracts with the plaintiffs, to be used by the defendants for outside stock-broking business.

The plaintiffs claimed an injunction to restrain the defendants from doing any of the above acts, and also damages.

The facts as found in the case, and as stated by the learned judge in his judgment were these:—

The plaintiffs are a limited company established in the city, and part of their business is to collect information as to prices and quotations on the Stock Exchange, and to telegraph that information to their subscribers, who pay a large sum each year for the information obtained from the plaintiffs; and the plaintiffs have for a long time been carrying on a lucrative business in this country. With each of their subscribers the plaintiffs enter into a contract not to supply the information to others.

The defendant is a person named Cronmire, who carries on business as an outside broker, under the name of Gregory and Co., in various places in the metropolis and in some provincial towns, and he also carries on an independent business as an outside broker, under the name of Woolf and Co., in London Wall.

The complaint against the defendants is, first, that they infringed the plaintiffs' copyright in a certain newspaper published by the plaintiffs, and containing the information that they have received from the Stock Exchange; and, secondly, that they unlawfully interfered with the plaintiffs' business by inducing some of the plaintiffs' subscribers to give them the information that such subscribers had obtained from the plaintiffs, and which the subscribers had contracted they would not disclose in that way, and that they (the defendants) used that information for the purpose of their own business to the detriment of the plaintiffs' business, and the plaintiffs ask for an injunction to restrain the defendants from continuing that course of conduct.

The way the plaintiffs' business was carried on was this: They had entered into a contract with the committee of the Stock Exchange, by which, in consideration of a royalty, they had obtained a concession and privilege of appointing a member of the Stock Exchange to obtain for them from time to time during each day information as to values and prices and fluctuations in stocks and shares, and the plaintiffs had appointed for that purpose a Mr. Herbert, to whom they paid a considerable salary, payment being made in advance.

It was the duty of Mr. Herbert to go into the different markets in the room, and ascertain prices and quotations, watch fluctuations, and telegraph the results to his employers, the plaintiffs. It was a matter that required considerable experience, information, and quickness, and a high degree of intelligence; and the course that he followed was to record in writing what he had ascertained and to furnish to an operator of the Stock Exchange the materials for telegraphing to the plaintiffs. The operator receiving his instructions from Mr. Herbert telegraphed to the plaintiffs the figures and prices given to him. The information was roughly grouped under different heads, such as quotations as to railway shares, as to mining shares, as to consols, and so on, and the information was transmitted by a Morse electrical machine, and the telegrams were issued in the ordinary way upon a slip that came through the machine into the plaintiffs' office.

When the information arrived it was the duty of the clerk by similar electrical means to transmit that information as it arrived to the different subscribers, and that he did, and in an adjoining room another clerk recorded by a type-writing machine the same information, and the sheets upon which the information was printed by the type-writing machine were made up into the newspaper, which was subsequently sold to anybody who wished for a copy. The information was thus communicated to the plaintiffs, and by them transmitted to their subscribers.

After the business had been carried on in this way for some time by the plaintiffs the committee of the Stock Exchange objected to information being given to outside brokers, and for a time the defendants (among others) were deprived of the information that they had hitherto had as one of the plaintiffs' subscribers; but subsequently all that the committee insisted upon was their right to veto the information being given to particular outside brokers, and the objection was made to

the information being given to Gregory and Co. in the first instance, and Woolf and Co. subsequently. The result was, that in March 1894 the contract between the plaintiffs and Gregory and Co. who had been subscribers, came to an end and was not renewed. The contract with Woolf and Co., went on for some time afterwards, but the information was fully supplied to Woolf and Co. by the plaintiffs, and it was frankly admitted by the defendant, Cronmire, in answer to interrogatories, that when the information which he had previously had was no longer available, he went to other subscribers of the plaintiffs and obtained from them the information that they had from the plaintiffs.

It was said that, in taking that course, the defendants had induced those subscribers to break their contracts with the plaintiffs. There were three forms of contract entered into between the plaintiffs and their subscribers. By the first, the material condition was this, that the intelligence supplied by the company is copyright, is to be used only in the office or other place in which it is delivered, and is not to be sold or communicated to non-subscribers for a pecuniary consideration or otherwise. The second form varied slightly, but it is unnecessary to refer to it; and the third form of contract with the newspapers contained clauses with a similar object, the intention merely being that the subscriber should only use the information for the purpose of his business, and should not enable anybody to set up a rival institution to the business carried on by the plaintiffs.

The defendants availed themselves of the means above mentioned to get the information which the subscribers were bound by their contracts not to disclose, and used that information, as it was admitted, for the purposes of their business by transcribing, on boards set up in different places, the statements contained in the telegrams from the Stock Exchange to the plaintiffs.

Under these circumstances the plaintiffs complained that their copyright in their newspaper had been infringed, and there can be no doubt that the main object of publishing that newspaper was to protect their copyright. The newspaper was registered, and the object was to afford an additional protection for the communications made by the plaintiffs to their subscribers, and to enable the plaintiffs, in case their subscribers were induced to break their contracts with them, to complain of what was done as an infringement of the copyright in the paper.

The nature of the arguments and the cases cited appear sufficiently in the judgment.

Finlay, Q.C., *Scrutton*, and *Shearman* for the plaintiffs.

Sir *Richard Webster*, Q.C., *Cock*, Q.C., and *Macaskie* for the defendants.

Cur. adv. vult.

June 13.—MATHEW, J.—[After stating the facts as already set out his Lordship proceeded:] With regard to the registration of the newspaper, I see nothing illegitimate or improper in the course adopted by the plaintiffs. Few people seemed to care for the publication, but it was properly registered, and available for anybody who thought fit to buy it. It was admitted that there had been technically an infringement, but the defence put forward on behalf of the defendants was, that there was no copyright, and could be no copyright under the Act in such a publication, and it was pointed out that the publication had no literary merit. Unquestionably it had not, and it was not interesting to the general public, though eminently instructive to a portion of the public. But it was argued by Sir R. Webster that, without literary merit due to intellectual and mental exertion, it was impossible to produce anything which could be covered by the protection of the Copyright Act, and he referred to the terms of the Act, and especially to the preamble, which recites that "whereas it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the public." Sir R. Webster ridiculed the notion that these compilations of Mr. Herbert's could be regarded as literary productions likely to be of lasting benefit to the world, and he proposed to construe the subsequent sections in the Act very strictly by the preamble, an attempt which, although often made, has never in my experience been successful, because when we turn to the subsequent sections, particularly the definitions in sect. 2, it is quite clear that productions are entitled to be protected which go far beyond, or are far less than the description contained in the preamble. Sir R. Webster relied on a recent case in the Court of Appeal, the case of *Chilton* v. *The Progress Printing and Publishing Company* (72 L. T. Rep. 442; (1895) 2 Ch. 2, 9). That was a very peculiar case. The plaintiff was a turf prophet, and he published from time to time predictions and prophecies as to the horses that would win, and the defendants published those prophecies of the plaintiff, attributing them to the plaintiff, stating in point of fact that the plaintiff predicts that such and such a horse—naming the horse—will win such a race, and the plaintiff applied for an injunction to restrain the defendants from repeating such publication. The Court of Appeal—affirming Kekewich, J.—came to the conclusion that this was not a literary production within the meaning of the Copyright Act. It is not very clear on what precise ground the Court of Appeal proceeded, but I should infer that they considered that the production in question was worthless, and did not imply any information or any exertion on the part of the person who made it, and that the copying of that worthless guess was not an actionable wrong, and the court therefore decided that the plaintiff was not entitled to an injunction. Lord Halsbury then referred to the preamble of the Act, and pointed out very carefully that the preamble did not control the other sections in the Act. That case appears to me to have no bearing whatever upon this case. There is abundant authority, on the other hand, to show that compilations of this description are within the Copyright Act, and are entitled to protection. Some of the many cases which illustrate that view are *Kelly* v. *Morris* (14 L. T. Rep. 222; L. Rep. 1 Eq. 697), where it was held that Kelly's Directory, a laborious work, but not one of literary interest, was entitled to be protected; *Maple and Co.* v. *The Junior Army and Navy Stores* (47 L. T. Rep. 589; 21 Ch. Div. 369), in which a catalogue of Maple and Co., a laborious work, but not one of literary interest, was held to be entitled to protection; and the

principle was recognised in the case of *The Trade Auxiliary Company* v. *Middlesbrough and District Tradesmen's Protection Association* (60 L. T. Rep. 681; 40 Ch. Div. 425), that the compilation in question, although without literary interest, was the result of considerable labour, intelligence, and skill, and was valuable information for which the plaintiffs paid, and which they sold at a considerable profit. Without attempting any definition of what the Copyright Act applies to, or does not apply to, I am clearly of opinion, on the authority of these cases, that the compilation in question was within the protection of the Act. Infringement was not disputed, and therefore so far the plaintiffs would appear to be entitled to what they ask. In the alternative the plaintiffs put their case in this way: They said that the information contained in what was communicated on the tapes sent from the Stock Exchange to the plaintiffs has been misappropriated by the defendants, and that the defendants have—as stated in the course of the argument—tapped the wires and got the information, which it was not intended should reach them, but should reach the plaintiffs, and it was said that the plaintiffs' common law right was infringed. I am unable to see any answer to that contention, in support of which the plaintiffs relied on the well-known case of *Caird* v. *Sime* (57 L. T. Rep 634; 12 App. Cas. 326). What was contained in those telegraphic messages sent to the plaintiff was valuable property, intangible it may be, but valuable money's worth notwithstanding. That property the defendants possessed themselves of by means which as between them and the plaintiffs were illegitimate means, and on that ground also, I am of opinion that the plaintiffs are entitled to complain of what the defendants have done. Upon the third position, also, taken by the plaintiffs, I think they are in the right. They complain that their business had been illegally and improperly and maliciously interfered with by the defendants. The defendants were old subscribers; they knew the terms of the contracts between the subscribers and the plaintiffs—that was not and could not be disputed—they were therefore aware that they were not entitled to obtain the information that the subscribers got under their contracts with the plaintiffs, and which the subscribers were bound not to impart, except in accordance with the terms of the contracts; knowing all that, the defendants got this information without paying the subscription, and so, it was said, they interfered with the plaintiffs' business. The defendants dealt with that in this way: They said that it was a question of fact in every case whether there has been a malicious interference with the freedom of trade, and that the court ought not to come to the conclusion that there had been any such malicious interference in this case, because what was done by the defendants was done in self-defence. It was said that they were debarred by the action of the Stock Exchange Committee from obtaining this information, for which they were perfectly willing to pay the plaintiffs, and it was said that the plaintiffs lent themselves to the purposes of the Stock Exchange, which were, it was said, waging war upon outside brokers, and helped the Stock Exchange to interfere with the defendants' freedom of trade, hampered them in their business, and entitled them to take the steps they did in self-defence; that the plaintiffs have inflicted upon themselves any loss of which they complain, as all they had to do was to give the defendants the information for which the defendants were willing to pay. In other words, it was said the case might be disposed of by reference to that very slippery maxim, *Volenti non fit injuria*. To deal with that line taken up by the defendants it is necessary to examine critically what the position of the committee of the Stock Exchange was, and what the relations between them and the plaintiffs were. It is perfectly clear to my mind that the committee of the Stock Exchange would be justified and would be entitled to prevent anybody, except members of the House, from obtaining any information as to the transactions that were going on during the day. The committee publish at the end of each day a record of all transactions during the day, and that would be quite within their rights, and it would be perfectly legitimate if they refused to impart to any outside broker information except that which was contained in their publication at the end of each day. They have not followed that course, but they allow the information to be given in the course of each day from time to time. They were quite entitled to say to whom that information should be given, and in this particular case it was agreed that they had supplied the plaintiffs with the information, upon the condition that that information should not be transmitted to the defendant Cronmire. I see nothing wrong in that—nothing illegitimate—nothing of which the defendants are entitled to complain. The defendants did not suggest, and could not suggest, that the committee were actuated by any motive of which they were entitled to complain, or that the committee had any object of interfering in the defendants' business in an illegitimate or improper way. It is useless for the defendants to say that they were willing to pay the plaintiffs for the information if they could get it, but they were willing to pay for what they knew the plaintiffs could not supply, because their contract with the Stock Exchange Committee prevented them from doing so. I see nothing whatever wrong in the plaintiffs' submitting to the terms upon which they were permitted to obtain this information by the committee. Their bargain was that information should be used in a particular way, and should not reach the defendants as if they were subscribers. That being so, has there been an interference with the plaintiffs' business within the meaning of the well-known authorities on the subject? For the defendants it was argued that no special damage was proved. No special damage could be proved. It would be impossible to show what pecuniary loss the plaintiff did in fact sustain; but that pecuniary loss would be the inevitable result of what the defendants were doing, if they were entitled to do it, is clear beyond all doubt, because if any subscriber were, in violation of his contract with the plaintiffs, to impart information to the defendants, or to any person in the defendants' position to be used as the defendants used it, their subscriptions would not last long. It would be in the power of any subscriber, who was willing to act as the defendants have done here, practically to open a rival institution to the plaintiffs', and so put an end to the plaintiffs' subscribers. No person would subscribe and pay a large sum of money when it would be possible

for a very much less sum to obtain all the information through a person acting as the defendants did here. Proof of special damage is not necessary for the cause of action, and I do not think the rule of law can be better explained than in the judgment of Lord Esher, M.R. (then Brett, L.J.), in the case of *Bowen* v. *Hall* (44 L. T. Rep. 75; 6 Q. B. Div. 333). He says (44 L. T. Rep. at p. 47): "The question is whether all the conditions are by such a case fulfilled. The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by Coleridge, J. (in *Lumley* v. *Gye*, 2 E. & B., at p. 247). But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." Then he refers to *Lumley* v. *Gye* (2 E. & B. 216) and other cases whi h make clear the true proposition that where what is done is an interference with the freedom of trade in this sense, that a customer is induced to break his contract by the person whose object it is to benefit himself at the expense of the other, that is a wrongful act which is actionable, and all those conditions appear to me to be fulfilled in this case. What was done was done by persuading customers of the plaintiffs to break their contracts with the plaintiffs, the object being to benefit the defendants to the disadvantage and detriment of the plaintiffs' business. The plaintiffs, therefore, are entitled to what they ask for, that is, an injunction to restrain the defendants from the repetition of the acts mentioned in the statement of claim. The effect of the judgment will be to restrain the defendants from infringing the copyright in the newspaper, and from publishing any of the information contained in the copies furnished by the plaintiffs to their subscribers.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Nicholson* and *Crouch*.

Solicitors for the defendants, *Bennett* and *Leaver*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 12, 13, *and* 26.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

SELIGMAN *v.* PRINCE AND CO. LIMITED. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Debentures—Validity—Fraudulent preference—"Private" company.

In Aug. 1892 *P. mortgaged his business premises, book-debts, and goodwill to O. S. for* 600*l. on the terms of the mortgagee receiving a share of the profits in lieu of interest, and of the mortgage being kept on foot for twenty years. In July* 1893 *P. obtained a loan of* 150*l. from L. S., a brother of O. S.*

In Nov. 1893 *L. S. took proceedings to obtain repayment of the loan. Thereupon, an agreement was entered into between P. and O. S. for the formation of a company to take over the business, and for this purpose O. S. released his security and took a bill for* 1100*l. at three months, and agreed to accept debentures of the company for* 925*l. in satisfaction of the bill on its maturing. P. was to be managing director of the company, and was to vote for the issue of the debentures to O. S.*

At this date the business was really insolvent. The company was formed, the memorandum being signed by P., by a brother of his, and by clerks and servants employed in the business. The only two directors were P. and his brother. By the articles of association the directors were empowered to borrow or raise money by the issue of debentures. By the agreement for the purchase of the business, the company agreed to buy the business premises and assets from P. for a sum to be paid in fully paid-up shares, and P. was to be indemnified from his business debts and liabilities.

On the 4th Dec. 1893 *debentures of the company for* 175*l. were issued to L. S. in discharge of the debt of* 150*l. due to him from P. On the 4th Jan.* 1894, *although the bill for* 1100*l. held by O. S. would not become due till the 21st Feb.* 1894, *debentures for* 925*l. were issued to him, and the bill was given up. On the 31st Jan.* 1894 *a petition was presented to wind-up the company. On the 1st Feb. the plaintiff commenced the present action on behalf of himself and all other debenture-holders to enforce his security, and on the 5th Feb. a receiver and manager was appointed in the action. On the 14th Feb. an order was made for the winding-up of the company. The plaintiff's action was subsequently tried before Williams, J. and dismissed.*

On appeal: Held, that the directors had power to issue the debentures, because, although L. S. was not a creditor of the company, it was bound to indemnify P. against his debt to the plaintiff; and that the power had not been improperly exercised, the company being formed for the express purpose of taking over P.'s business on the terms of paying his business debts, and the debentures had been issued to carry out that object.

Re The Inns of Court Hotel Company Limited (*L. Rep.* 6 *Eq.* 82) *and* Howard *v.* The Patent Ivory Manufacturing Company Limited (58 *L. T. Rep.* 395; 38 *Ch. Div.* 169, 170) *approved.*

Held also, that there was no fraudulent preference.

Re George Newman and Co. Limited (72 *L. T. Rep.* 697; (1895) 1 *Ch.* 674) *and* Broderip *v.* A. Salomon and Co. Limited (72 *L. T. Rep.* 755; (1895) 2 *Ch.* 323) *distinguished.*

Decision of Williams, J. reversed.

THIS was an appeal by the plaintiff against a decision of Williams, J., given on the 13th Feb. 1895, the question being as to the validity of certain debentures issued by the above-named company to the plaintiff.

The facts of the case are fully stated in the judgments of the Lords Justices.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

Grosvenor Woods, Q.C. (with him *F. Whinney*) for the appellant.—The debentures in question were validly issued to the plaintiff, for the purpose of carrying out the objects for which the company was established:

Re The Inns of Court Hotel Company Limited, L. Rep. 6 Eq. 82;

Howard v. *The Patent Ivory Manufacturing Company Limited*, 58 L. T. Rep. 395; 38 Ch. Div. 169, 170.

The company had power to borrow or raise money on any terms or conditions by the issue of debentures, &c. As to the use of the word "raise," see

Re The Anglo-Danubian Steam Navigation and Colliery Company Limited, L. Rep. 20 Eq. 339, 341.

In a case before Williams, J., of

Davies v. *R. Bolton and Co. Limited*, 71 L. T. Rep. 336; (1894) 3 Ch. 678,

it was held that, as against a transferee who took without notice, certain irregularities in the issue of a debenture were covered by a clause in the articles of association, and that the debenture was therefore valid. There is no case very similar to the present, but I submit that the substance of it is within the reasoning of Kay, J., in *Howard* v. *The Patent Ivory Manufacturing Company Limited* (*ubi sup.*), and that the issue of the debentures was within the borrowing power of the company.

Farwell, Q.C., and *Theodore Ribton* for the respondent, the official liquidator.—The view taken by Williams, J., was much the same as that taken by this court in

Re George Newman and Co. Limited, 72 L. T. Rep. 697; (1895) 1 Ch. 674;

Broderip v. *A. Salomon and Co. Limited*, 72 L. T. Rep. 755; (1895) 2 Ch. 323.

They also referred to

Re The Pyle Works Limited (*No.* 2), 63 L. T. Rep. 628; (1891) 1 Ch. 173.

Grosvenor Woods, Q.C. replied.

Cur. adv. vult.

June 26.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an appeal from a decision of Williams, J. dismissing with costs an ordinary debenture-holders' action. The defences raised by the pleadings are substantially as follows:—(1) That no consideration was given for the debentures, and that the directors of the company had no power to issue them; (2) that, if they had such power, it was improperly and irregularly exercised, and that the debentures are invalid on that ground; (3) that the company is being wound-up and is insolvent, and that the issue of the debentures was a fraudulent preference. The learned judge has held that there was no fraudulent preference, but he has refused relief to the plaintiff on the other grounds relied upon by the company. The material facts of the case are as follows: In 1892 one Llewellyn Prince commenced carrying on business as a tailor in the West-end of London. In August of the same year he borrowed 600*l.* from the plaintiff's brother Oscar Seligman, upon terms contained in a deed dated the 24th Aug. 1892. By this deed Prince mortgaged his business premises and book-debts and goodwill to Oscar Seligman as a security for 600*l.*, and covenanted to pay that sum within three months after notice in writing requiring payment thereof; but payment was not to be required for eighteen months, and Prince was not to be entitled to pay off the loan for twenty years. Prince then covenanted to carry on the business, to keep and furnish proper accounts, and to pay Oscar Seligman three-sevenths of the net profits in lieu of interest. Whatever the legal effect of this arrangement may have been, it is obvious that Prince could no longer dispose of his business, or of the property comprised in the mortgage without the consent of Oscar Seligman. In July 1893 Prince applied to the plaintiff for a a loan of 150*l.*, and the plaintiff lent him this sum, without security, but upon a verbal understanding that the loan should be repaid as soon as sufficient money could be got by Prince from his customers. On the 26th Sept. 1893 the plaintiff issued a writ to obtain repayment of his loan, and he was in a position to sign judgment against Prince for the amount. At about this time Prince determined to form a company to take over his business. A balance-sheet, showing the state of the business on the 30th Sept. 1893, was prepared. According to this balance-sheet there was an excess of assets over liabilities, but only 150*l.* was allowed for bad debts off the sum of 2339*l.* due from customers, and which was the main asset of the business. The evidence shows that the bad debts ought to have been put down at a much larger figure, and I have no doubt that the business was insolvent, and not solvent. On the 17th Nov. 1893 an agreement was signed between Llewellyn Prince and Oscar Seligman for the formation of a company to take over the business. Prince was to form the company. Oscar Seligman was to release his security. Prince was to accept and give him a bill at three months for 1100*l.*, and at the maturity of the bill Oscar Seligman was to accept first mortgage debentures of the company for 925*l.*, bearing interest at 7 per cent., in satisfaction of the bill. These debentures were to be part of an aggregate of like debentures for 1300*l.* It was part of this agreement that Prince should be the managing director of the company, and should vote for the issue of these debentures to Oscar Seligman, and he was to have power to nominate a director so long as his debentures were unpaid, and there were to be only two directors of the company. The plaintiff was not a party to this agreement, but it is plain that he knew that an attempt was to be made to form a company, and that he was willing to take its debentures in satisfaction of Prince's debt to him. On the 18th Nov. 1893 the company was registered. The memorandum of association contained (*inter alia*) the following clauses, defining the objects for which the company was incorporated: (A.) "To purchase or otherwise acquire as a going concern the business of a tailor and outfitter now carried on by Llewellyn Prince, under the name and style of Prince and Co., in London, and all or any of the assets or liabilities of the said Llewellyn Prince in relation to the said business, and with a view thereto to enter into and carry into effect, with or without modification, the agreement, a draft of which has been initialled by two of the subscribers hereto for identification." (I.) "To sell, exchange, mortgage (with or without a power of sale), assign, lease, sublet, and generally otherwise

deal with the whole or any part of the business, estates, property, or undertaking of the company as a going concern or otherwise, to any person or persons, association or associations, or otherwise, for such consideration as the company may think fit, and either for cash or for shares, debentures, or securities of any other company having objects including the objects of this company, and to hold and distribute among the members in specie the whole or part of the consideration for such sale." (K.) "To borrow or raise money on any terms or conditions, by the issue of, or upon, bonds, debentures, debenture stock, perpetual or otherwise, certificates, bills of exchange, promissory notes, or other obligations or securities of the company, or by mortgage, charge, hypothecation, or pledge of all or any of the company's property (both present and future), including its uncalled capital, or in such other manner as the company may think fit." The articles of association of the company provided that: "The regulations contained in Table A of the first schedule to the Companies Act 1862 shall apply to this company, and that, subject as hereby modified, such regulations shall be the regulations of the company." Table A contains the following clauses: (52) "The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." (53) "Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors." (55) "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made." The special articles contained (*inter alia*) the following clauses: (3) "The directors shall forthwith enter into, on behalf of the company, an agreement with Llewellyn Prince, in the terms of the draft which, for the purpose of identification has been initialled by two of the subscribers to the memorandum of association, and the board shall carry the same into effect, subject to any modification thereof which the board may approve." (7) "The qualification of a director shall be the holding in his own right of 100 shares, and this qualification shall apply as well to first directors as to all future directors; but the first directors shall be allowed a period of three months in which to obtain their qualification shares." (8) "The first directors shall continue in office till the first ordinary general meeting of the company in the year 1894, and one of the first directors shall be Llewellyn Prince, who shall be managing director." (10) "No director shall vote on any question in which he has a personal interest apart from the members at large." (13) "One director shall be a quorum for a board meeting. The seal of the company shall be affixed in the presence of and countersigned by one director and the secretary." (16) "The directors shall have power to borrow or raise money by the issue of debentures or otherwise, as they shall think proper, and on the issue of any new shares the same shall, in the first instance, be offered to the members of the company for the time being, in proportion to their respective holdings." The memorandum was signed by seven persons for one share each. Mr. Llewellyn Prince and a brother of his (Mr. J. R. Prince) were two of the subscribers. The other persons were, we were told, clerks or servants in the business. On the same day a three months' bill for 1100*l.* was given by Prince to Oscar Seligman. This would fall due on the 21st Feb. 1894. On the 28th Nov. 1893 a meeting of two directors —viz., the two Princes, the secretary and the solicitors, of the company—was held, and it was resolved that the seal of the company should be affixed to the contract referred to in the memorandum of association. On the 28th Nov. the agreement was sealed accordingly. The agreement was between Llewellyn Prince and the company, and by it the company agreed to buy his business, and business premises and assets, for 3600*l.*, to be paid by 720 fully paid-up shares of 5*l.* each. Prince was to be managing director. The company was to indemnify him from his debts and liabilities shown in the balance-sheet already referred to. No mention is made in this agreement of either of the Seligmans, nor is there any mention of debentures. This agreement was duly filed at the proper office, and on the 4th Dec. 1893 another meeting was held of the two Princes as directors, the secretary and the solicitor of the company. Mr. Oscar Seligman and a Mr. Warner were also present. Mr. Warner was then a solicitor's clerk and acted for Oscar Seligman, and also, according to the evidence, for the plaintiff; for, although the plaintiff's counsel dispute this, it is plain that the plaintiff left Mr. Warner to do the best he could for him. At this meeting it was resolved that the 720 shares mentioned in the agreement for sale should be allotted as fully paid-up (in accordance with Mr. Llewellyn Prince's request), thus—500 to Mr. Llewellyn Prince, 120 to Mr. Oscar Seligman, and 100 to Mr. J. R. Prince. It was stated at that meeting that Mr. L. Seligman was in a position to sign judgment for a debt of 150*l.* taken over by the company, but that he had offered to accept in discharge of that debt and interest 7 per cent. first mortgage debentures of the company (provided that the issue did not exceed 1300*l.*) to the nominal value of 175*l.* It was also stated that Mr. Llewellyn Prince had borrowed for the purpose of the business, since the 30th Sept. 1893, 125*l.* from Mr. H. Warner on condition that Warner would accept debentures similar to those issued to Mr. L. Seligman for 200*l.* It was also stated that the company had the option to repay cash or issue the debentures. It was resolved to elect to issue debentures. It was further resolved that a debenture issue of 1300*l.* in fifty-two debenture shares of 25*l.* each be created in accordance with the powers contained in the memorandum and articles of association, carrying 7 per. cent. interest. It was also resolved to issue six debentures to L. Seligman, and eight to Warner. There is no allusion in these minutes to the payment of Mr. Oscar Seligman, probably because the bill for 1100*l.* which he held was not due. Pursuant to the above resolution debentures for 175*l.* were

issued to the plaintiff, and those are the debentures in respect of which he sues. They are in the ordinary form, but made payable if an order is made or resolution passed to wind-up the company. On the 4th Jan. 1894 the bill for 1100*l.* held by Oscar Seligman still not having become due, debentures for 925*l.* were issued to him, and the bill was given up. Shortly after this proceedings were taken to wind-up the company. On the 31st Jan. 1894 a petition was presented by the company. On the 1st Feb. 1894 the plaintiff commenced his action, on behalf of himself and the other debenture-holders. On the 5th a receiver and manager was appointed in that action. On the 6th the company resolved to wind-up voluntarily. On the 14th an order was made for winding-up by the court. The action commenced by the plaintiff was proceeded with in the usual way, and ultimately was dismissed with costs, as already stated. Such being the facts, it is necessary to consider the legal position of the plaintiff. He is the holder of debentures issued by the directors of the company under the seal of the company, and which have become payable by the company according to their terms. Unless, therefore, they can be successfully impeached, the plaintiff is entitled to judgment. It is said, first of all, that the directors had no power to issue debentures, except for the purpose of raising and borrowing money (see article 16), and that the debentures issued to the plaintiff were not issued for any such purpose. Literally this is true; but to hold the debentures invalid on this ground would be to sacrifice substance to form. It is true that the plaintiff was not a creditor of the company, but he was a creditor of Prince, and the company was to indemnify Prince against his debt to the plaintiff. If the company had borrowed money from the plaintiff or anyone else, and with the money so raised had paid off the debt owing to the plaintiff by Prince, the debentures would have been perfectly valid, and would have been within the very terms of article 16. What was done was, in substance, though not in form, the same thing; and the decisions of Giffard, V.C. in *Re The Inns of Court Hotel Company* (L. Rep. 6 Eq. 82), and of Kay, L.J. in *Howard* v. *The Patent Ivory Manufacturing Company* (58 L. T. Rep. 395; 38 Ch. Div. pp. 169, 170) support this view of the case and show that these debentures are not invalid on the ground that no money was actually borrowed or raised upon them. But, even if this point were more open to doubt than it is, all doubt is removed by clause (*i.*) of the company's memorandum and article 55 of Table A to the Companies Act 1862. Although clause (*i.*) is not one of those matters required by statute to be in the memorandum of association, and such a clause derives no greater efficacy by being put into the memorandum rather than into the articles of association, still, it is as valid as if it were one of such articles, and it cannot be said that the issue of debentures to the plaintiff was without consideration. If the plaintiff had refused to accept debentures, Prince would have required the company to pay the plaintiff in cash, and the consideration moving from the plaintiff to the company was relief from this necessity. Next, it is contended that these debentures were issued by Prince improperly, and acting as an individual in his own interest, and not *bonâ fide* in the interest of the company, and that the plaintiff knew this to be the case. It is, however, impossible to ignore the existence of the company as a corporate body distinct from Prince, and impossible to ignore the company's memorandum and articles of association. According to them the issue of debentures was left to the directors, and by article 13 one was a quorum, and one could authorize the company's seal to be affixed. Further, the company was formed for the express purpose of taking over Prince's business on the terms of paying his business debts. It is plain that these debentures were issued in order to carry out this object, and in order to bind the company on the one hand and to relieve it from pressure on the other; and, although no doubt Prince was acting in his own interest in this matter, his interest and the interest of the company as a body corporate and existing for the purposes mentioned in the memorandum were not conflicting interests, but were similar in all respects. Nor does the fact that the draft of the resolutions of Dec. 4, 1893, was prepared by Warner in the interest of the two Seligmans in any way prove the contrary. By adopting the resolutions he had prepared Mr. Prince and his brother were not betraying the company or abusing the powers conferred upon them. They were exercising those powers for the purposes for which they were created. I cannot therefore come to the conclusion that the debentures issued to the plaintiff are invalid as against the company upon the ground that the power to issue them was not so exercised as to bind the company. With respect to fraudulent preference, the view taken by the learned judge was quite correct. Prince is not a bankrupt, and the Bankruptcy Act and the doctrine of fraudulent preference cannot be applied in favour of his unpreferred creditors as such. The company having been ordered to be wound-up so soon after the debentures were issued is, by sect. 164 of the Companies Act 1862, to be treated as a bankrupt person, but when these debentures were issued to the plaintiff the company's only creditor was Prince, and if a man has only one creditor and pays him that payment cannot be set aside as a fraudulent preference simply because other debts are afterwards contracted. Besides which no fraud on creditors was really contemplated by anyone, and the pressure put by Prince on the company to give debentures to the plaintiff would be enough to enable the plaintiff to have them treated as valid, even if the company had had other creditors than Prince when the debentures were issued. For the reasons above stated I have come to the conclusion that the appeal must be allowed and the judgment be reversed, and the usual judgment in a debenture-holders' action be substituted for it, and the plaintiff is entitled to the costs of the appeal. This decision in no way conflicts with the decisions of this court in *Re George Newman and Co.* (72 L. T. Rep. 697; (1895) 1 Ch. 674), or in *Broderip* v. *Salomon and Co.* (72 L. T. Rep. 755; (1895) 2 Ch. 323). The company is recognised as a corporate body distinct from Prince, and there are no proceedings against Prince as there were against Salomon entitling the company to set aside the agreement for the sale of the business to acquire which the company was formed, or to be indemnified by the vendor against the debts with

which he endeavoured to saddle the company. No such fraud as was proved in *Salomon's* case is proved in this case, and on the materials before us the plaintiff is entitled to the usual judgment in a debenture-holders' action, with costs of the appeal.

LOPES, L.J.—It is said that the debentures are invalid on two grounds. First, on the ground that the directors had no power to issue them; and secondly, on the ground that, if they had, they improperly exercised that power. There was another question raised to the effect that the debentures were a fraudulent preference. The last question was decided by the learned judge in the court below in favour of the defendant, and I agree with the decision; the two former in favour of the plaintiff, and I am unable to agree with the view he has taken. The facts have been very fully stated. I will very shortly state my reason for differing from the learned judge in the court below. The plaintiff is holder of these debentures, which are unimpeachable, so far as their form is concerned. But it is said they are not issued to any creditor of the company; they are issued to the plaintiff, who is not a creditor of the company, but a creditor of Prince, and are issued not for the purposes of the company but to discharge a private liability of Prince. But is this really the case when the whole transaction is carefully looked at? The company had indemnified Prince against his liabilities, and one of those liabilities was his debt to the plaintiff. Suppose the company had issued the debentures in question to Prince, as they might have done, as part of the consideration for the purchase of his business, and Prince had taken them to his bankers and raised the amount of the debt upon them, and then handed it over to the plaintiff, no question could then have been raised as to the validity of the transaction Having regard to the fact that the company had indemnified Prince, was not what was done practically the same thing, but done in a less circuitous mode? I am of opinion that the directors had power to issue these debentures to the plaintiff, and that they were not issued without consideration. But it is said that the directors improperly exercised this power, that they did not issue the debentures *quâ* directors, but in their individual capacity. How can this be successfully urged? Every formality was complied with. Every requirement in the memorandum and articles of association was observed. The debentures were issued in the interest of the company quite as much as in the interest of Prince. They relieved the company from pressure from Prince, who was entitled to be indemnified against his liability to the plaintiff, and they released Prince from pressure from the plaintiff, who was entitled to proceed upon his judgment. The debentures were issued to carry out the object for which the company was formed, viz., the acquisition of Prince's business, and I am unable to say that the directors improperly exercised their powers in issuing them to the plaintiff. This case is entirely different from the case of *Re Aron Salomon* (*ubi sup.*). The learned judge did not consider that there was anything dishonest or fraudulent, or against the policy of the Joint Stock Companies Acts, in the formation of the company as there was in the last named case. The appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. In the consideration of this case the learned judge in the court below has found, and we are unable to differ from him on that point, that in the formation of the company there was no fraud intended; and he seems, amongst other things, to have drawn the conclusion that I should have drawn myself, that it was intended on the part of all the persons concerned in forming the company that the business should be carried on. Now, with reference to the debentures allotted on the 4th Dec. to the plaintiff in the debenture action, I have come to the conclusion that there was no bargain properly so called between him and Prince which would bind him to accept the debentures, or bind Prince to give them. No doubt, through Mr. Warner, he had been brought to say that he would accept debentures, but that was only an offer. He might have withdrawn that offer. So that there was no bargain antecedent to the formation of the company about these particular debentures. Under these circumstances I cannot but think that under the combined operation of the memorandum and articles of association, as quoted by Lindley, L.J., there was power to do what the directors did on the 4th Dec. Then, it is said that they did not exercise their power for the benefit of the company but for the individual benefit of Llewellyn Prince himself. If that were so I do not see that there is anything to invalidate the other properly appointed directors, but I may say that I do not see anything to invalidate Llewellyn Prince's action. If he had a personal interest, apart from the members at large, it might be so, but I do not see that he had that personal interest. He had a personal interest along with the others, because it is perfectly plain that the company, as a company, could not have gone on at all if it had not been for the arrangement made about these debentures, or some other arrangement of a similar character. I think that disposes of the ground upon which the learned judge found these debentures invalid, and on the question of fraudulent preference I agree with what has been already said, and with what the learned judge himself said There is no preferring of these creditors of the company to other creditors of the company. Seligman was no doubt a creditor of Prince, but he was not a creditor of the company, and he was not, in that capacity, preferred to any other creditor of the company, if indeed there were other creditors of the company, which must have been to a very small amount, the company having been formed on the 18th, the agreement sealed on the 28th Nov., and this resolution of the 4th Dec. passed so short a time afterwards. At that time I do not think that any person contemplated the winding up of the company. It was only that it was found impracticable to raise further cash, and that at once would show that the company was not in a position to pay off Seligman, and the other Seligman, or Warner, otherwise than in some such way as they did. I agree that the appeal ought to be allowed, and that the order of Lindley, L.J. is right in this case.

Appeal allowed.

Solicitors for the appellant, *Warner* and *Seligman.*

Solicitors for the respondent, *Thomsons, Brooks,* and *Danby.*

Wednesday, July 24.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Re Bircham and Co. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor and client—Costs—Taxation—Debentures—Covering deed—Deed executed but no debentures issued—Completed mortgage—General Order under Solicitors' Remuneration Act 1881 (*44 & 45 Vict. c. 44*), *r. 2 (a) (c), sched. I., part* 1.

A deed, whereby real estate of a limited company was conveyed to trustees to secure first mortgage debentures, was prepared on behalf of the trustees by a firm of solicitors. The deed was executed and delivered, but no debentures were issued and no money advanced.

Held, that the deed was not a completed mortgage within the General Order made under the Solicitors' Remuneration Act 1881, *and consequently the solicitors were not entitled to be remunerated according to the scale in sched. I., part* 1, *of the order.*

Decision of Kekewich, J. reversed.

This was a summons by a firm of solicitors to review a taxation.

By an indenture, dated the 9th Jan. 1894, and made between the Midland Coal, Coke, and Iron Company Limited, three gentlemen called the trustees, and other necessary parties, after reciting that, in pursuance of a scheme of arrangement the company should be at liberty to raise a sum of money not exceeding 90,000*l.* as a first charge upon all the property and assets of the company, excepting its uncalled capital; that the company in pursuance of the scheme had become the beneficial owner of certain freehold and leasehold lands and hereditaments; that the company had determined to raise the said sum of 90,000*l.* by the issue of debentures, and further to secure the same in manner thereinafter appearing; and that it was intended that certain fixtures, plant, and chattels should be transferred to the company with the intent that they should be made subject to the floating charge created by the debentures intended to be issued for 90,000*l.*: it was witnessed that the company, together with the other necessary parties, conveyed and assigned the said freehold and leasehold lands and hereditaments (with certain exceptions) to the trustees upon trust that they should permit the company and its assigns to hold and enjoy all the premises (thereinafter called the mortgaged premises) and carry on thereon and therewith the business of the company until the security by this deed constituted should become enforceable, and then upon trust that they might in their discretion without any request, and should upon the request in writing of the holders of one-tenth of the debentures (but in either case without any further consent on the part of the company or its assigns) enter upon and take possession of the mortgaged premises, and at the like discretion might, or upon the like request should sell and convert into money the same or any part thereof.

The security by the deed constituted was to become enforceable (1) if default were made in the payment of some or any of the principal moneys secured by the debentures or any of them, or in payment of some interest on the same for three months after the same might become respectively payable; (2) if an order were made or an effective resolution of the company passed for the winding-up of the company; (3) if a distress or execution were levied or enforced against any of the company's chattels or property; (4) if the company committed a breach other than the above of any covenant therein contained. And it was further provided by clause 9 of the deed that the trustees should hold the moneys to arise from any sale or conversion under the trust for conversion, after payment of costs and expenses, in or towards payment to the holders of debentures *pari passu* in proportion to the amount due to them, without any priority whatsoever, firstly, of all arrears of interest unpaid; secondly, of all principal moneys due on such debentures; and thirdly, for the benefit of the company or its assigns; and by clause 17, that after the trustees should have made such entry as aforesaid, and until the whole of the mortgaged premises should be sold and converted under the trust for conversion, the trustees might, if they should think fit, carry on the business of the company in and with the mortgaged premises, and might manage and conduct the same as they should think fit, and for the purposes of the business might employ such agents, managers, and servants, upon such terms as they should think proper, and generally might do all such acts and enter into all such arrangements respecting the premises as they could do if they were absolutely entitled to them; provided, that they should out of the rents and profits of the premises discharge the expenses incurred in and about such management or otherwise in respect of the premises, and should apply the residue of such rents and profits for the benefit of the company and its assigns; and by clause 19, that the company should pay the principal moneys and interest secured by the debentures in accordance with the terms thereof respectively, and should observe and perform the several conditions indorsed thereon; and by clause 20, that the principal moneys and interest intended to be secured by the debentures should be a first charge on the mortgaged premises, and as between the several holders thereof (except as therein otherwise provided) the debentures should rank *pari passu* without any preference or priority by reason of date or otherwise; and by clause 37, that the company should every year during the continuance of the security pay to the trustees by way of remuneration for their services as such trustees, until the security by the deed constituted should become enforceable, 52*l.* 10*s.*, and after such security should have become enforceable, such reasonable sum as should be determined either by the debenture-holders or upon application by a judge in chambers. Such remuneration to be in addition to all proper travelling and other expenses in relation to the execution of the trusts, and that (in addition to the ordinary right to indemnity by law given to trustees) the company should keep the trustees indemnified against all actions, costs, charges; and claims in respect of the execution of the trusts; and by clause 41, that the trustees might apply to the court in order that the trusts might be carried into execution under the direction of the court, and for the appointment of a receiver and manager; and by clause 42, that, notwithstanding the Conveyancing Act 1881, s. 24, the trustees

(*a*) Reported by C. F. Duncan and W. C. Biss, Esqrs., Barristers-at-Law.

might at any time after entry appoint receivers of the mortgaged property, every receiver so appointed being entitled to exercise all the powers conferred by the above Act, and also special powers given by the deed.

This deed was prepared by Messrs. Bircham and Co. on behalf of the trustees, and was executed by all the parties thereto, and delivered to the trustees, but no debentures were actually issued and no money was advanced, although a loan was obtained from Lloyd's Bank upon the security of an agreement to issue debentures in accordance with the deed. The deed had not then been stamped.

Upon the taxation of Messrs. Bircham and Co.'s bill of costs the taxing master refused to allow the scale charge, and allowed only items for work done.

In their objections to the master's taxation Messrs. Bircham and Co. said:

The said costs are and should be regulated by sched. 1, part 1, of the General Order made under the Solicitors' Remuneration Act 1881.

The master replied:

I am of opinion the solicitors cannot claim the scale. I have offered them to bring in items, and to allow items. The matter is not a completed one. No money has been advanced. The deed is a deed of trust, not an ordinary mortgage deed. Messrs. Bircham act for "trustees," not the parties who may lend money. I think it will be admitted the deed is not stamped as a mortgage.

The summons was heard by Kekewich, J. on the 20th and 21st June.

Warrington, Q.C. and *Kenyon Parker* for Messrs. Bircham and Co.—This deed is a mortgage, and is like an old-fashioned mortgage on trust for sale. There is no definition of mortgage in the Solicitors' Remuneration Order. So far as the solicitors are concerned, their part of the business was concluded, and the mortgage was completed, when, after duly investigating title, &c., the deed which they prepared was executed and delivered. They are therefore entitled to their costs under schedule 1, part 1 of the order, for rule 2 (*a*) provides that "In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in part 1 of schedule 1 to this order, and to be subject to the regulations therein contained."

Bramwell Davis, Q.C. and *Younger* for the company.—The deed is not a mortgage at all. There is no covenant to pay the trustees. The trustees are not mortgagees; they are to have a salary for their trouble. To make it a mortgage at all the loan contemplated must have been advanced. As no money has been advanced it is certainly not a completed mortgage, and the costs ought to be taxed under schedule 2, by virtue of rule 2 (*c*), which provides: "In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore or in schedule 1 hereto prescribed, but which is not in fact completed . . . and in respect of all other deeds or documents and of all other business the remuneration for which is not hereinbefore or in schedule 1 prescribed, the remuneration is to be regulated according to the present system as altered by schedule 2 hereto. They referred to

Re Smith, Pinsent, and Co., 44 Ch. Div. 303;
Re Lacey and Son, 49 L. T. Rep. 553 and 755; 25 Ch. Div. 301;
Savory v. *Enfield Local Board*, 68 L. T. Rep. 722; (1893) A. C. 218;
Re Read, 71 L. T. Rep. 189; (1894) 3 Ch. 238;
Re Stewart, 60 L. T. Rep. 737; 41 Ch. Div. 494.

Kekewich, J.—Before venturing to differ from the taxing master, I must be satisfied on three points: first, that the instrument before the court is a mortgage; secondly, that the solicitors objecting to the taxing master's decision are the mortgagee's solicitors; and, thirdly, that the mortgage has been completed. I pass over any preceding investigations, preparations, and so forth, because nothing turns upon them here. Of course, I must not be understood as meaning that one can jump to the completion without those other processes having been gone through in fact, but here the question is whether there has been completion. Let me take those points in order. First, is this deed of the 9th Jan. 1894 (which I will presume for this purpose to have been, or to have been intended to be, stamped according to law) a mortgage? It seems to me to fulfil many essential elements of a mortgage, and notwithstanding the arguments to the contrary, I cannot myself see why it is not to all intents and purposes a mortgage. Counsel have not burdened me with references to law dictionaries for a definition of a mortgage. It is a familiar term, and I certainly have not the slightest intention of attempting a definition; but a deed which fastens property on persons, whether as the agents of others or for their own benefit, as a security for money lent, and for the interest on that money, is to all intents and purposes a mortgage. This is a deed of that character. It is a deed in the form of a trust for sale. That is a form of mortgage which is to be found in the books of precedents, and which, if not common, is, at any rate, not altogether out of date. It contains powers of management of the property—all such powers as having regard to the special character of the property are deemed necessary in order to enable the persons to whom the conveyance is made to enter and realise the property conveyed, and until realisation to utilise it for the benefit of those to whom the money is due. The persons advancing the money, or intending to advance the money, are not parties, but that seems to me a mere accident (using the word "accident" rather in the old-fashioned logical sense) than of the essence of the transaction. There is no reason on earth, if such a deed were executed with reference to the security of debentures agreed to be taken and intended to be registered, why all the debenture-holders should not be set forth in the schedule, and why they should not be made parties to the deed by reference to that schedule. That is not the common form, and it is not at all convenient. It is really a practical suggestion of modern times, but I only mention it as showing it is quite possible to frame the deed in that way, and if it were so framed it in substance would be akin to its present character. Now, what is there which makes it not a mortgage? There is no covenant of payment to these trustees. Of course not, they are not intended to receive money in that way, or rather they are not intended to recover

money from the company otherwise than through their security. It is not intended they shall be personal creditors of the company; but the essence of the mortgage surely is the covenant to pay, and it would be quite possible to have a mortgage without a covenant to pay. We all know that trustees may raise a portion of the money under a settlement with power to create such a term, and being assignees of trustees of a term do not covenant to pay. The covenant to pay is not a necessary part of the mortgage at all. I should be somewhat surprised, if a gentleman were advancing 10,000*l.* to pay a portion of a younger child raised on the security of the loan, to hear that he had not got a mortgage because he had not got a covenant to pay. It is usually necessary to insist on the tenant for life entering into a covenant at any rate to pay the interest; but sometimes there is no tenant for life competent, and certainly I have seen many such mortgages which do not include a covenant to pay. Here the omission is for different reasons that I have already mentioned, because the persons to lend the money as creditors are not the persons to whom the mortgage is made. They are agents or trustees for others, but these gentlemen hold these debentures as security. I really do not know that any other reason worth mentioning is given except one to which Mr. Younger called my attention, namely, that in clause 27 there is the provision, which I confess I had not read, but assumed to be there from sufficient knowledge of deeds of this character, that the company would pay to the trustees a certain amount of remuneration. Why not? Whatever is to be paid to these gentlemen for performing their services, which may or may not be onerous, must of course fall upon the mortgagors—well, I must not say "mortgagors" for the moment, but upon the company who are creating the security, and whether they do it by salary, as in this deed, or do not, seems to me to be perfectly immaterial; but one need not deal with it in that way. It is not at all an uncommon thing in mortgages of the strictest form—mortgages in favour of the mortgagee and of the most approved fashion—to put in a clause providing for the appointment of a receiver, not providing for a receiver to be appointed by the court or anything of that kind, but a receiver appointed by the parties. Who pays for that? Why the mortgagor. It is quite rational, reasonable, and proper, that the deed itself providing for the appointment of a receiver should also provide what the receiver is to be paid. Whether he is the nominee of the mortgagor or the nominee of the mortgagee is perfectly immaterial. He is there to protect the mortgagee at the expense of the mortgagor. It seems to me, without going further, that it is tolerably clear that this is a mortgage. I am at a loss how otherwise to describe it. There is a modern phrase which we all understand, that is a "covering deed," that is to say, a deed by which property is conveyed to trustees in order to secure the payment of money and interest to certain persons who are the *cestuis que trust*, and who are commonly called the debenture-holders. I know of no case in which the character of the covering deed has been construed so as to give me any assistance on the present occasion, and counsel have not found it. But there is one case which occurred to me as worth looking at, of *Ross* v. *The Army and Navy Hotel Company* (55 L. T. Rep. 147 and 472; 34 Ch. Div. 43), where the question was, as regards the deed, whether the covering deed was a debenture issued by a joint-stock company within the meaning of the exception against registration in the Bills of Sale Acts, and it was held that it was not a debenture of that kind. It was there called a covering deed. It was said not to be a debenture, and although the debentures were within the exception the covering deed was not. The decision of the court was put conversely, that although the deed was not the debentures were, and that saved the debentures. There is nothing in the case at all indicating that it is not a mortgage. I should say that all that fell from Kay, J., who decided the case in the first instance, and from the Lords Justices in the Court of Appeal, all point to its being a mortgage because it was not a debenture. I think, therefore, that this is a mortgage, and I confess that, on that point, I have not entertained any doubt since the case was first opened. As regards the second point, there really is no room for doubt. The allegation in the petition on which the order for taxation was made was that "Messrs. Bircham and Co. were also employed by the trustees for the debenture-holders of the petitioners in a certain business relating to a proposed issue of debentures, and the transfer to the said trustees of the property of the petitioners intended to form the security for the proposed issue." If this is a mortgage there can be no question that the trustees are mortgagees. Nobody else is, and, if they are not, it is no mortgage; so, in holding it to be a mortgage, I necessarily hold, as I intend to hold, that the trustees are mortgagees. It is part of the operation of the company, and Messrs. Bircham acted in this business as the solicitors for the trustees. It follows that they acted for them in their character as mortgagees, and that they were the mortgagees' solicitors. No more can be said about that. Then comes what, to my mind, is the real difficulty in the case, and that is, was this mortgage completed? What is the completion of the mortgage? Mr. Bramwell Davis's argument goes to this: that this mortgage was not completed in the sense that mortgages are generally completed—in the sense in which an ordinary advance of money on freehold or other property is secured by a proper mortgage with proper covenants and provisions, and so on; and, if not completed in that manner, therefore it was not completed at all. I was rather pressed with that view of the case, but I am afraid, if that view is right, it is not a mortgage. Everything that was necessary to bring this to an end—which, I suppose, means complete it—was done; and, if it was a mortgage, it seems to me to follow it was completed. If it was not completed, it seems to me to me to follow it was not a mortgage. However, I do not propose to dispose of an important point like this in that short way. What is the essence of completion of a mortgage? I am referred to the ordinary practice which one knows pretty well. A gentleman wishes to raise money on the security of his estates, and he tells his solicitor (I have nothing now to do with negotiations—I may pass over that) to arrange for a loan of 10,000*l.* on the security of his estates. Either the solicitor has a client ready to advance the money—in which case the whole transaction is, to use the language of the

profession, "completed in the office"—or he has not, in which case he applies to some other friendly solicitor or banker; or it may be an insurance company. The procedure does not differ one jot however it is done, except, of course, when the transaction is completed in the office; what actually takes place then is different from what happens when some outsider finds the money. But in either case no doubt the deed is not handed over—or, rather, I should say, it is not delivered until the money is forthcoming. It may be executed as an escrow, but it is not actually delivered. It is not a completed deed until the money is handed over, and the result is that, as a matter of fact, whatever else may be done, the mortgage is not in that sense completed without the loan being also completed. But this must be borne in mind: it differs in this respect that this is a conveyance to the trustees, who are not themselves to find the money, and it seems to me, if I am right in saying so, that a conveyance to trustees for others of property by way of security for the payment of principal and interest to those others, is a mortgage, and it may be completed without the payment of any money at all. Without treating it etymologically, or in any pedantic manner, what is the meaning of "completion?" It is bringing the matter to an end; or, to use a less accurate expression, "seeing it through." When you have done all that has to be done, even if that is not done which the parties wish to result from it, have you not completed it? I cannot myself see why a mortgage of this character is not completed when everything that is contemplated is done. Now, this deed, like all covering deeds, does not contemplate as a necessary part of the deed itself the issue of any debentures. It of course contemplates that they will be issued. The deed would be rendered futile if no debentures are issued, but it does not contemplate it as part of the deed itself. Let me try and illustrate that by a familiar instance. A conveyance in trust for sale on a marriage with a reference to a contemporaneous deed by which the trusts are to be declared contemplates the completion of that other deed, and it might be very well that a settlement would not be completed merely by the conveyance in trust for sale if the other deed for some reason or other failed in execution, because one hinges on the other. In other words, they are one document executed in two parts. But here we are dealing with an entirely different thing. Here the parties necessarily contemplate a future advance. They hope for an immediate advance, but they contemplate a future advance. Some money may be advanced now; some money may be advanced hereafter. It may be that the whole money may never be advanced; it is not exactly like a banker's mortgage, but there is something to be learned from the consideration of that—a mortgage to a banker probably to secure a sum already advanced, something due on current account, and in the ordinary form moneys hereafter to be advanced either on current account or by discounting bills, and so forth. That would be a complete mortgage, notwithstanding nothing is owing to the banker at the time that he advances the money, and probably it would be a complete mortgage, even although the banker did not put himself under legal obligation to advance anything at all; *i.e.*, if it were a deed merely conveying property to the banker or to trustees for the banker, in order to secure moneys which shall from time to time hereafter be due on current account, or on negotiation of bills, and so forth. There does not seem to me to be any reason why on that ground it should not be considered as completed. What could these mortgagees' solicitors do more? They had nothing whatever to do with the raising the money. Their function is fully discharged when they have ascertained that the deed containing the proper clauses properly expressed is executed by the mortgagors; that is to say, by the company, and that the documents of title, whatever they may be, are properly handed over to the mortgagees and placed in a proper box or receptacle, so that the trustees are properly constituted owners of that which is conveyed to them as security. They have nothing to do with anything else. In that character it matters not one jot to them whether money is hereafter advanced or not. No doubt it is such a part of the transaction that there shall be a loan, that you may say it is the essence of the transaction that a loan shall be carried out. But why does that prevent the completion of the mortgage deed? I have introduced a word which does not occur in this schedule. The words in schedule 1, part 1, are "for investigating title to freehold, copyhold, or leasehold property, and properly preparing and completing mortgage." If by the phrase "completing mortgage" is meant seeing that the money is advanced, then probably I am wrong, but I cannot conceive it was intended that solicitors, not, be it observed, being negotiators for this purpose, but solicitors merely acting in their personal character of legal advisers, shall be required to find the money or see that others find the money, but they must complete their duties and are entitled to charge accordingly. Now, I have been asked to say that this cannot be within the schedule, because it never could have been intended that solicitors should be paid the scale fee when the money is not forthcoming. That does not seem to me (except as an argument on the construction) to be an argument with which I am concerned on the present occasion. It is well known to all of us that neither solicitors or barristers are always paid the best fees for what is the most troublesome work, and the notion, as I understand it, of the scale fee is to average it, and though it may give them a very large fee sometimes for comparatively little work, although no doubt a large sum involves a large responsibility, on another occasion they may find it is most inadequate remuneration. The notion is, that this scale fee is a fair way of averaging the costs, and regarding it in that way I cannot consider that there is any iniquity that the solicitors should be paid the scale fee, although unfortunately for their clients the amount according to which the scale is estimated has not been forthcoming. With who else is entitled to be paid for negotiating another mortgage, and what happens to other people, I am not concerned. I have dealt with this case quite irrespective of the further evidence. I understand that that evidence which has been admitted and properly admitted—because it is highly desirable that either here or elsewhere we should proceed on the real facts—amounts to this: I understand that, though the debentures were not issued in the

strict sense of the word, that is to say, issued to persons who were advancing the money and going to hold them as security, there has been a sort of conditional issue which is common enough now, that is to say, some persons have a lien on the debentures to prevent their being issued to others (that is what it really comes to), and perhaps have a right to have them issued to them if the conditions are not altered. I do not propose to go into those facts, because I think it more satisfactory to deal with the case as if I were now starting on the 9th Jan. 1894, which I take to be the day when the mortgage was in my sense of the word, completed. My view is, that Messrs. Bircham were then entitled to say, "We have investigated the title to the properties, we have prepared this mortgage deed, which has now been executed by the mortgagor and delivered to the trustees, the mortgagees; we have seen that the documents of title are handed over properly and put in the custody of the mortgagees, and that being so, we say we have completed the mortgage." On those grounds I think that the matter must go back to the taxing master with a direction to allow the scale fee—he must say what the scale fee is—and the company must pay the costs of this application.

From this decision the company appealed.

Bramwell Davis, Q.C. and *Younger* for the appellants.—The solicitors are not entitled to the scale fee, as the transaction was not a completed mortgage within rule 2, sub-sect. (*a*). It is only after the negotiations have been completed, and a loan effected, that this rule applies:

Re Smith, Pinsent, and Co., 44 Ch. Div. 303.

This is not a mortgage, as the completion of the deed is not the act which enables the company to receive the money. The deed must be the actual governing instrument, and this does not contain the whole security. It is a deed executed in view of a contemplated mortgage. No money was to be received by the trustees. The object of the scale fee is to enable the borrower to know exactly what the transaction will cost him; here there will be the further cost of getting the money. Kekewich, J. has treated the word "mortgage" in the rule as meaning mortgage deed, but it means the whole transaction. The general scope of the order was considered in *Savery* v. *The Enfield Local Board* (68 L. T. Rep. 722; (1893) A. C. 218). The judgment of Lord Macnaghten in *Parker* v. *Blenkhorn* (59 L. T. Rep. 906, 908; 14 App. Cas. 1, 10) is in favour of the appellants; and also the strict construction given to the word "property" in schedule 1, part 1, by Kay, J. in *Re Stewart* (60 L. T. Rep. 737; 41 Ch. Div. 494, 506).

Warrington, Q.C. and *Kenyon Parker* for the respondents.—This is a mortgage, and the solicitors did all their part of the work when they investigated the title and prepared this deed, which was duly completed. The actual getting of the money was not intrusted to them, and the intention of the Act and rules was that the solicitor should be paid under them for doing the proper business of a solicitor, not for acting as a scrivener. It was not a part of the duty of the solicitor to hand over any money. But this was not an abortive mortgage, for the directors obtained an advance of 40,000*l.* from Lloyd's Bank on the security of some of these debentures. The scale allows the mortgagee's solicitor a fee, amongst other things, for "preparing" the mortgage, and that shows the "deed" is referred to and not the transaction. It is said this is not an ordinary mortgage, but the Act and rules make no distinction between different kinds of mortgages.

Lindley, L.J.—In this case a question of some little difficulty has arisen, but, having had the advantage of the argument on both sides, we have come to the conclusion that the view taken by the taxing master is correct. Of course there is no question here about paying Messrs. Bircham for their services; it is a question whether they are to be paid in one particular way rather than in another particular way. Now, their case is this, that there was a security (I call it by that name for the present) for 90,000*l.* They say, "We prepared that, and we are entitled to the scale fee upon that sum." The other side say, "You had to prepare a security for 90,000*l.*, but not a farthing has been received on it, therefore you are not entitled to the scale fee, but only to be paid in the ordinary way as solicitors apart from the scale fee for your work and labour as taxed by the taxing master." I will not go into the facts at present. I will begin by looking at the Act of Parliament under which the question arises, that is, the Solicitors' Remuneration Act 1881. The Act of Parliament says that orders may be made "for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action," and so on. Then the order which has been made in pursuance of that Act of Parliament contains a clause, clause 2, which is the important one in this case. The first clause does not apply, it applies only to transactions with respect to registered property under certain Acts of Parliament. Clause 2 says, "Subject to the exception aforesaid the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages . . . is to be regulated as follows." Then come certain sub-sections, "(*a*) In respect of sales, purchases, and mortgages completed, the remuneration" shall be according to the scale in part 1, schedule 1 to the order. I pass over sub-sect. (*b*) referring to leases and agreements for leases which does not apply to this case. Then sub-sect. (*c*) provides that in respect of business not thereinbefore provided for connected with any transaction which is not in fact completed, and in respect of settlements and so on not provided for thereinbefore or in schedule 1, and in respect of all other deeds or documents and of all other business the remuneration for which is not thereinbefore or in schedule 1 thereto prescribed, the remuneration is to be regulated according to the present system as altered by schedule 2 thereto. So what we have to do is to determine within which clause this transaction falls. Is it within clause (*a*) a mortgage completed, or is it within clause (*c*) a transaction not in fact completed? I have no hesitation in saying that it comes within clause (*c*) and not within clause (*a*). Now the short facts are these: A company was formed, and proposed to raise debentures, to create a first charge of 90,000*l.* by debentures, and the security in question was prepared by the solicitors for that purpose.

The security consists of a trust deed to secure these first mortgage debentures and of the debentures themselves, the debentures being an essential part of the security. The debentures contain a covenant to pay, and the company charges with such payments its undertaking and all its property. On the back of the debentures are certain conditions, the first of which is that they are to rank *pari passu*, and the last says that the holders of the debentures are or will be entitled *pari passu* to the benefits of it subject to the conditions contained in the deed, that is the deed in question. Now this is their security. What is the deed? The deed is what it purports to be. It is a conveyance to trustees upon trust to secure these debentures. But until a debenture is issued the trust upon which the property is held is a trust for the company. It is in vain to call this a mortgage before any debentures are issued. It does not come into operation at all except as regards the possession of the legal estate. No doubt the legal estate is transferred to the trustees as soon as the deed has been executed by the company; but this deed is not a security until the debentures have been issued, and the issue of debentures is an absolute condition precedent to this deed becoming a security. I do not mean to say a deed in this shape might not be called a mortgage; but when you bear in mind that it is not a mortgage in form, and is not a mortgage in the ordinary sense, but is only what it purports to be, a better security for a charge already created, and when you bear in mind it has no effect whatever until a debenture is issued, it seems to me that this deed is not a mortgage. I doubt very much whether Mr. Parker is right when he says a mortgage to secure future advances would be within clause (*a*). Suppose nothing is due? I doubt very much whether the solicitor would be entitled to the scale fee, and I doubt very much whether Mr. Parker is right in saying a solicitor would be entitled to the scale fee upon the largest sum that might be covered by the stamp. But we have not to decide that question now, and therefore I say no more about it. It seems to me that, until the debentures are issued, there is no completed transaction. But the whole thing was void. Before any debentures were issued, and I suppose when they hoped to issue them, the directors went to Lloyd's Bank and borrowed various sums of money amounting to 40,000*l.*, and an agreement was entered into with Lloyd's Bank that the bank should have debentures if they wanted them, and debentures were sealed but never issued; and before any debentures were issued the whole scheme was changed. The directors found the debentures would not be taken up, and then they borrowed 90,000*l.* from an insurance office on an ordinary mortgage and paid off Lloyd's Bank, who had advanced the 40,000*l.* If you call it a mortgage, which I do not think it is, or call it what you will, it seems to me clearly to come within sub-section (*c*) as an incompleted, or not in fact completed, piece of business rather than to come under sub-section (*a*), which relates only to "mortgages completed." That was the view of the taxing master. I think he was quite right, and I think therefore that this appeal must be allowed.

Lopes, L.J.—I am of the same opinion. The question which arises is, first, whether a solicitor is to be paid according to the scale, or whether he is to be paid according to the items he puts forward. He claims to be paid according to the scale, and to be paid for a document which he says is a mortgage for 90,000*l.* The only question in point of fact that it is necessary to deal with here is, whether the instrument can be regarded as a completed transaction. It seems to me it is impossible that it can be said to be a completed transaction. It is to be observed that the Act of Parliament and the General Order made under it, never talk of a "mortgage deed," the word used is "mortgage," by which I understand a mortgage transaction. Now, can this be said to be a completed mortgage transaction? Can it be said that, when a solicitor has done all that he has to do with regard to the preparation of the deed and so on, that it is a completed mortgage, although not a penny is ever advanced, and the real object of the transaction, namely, obtaining the advance, is never accomplished or attained? Can that matter possibly be said to be a completed transaction, a completed mortgage? In my opinion it is impossible that such a contention can prevail. In the case now before us no debentures were issued. It is said that some were issued to Lloyd's Bank, but I do not think that what took place amounted to an issue of debentures. I think it was rather this, that Lloyd's Bank Limited said, "We are willing to take these debentures, but we only propose to hold them to this extent, namely, to prevent your giving them to somebody else." To my mind that cannot be said to be an issue of these debentures. We have not to decide that point, and I do not think this deed is a mortgage within the Act. The security for the advance to my mind is the debenture. This deed when followed by the issue of a debenture, in my opinion, constitutes a mortgage, therefore I am satisfied to rest my judgment upon the first point, namely, that this clearly is not a completed transaction. I am of opinion, therefore, that the taxing master was right, and that this appeal ought to be allowed.

Rigby, L.J.—I am of the same opinion. Whatever else this deed may be, I think it is not a completed mortgage within the meaning of the order. At the date of the execution it was not a security at all. It was a deed which was prepared with a view to its becoming a security of some kind if certain preliminary conditions are complied with, if there were people to whom debentures were issued who would be secured by the deed. But at the moment of execution it is a mere conveyance to trustees for the company, and it may never happen, and in my opinion it never did happen, that a single debenture was issued, so that it never became a security for any debenture. I say that, notwithstanding the transaction with Lloyd's Bank which has been pressed upon us. I have no doubt that Lloyd's Bank had a perfect right to call for the debentures, but it was not their object that they or their trustees should be actually debenture-holders unless a case of necessity arose. They wanted to have an opportunity of getting debentures, and that, unquestionably, they were entitled to; but, on the evidence, it appears they never actually had debentures, and I do not believe this deed ever became a security for anything. Whether it could be a mortgage even if the debentures had been previously issued—I mean a mortgage within the meaning of the statute—may be open to more doubt, though, so

far as I am personally concerned, I think that the completed mortgage must be a mortgage completed in a business sense at the time. I say advisedly a business sense. I do not mean to say that, if the mortgagees did not pay their money within twenty-four hours, or anything of that sort, it would not be a completed mortgage; but if the meaning was they were to pay at once, and if they did pay punctually in accordance with the agreement, that would be one thing; but when it comes to an arrangement which may extend over years, and which may never be carried out at all, I do not think that it could be possible by anything that followed afterwards to turn that into a complete mortgage at the time when it was drawn. I doubt very much whether you could possibly bring within clause (*a*) a case of a mortgage to secure future advances. The agreement there is that the advances may or may not be made, and may be postponed, though I do not refer to an advance to be made the next day or anything of that kind. I look to the substance of the transaction, and if it is possible to say, "This may go on for an indefinite time without being a security for any money at all," I do not think you can treat it as a completed mortgage. It follows, of course, that the taxing master's view was right, and would be equally so, according to my view. whether the claim was made for payment on the scale appropriate to 90,000*l.*, or 60,000*l.*, or the 40,000*l.* which, we are told, Lloyd's Bank did actually advance. The whole scheme was given up before the mortgage became a security for anything, before even the trust became a security for anything; and there is no moment of time at which it could be said that it was a completed security.

Solicitors: *Thorowgood, Tabor*, and *Hardcastle*, agents for *Cooper* and *Co.*, Newcastle, Staffordshire; *Bircham* and *Co.*

Thursday, Aug. 8.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

RICHARDSON *v.* RICHARDSON AND PLOWMAN. (*a*)

APPEAL FROM THE DIVORCE DIVISION.

Divorce — Practice — Husband suing in formâ pauperis—*Decree* nisi—*Dives or pauper costs —The Matrimonial Causes Act* 1857 (20 *&* 21 *Vict. c.* 85), *s.* 51.

A husband suing in formâ pauperis *for dissolution of the marriage is only entitled, if successful, to obtain from the co-respondent his solicitor's costs out of pocket, including a reasonable sum for office expenses, and the costs due to counsel and solicitor for obtaining the necessary certificate.*

Decision of Jeune, P. affirmed.

THE petitioner sued, *in formâ pauperis*, for a divorce on the ground of his wife's adultery with the co-respondent, against whom damages were claimed. The adultery was proved, damages were assessed by the jury at 30*l.*, and the President (Sir F. H. Jeune) pronounced a decree *nisi*, with costs against the co-respondent.

The registrar taxed the petitioner's bill of costs down to such costs as are usually allowed in such cases to a petitioner *in formâ pauperis*—practically only actual out-of-pocket expenses.

(*a*) Reported by W. C. BISS and H. DUBLEY-GRAZEBROOK, Esqrs., Barristers-at-Law.

Neville Tebbutt, for the petitioner, applied to review the taxation, and on the 27th May 1895 the President reserved judgment.

June 24.—The PRESIDENT (Sir F. H. Jeune) delivered the following written judgment:—The question in this case is whether a pauper petitioner, who has succeeded in a suit for dissolution, should be allowed to recover his full costs against the co-respondent. The practice in this division as to paupers' costs in divorce cases has never found its way into the Reports, and it is therefore desirable, as far as necessary, in the present instance to state what, on the best inquiries I can make, I believe it to be. The questions which arise are, of course, not so much as to the right to orders for costs as to taxation on such orders. A person who is permitted to sue in the Divorce Court *in formâ pauperis* is exempted from the payment of court fees. I have no doubt that in former times counsel and solicitor were assigned to him, just as they are in the common law courts, and that such counsel and solicitor had no right to look to their pauper client for payment, at any rate for immediate payment. It is sufficient for me to refer to the passages in Oughton on this point. In Tit. 8, "De admissione *in formâ pauperis*," he indicates the procedure by which a petitioner was admitted to sue as a pauper, stating, amongst other things, that if the opponents of the pauper so desire, the pauper must make oath that he will pay the expenses "cum ad uberiores fortunas pervenerit." In Tit. 49, among the various cases, certainly more numerous than at present, in which advocates and proctors would be assigned by the court, occurs that of such assignment to a pauper. According to a statute of Archbishop Winchelsey of 1259, it was laid down with regard to advocates and proctors so assigned: "Gratis et sine ulla spe receptionis feodorum consilium datant." It was, no doubt, in reference to this practice that, in *Lovekin* v. *Edwards* (1 Phil. 179, 183), Sir John Nicol said: "To sue as a pauper is a great privilege of law; it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them himself." Of late years the practice of assigning counsel and solicitors to paupers has not been followed, though the power to do so remains. Part of the reason for this probably was that, as poverty in the husband is generally poverty in the wife, this went in defended cases to a double assignment. Perhaps, too, it was thought—as indeed is generally the case—that pauper petitioners can themselves manage to present their cases to the court, with, at any rate, such aid as counsel are often willing to give. Whatever the cause, the present practice undoubtedly is as I have stated. It follows, I think, that there is nothing to prevent counsel or solicitor being retained by a pauper and receiving such fees as he, perhaps by the aid of friends, may be able to pay, and this is the effect of the opinion given by the Attorney-General (Sir Richard Webster) in 1890, as stated in 90 L. T., p. 79. Whether a solicitor not assigned by the court, but employed by the pauper, could, if he thought it worth while, sue his client on a retainer, it is not necessary to decide, but my present opinion is that he could.

But it does not, I think, follow, nor has it been the practice, that a successful pauper can receive full costs against a co-respondent. It would be undesirable that he should do so; partly because bargains between solicitors and clients for payment out of costs recovered against the co-respondent, which is the real nature of the inevitable bargain in such cases, are not to be encouraged, but more because a respondent wife can make no such bargain, and would so be placed at a disadvantage. It would be impossible to allow her to arrange with her solicitor that he should be paid by the co-respondent through the husband only in the case of her and the co-respondent failing to successfully defend themselves. I have been informed that, in one case at least, some years ago, a successful pauper was allowed to recover full costs against the co-respondent on the terms of paying court fees; but since the case of *Carson* v. *Pickersgill* (52 L. T. Rep. 950; 14 Q. B. Div. 859)—not, I believe, that Sir James Hannen considered that case was more than an authority by analogy—the practice that a pauper should recover against the co-respondent only his actual and necessary costs has been invariable. I am asked to depart from this practice on the ground that I have full discretion over costs by virtue of the 51st section of the Act of 1857 (20 & 21 Vict. c. 85), and, that the Chancery practice before the Judicature Act, rather than the common law practice, ought to be followed. What these two practices respectively were appears clearly from the case of *Carson* v. *Pickersgill* (*ubi sup.*) in the Court of Appeal. No doubt they differed. At common law by the effect of statute a solicitor could not recover costs from a pauper client. It was, therefore, eventually held by the courts of common law that it would be unjust to allow him to recover against an opponent the costs for which he was not himself legally liable, and it would appear from the judgment of the Master of the Rolls that all that could be recovered were the actual expenses of the solicitor, included in this being an allowance for the services of his clerks. The Court of Chancery, on the other hand, emphasising the punitive effect of costs, took the view that an unsuccessful defendant ought not to escape paying costs because his opponent was a pauper, a view which the Master of the Rolls, in the last-mentioned case, considered ethically unsound. The practice of the House of Lords is the same as that of the common law courts, the fees to counsel being disallowed, but the solicitor obtaining his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks. This appears from *Johnson* v. *Lindsay* (1892) A. C. 110). I desire to follow what, I think, was the view of Sir James Hannen—that the common law practice affords the best analogy for the Divorce Court in this matter. So long as counsel and proctors were assigned, the analogy was perfect. They could not recover from a pauper for their services in these courts, any more than could attorneys in the courts of common law. No doubt the cessation of the practice of assigning legal advisers makes the position different from that in the common law courts; and it must, I think, be admitted that the rule of refusing a successful pauper his full costs in the common law courts was based, in great part, on the law which prevented a solicitor from being retained by, or recovering costs against, a pauper client. But there remains the consideration to which I have referred above—the strong objection to bargains for payment at the co-respondent's expense, and the still stronger objection, peculiar to the Divorce Court, of the inevitable disadvantages to the wife. I think, therefore, that the practice—it must be remembered only the practice, because the statutory power of the court remains unfettered—should be adhered to of allowing a pauper only his or his solicitor's costs out of pocket, understanding the term as defined by the Master of the Rolls in *Carson* v. *Pickersgill* (*ubi sup.*) with regard to common law costs, or in the case I have referred to with regard to the practice in the House of Lords. It is not necessary, for the purpose of disposing of this case to decide which practice should be followed when a wife or a co-respondent succeeds against a pauper petitioner, nor is it probably a matter of much practical importance. But it may be useful that I should say that I understand the practice hitherto followed has not excluded successful respondents and co-respondents from obtaining an order for their full costs, for what it is worth. At first sight it seems to place the pauper on an inequality with his opponents, because they obtain an order for their full costs, which he does not; but, on the other hand, to give them no order at all for costs would place them in a less favourable position than the pauper, as he can at least recover costs out of pocket; and the advantage which the pauper obtains over other litigants in escaping the payment of court fees may be considered to some extent to counterbalance the difference between the amount of costs he is able to recover and possibly liable to pay. I think, therefore, that there should be no hard-and-fast rule of practice absolving a pauper who fails, from liability to an order for costs against him. Whether a wife should obtain an order against a pauper husband for security, with a stay on failure to provide such security, is a matter as to which, I understand, no clear rule of practice exists, nor, in my opinion, should be laid down. Such cases must be very rare, and each should, I think, be dealt with on its own merits, especial regard being had to the nature of the defence relied on by the wife.

Leave to appeal if necessary.

From this decision the petitioner appealed.

Tebbutt for the appellant.—Full costs ought to be allowed. It was the practice in the old Court of Chancery to allow a party suing or defending *in formâ pauperis* if successful "dives" costs:

Rubery v. *Morris*, 1 Mac. & G. 413.

The practice was followed by the old ecclesiastical courts, and ought still to prevail. There is no case which shows that it was the practice to make any difference as to costs between persons suing *in formâ pauperis* and others. Neither is any such practice referred to in the text-books on Ecclesiastical Law: (Conset, Ecclesiastical Practice p. 56.) Even if it has been the practice not to give "dives" costs for some years past, the Court of Appeal can now declare that practice to be incorrect, as was done on another point in

Robertson v. *Robertson*, 45 L. T. Rep. 237; 6 P. Div. 119.

The rules of the Supreme Court do not apply to the Divorce Division, and therefore *Carson* v.

Pickersgill (*ubi sup.*) does not apply to that division, and the old practice ought to prevail until the rules of that division specially provide otherwise.

Lindley, L.J.—The question in this case is, whether the President of the Divorce Division was wrong in following in that division the rule with reference to costs in the case of a pauper litigant, which now obtains universally in all the other divisions of the High Court and in the House of Lords. That rule was carefully considered and laid down in *Carson* v. *Pickersgill* (*ubi sup.*). This is a case in which a co-respondent was concerned. Therefore the practice of the ecclesiastical courts can have nothing to do with it, as they had nothing to do with co-respondents. Under the Matrimonial Causes Act 1857 the co-respondent must be made a party. It is important to observe therefore that there can be no old principle applicable to this case. In the case of suits for judicial separation I am by no means satisfied that the practice of the ecclesiastical courts as to costs in these cases was as well settled as we are asked to assume. Indeed I am told that the senior registrar is of opinion that the practice was not so settled. Sect. 51 of the Matrimonial Causes Act 1857 gives the court a discretion as to costs, and the President having considered this matter has come to the conclusion, in the exercise of his discretion, that, having regard to the modern practice, and to *Carson* v. *Pickersgill* (*ubi sup.*), the rule in that case should prevail except under special circumstances. We are asked to say that a different rule ought to prevail. I am not prepared to do so. I think the old Chancery rule was wrong and proceeded on a wrong principle. The object of ordering a party to pay costs is to indemnify his successful opponent. Then why should he recover more than he is liable to pay? I do not see why he should make a profit. That is the view which has prevailed lately, and has led to the abolition of the old Chancery practice and to the introduction of the new rule into all the divisions of the High Court. I am of opinion that the President is right, and that the appeal should be dismissed.

Lopes, L.J.—I am of opinion that the decision of the President is right. I think it would be a great mistake to have one rule in the Divorce Division and another rule in all the other divisions. To have such a distinction without sufficient grounds would be a great mistake. What is the object of giving costs? Costs are given to indemnify a successful party against expenses to which he has been put by his unsuccessful opponent. A pauper litigant has not incurred any expenses. Then what is there to indemnify him against? If you allow him "dives" costs, he might put them into his pocket and make a positive profit, thereby taking an undue advantage of the great indulgence afforded him of letting him sue as a pauper. Stress has been laid on the practice of the old ecclesiastical courts; but I think that practice has no application here. The ecclesiastical courts had no power to grant a divorce *à vinculis*, and therefore, so far as any analogy is to be called in aid, the analogy of the common law courts should be adopted.

Rigby, L.J.—I am of the same opinion. Even if it were made plain that the practice of the old ecclesiastical courts was as has been contended for, I do not see how it applies here. Sir James Hannen laid down a rule, and so established a practice, which seems not unreasonable. It was that which has been adopted by all the other divisions of the High Court, and has been accepted by the House of Lords as the better practice. It is a good rule, and we should be taking on ourselves a great responsibility if we overruled the President on the ground that we were bound by an old practice which is not admitted.

Solicitors: *Bramall, White,* and *Sanders.*

Tuesday, July 16.

(Before Lindley, Lopes, and Rigby, L.JJ.)

The Metropolitan Coal Consumers Association Limited v. Scrimgeour and Co. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Company—Issue of shares—Broker's commission for placing shares—Whether ultra vires.

Where the services of brokers are reasonably necessary to assist in the issue of the capital of a limited company, the payment of a reasonable commission to them for procuring applicants for shares can properly be made out of the capital of the company, whether authorised by its memorandum of association or not, there being nothing illegal or contrary to the policy of the Companies Acts in such payment.

The Lydney and Wigpool Iron Ore Company Limited v. Bird (55 *L. T. Rep.* 558; 33 *Ch. Div.* 85) *and* Re The Faure Electric Accumulator Company Limited (59 *L. T. Rep.* 918; 40 *Ch. Div.* 141) *distinguished.*

Decision of the Divisional Court (*Day and Wright, JJ.*) *affirmed.*

The above-named association was incorporated on the 31st Jan. 1889 with a capital of 250,000*l.*, divided into 50,000 ordinary shares of 1*l.* each, and 20,000 preference shares of 10*l.* each.

By the memorandum of association, clause 3, sub-clause (*l*), one of the objects of the association was stated to be:

To pay out of the funds of the association all brokerages, commissions, legal and other expenses for the issuing of the capital, and in respect of the formation of the association.

By the articles of association it was provided (*inter alia*) as follows:

Art. 113. The business of the association shall be managed by the board, who may pay all brokerages (if any) payable in respect of the placing of any of the shares in the association.

On the 7th Feb. 1889 a prospectus of that date was issued on behalf of the association inviting applications for its preference and ordinary shares. Copies thereof, together with forms of application for shares, were distributed to certain stockbrokers, among other persons.

At a meeting of the subscribers to the memorandum and articles of association, acting as the first directors, held in Feb. 1889, it was resolved that the secretary should be authorised to inform any brokers or agents who might be disposed to assist in placing the capital of the association that the association would pay in consideration of such assistance a brokerage of 5*s.* per share on

(a) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

preference shares and 6*d.* per share on ordinary shares.

J. and A. Scrimgeour and Co., a firm of stockbrokers, carrying on business in the city of London, made application to the secretary in the names of certain clients of theirs for preference and ordinary shares in the association, and the same were allotted accordingly.

On the 11th March 1889 the secretary forwarded to Scrimgeour and Co. a cheque for 26*l.* 10*s.*

This payment was made by way of brokerage or commission on the applications for shares upon which the stockbrokers' names were stamped, on the footing that they, by forwarding such applications for shares, had thereby placed the shares subsequently allotted upon such applications; and that under such circumstances the association was justified under its memorandum and articles of association in paying such brokerage.

By an order, dated the 20th Jan. 1890, the association was ordered to be wound-up, and an official liquidator was appointed.

In Aug. 1892 the fact of the payments for brokerage came to the knowledge of the official liquidator, and subsequently, in accordance with the directions of the chief clerk, this action was commenced against Scrimgeour and Co., in the Mayor's Court, London, on the 24th May 1894, for the return of the brokerage paid by the directors of the plaintiff association to the defendants on the 11th March 1889, on the ground that the payment of that sum was without consideration and was *ultra vires*.

The trial of the action took place on the 18th Feb. 1895 before the Recorder (Sir Charles Hall), who found a verdict for the defendants.

Against that decision the plaintiff association appealed to the Divisional Court (Day and Wright, JJ.), on the ground that there never was any contract beween the plaintiff association and the defendants that the association would pay brokerage or commission on shares applied for by or through the defendants; and that in default of such contract the payment by the directors to the defendants of the sum of 26*l.* 11*s.* out of the funds of the association by way of brokerage or commission on shares applied for by or through the defendants was a breach of trust on the part of the directors who made such payment, notwithstanding the express powers in relation to the payment of brokerage and commission contained in the memorandum and articles of association; and that the defendants in receiving such sum under such circumstances became participators in such breach of trust, and were liable to repay the same to the association. Also on the ground that, even if the said sum had been paid in pursuance of a contract in that behalf previously entered into between the association and the defendants, such payment was *ultra vires* the association notwithstanding the express terms in that behalf contained in the memorandum and articles of association, as being a payment in the nature of a discount upon the shares in respect of which such payment was made.

The appeal was heard on the 25th April 1895, when the following judgments were delivered:—

Day, J.—I am of opinion that this appeal should be dismissed. I have listened attentively to what Mr. Cock has argued before us, but I must confess that I cannot discover upon what grounds this action can be maintained. It appears that this was a company in course of formation, and the company issued a number of prospectuses and forms of application, and it seems to have sent a bundle of these to the defendants, who were brokers in the City. The only object with which they were sent to these brokers was to use them—not to use them for themselves only, but to get them used by their clients. The brokers in the City were likely to have clients who might be disposed to take shares, and who would wish to fill up applications for shares, and the documents were sent to the brokers for the purpose of inducing their clients to do so. The company did what is stated to be usual in the City. Having got their clients to fill up the applications for shares, the brokers sent the applications to the office of the company. Each application for shares is stamped with the name of the broker who has obtained the application, in this case with the names of the defendants. After the company's shares were issued a cheque was sent to the defendants. In accordance with the practice which we are told exists, the company felt bound to pay the commission upon the applications for shares. Accordingly the company appears to have paid to the defendants a considerable sum of money as commission upon the applications for shares which they sent in, and which were stamped with their name. Being stamped with their name there was something in the nature of an application for payment of the commission. Although there was no letter there was a stamp upon the applications for shares, which is as good as a letter. Thereupon this company, it may be said to their credit, at once sent to the brokers the amount of commission which they say they had earned. Now, having paid this money, the company, as is not surprising, having spent a certain quantity of its capital in rewarding brokers for inducing their clients to sign applications of this sort, went into liquidation. Having gone into liquidation, it occurs to the liquidator that he might recover the money from the brokers to whom such commissions had been paid. I am not going to discuss the question of whether these commissions are lawful payments as between the broker and his clients. I will not discuss the question whether it is a right or a fair thing for a broker to take commissions from a company for procuring his own clients to sign applications for shares in a company which is to pay him commission. That question has been raised in this case, but it is unnecessary to consider it. I am at a loss to find what grounds there are for the action brought by the liquidator. It is said that the money has been paid without any contract. I see overwhelming evidence of a contract. The company sent to the brokers the prospectuses and the letters of application. The brokers returned them filled up by their clients with their stamp upon them, which is equivalent to a demand for the money for their hire, according to the well-known practice in the City. Thereupon the company pay the amount due for the services in which the brokers have been engaged. I am, I repeat, at a loss to understand on what ground the company or its liquidator can recover back that money. I pressed Mr. Cock to give some explanation of the action—to tell me on what grounds it is based; but he says simply that the payment of the brokerage is an

unlawful payment. It may be in some respects a very inconvenient system; that I say nothing about. But the persons who can complain of the inconvenience are not the persons who ask for these express services, who get these particular services, and who pay for these particular services. It does not lie in their mouths to say, "We should like now, as we have failed in business, to get the money back again." That does not seem to me to lie in their mouths at all. No other point seems to have been taken at the trial; no question seems to have been raised at the trial as to whether it is contrary to the general policy of the law or not. I am sure I do not know that it is. I give no opinion upon that subject. But it is perfectly clear that, according to the provisions of this company's articles of association, the directors are allowed to pay out of the capital of the company such commissions as they think fit for getting the capital of the company taken up. Therefore it seems to me that, the burden of proof resting upon the plaintiff, no case has been made out by the plaintiff which would entitle the plaintiff to recover from the defendants these moneys. I am, therefore, of opinion that this appeal must be dismissed.

Wright, J.—I am not at all sure, having regard to the memorandum of association of this company, as well as the articles, that it was illegal for the directors, as between themselves and the company, to pay something to the brokers for services in bringing in subscriptions. But, even if it was illegal or *ultra vires* on the part of the directors, and as between them and the company so that the directors might be ordered to make it good to the company, it is a very different question when you seek to recover from strangers the money paid. I very much doubt whether it is enough, as against a stranger, to show that the payment of the money was *ultra vires*. I think that it is not enough, and that there must be something which would make out what was necessary to satisfy one of the few equitable causes of action at common law for money had and received. It would not be enough to say simply that the person who paid the money had no strict legal right to pay it. That is all at most that Mr. Cock has shown. and the Recorder has simply held that he is not satisfied that that money was paid under circumstances which constituted money had and received to the use of the company. We cannot say as a matter of law that he ought to have been satisfied. Therefore this appeal fails. The appeal is dismissed with costs.

From that decision the plaintiff, by leave, now appealed.

Swinfen Eady, Q.C. and *Quin* for the appellant. —Although the memorandum and articles of association of this association authorised the payment by the directors of brokerages in respect of the placing of any of the shares, yet we submit that such payments, whether made in pursuance of a contract express or implied between the association and the defendants, were *ultra vires* the association:

The Lydney and Wigpool Iron Ore Company Limited v. *Bird*, 55 L. T. Rep. 558; 33 Ch. Div. 85, 95;

Re The Faure Electric Accumulator Company Limited, 59 L. T. Rep. 918; 40 Ch. Div. 141.

The payments in question were payments made out of capital, and therefore reduced *pro tanto* the capital which upon principle a company, formed under the Companies Acts, is bound to keep intact. The payment of brokerages in respect of the placing shares is equivalent to issuing the shares at a discount, which is clearly invalid:

Re The Licensed Victuallers' Mutual Trading Association; Ex parte Audain, 60 L. T. Rep. 684; 42 Ch. Div. 1;

Re The Almada and Tirito Company, 59 L. T. Rep. 159; 38 Ch. Div. 415;

The Ooregum Gold Mining Company v. *Roper*, 60 L. T. Rep. 427; (1892) App. Cas. 125.

The application of the association's funds in payment of brokerage or commission is not legalised by the fact of such payments being expressly authorised by its memorandum and articles of association. Such payment is in effect a reduction of capital otherwise than is sanctioned by the Companies Acts. Express power in the memorandum of association cannot validate what is invalid by statute:

Trevor v. *Whitworth*, 57 L. T. Rep. 457; 12 App. Cas. 409, 436.

Jelf, Q.C. and *A. T. Toller*, for the respondents, were not called upon to argue.

Lindley, L.J.—This is an attempt to push some sensible and well-recognised doctrines of this court to an absurdity; and I think that it is the duty of the court to resist any such extension of those doctrines. The law is clear that limited companies cannot issue shares at a discount. What is the meaning of that? The meaning of that is, that shares cannot be issued upon terms which are inconsistent with the provisions of the statutes relating to limited companies. In other words, the statutes having said that every holder of a share shall pay so much for it, a company cannot issue the share upon the terms that the shareholder shall pay less. That is the whole of the theory of issuing shares at a discount. Now how can this payment of brokerages be said to be issuing shares at a discount? The transaction here is this: The company have by the articles of association authorised its directors to pay to brokers a fair and reasonable commission for their services in procuring people to take shares. That is what they have done. What is there wrong in that? What is there contrary to the Acts of Parliament in that—what is there illegal in that in any sense or shape? I confess I cannot see the slightest sign of any illegality. That it may be so manipulated as to lead to the issue of shares at a discount is possible, and when such a case arises we will deal with it. But we are free from anything of the sort here. I do not myself attach the slightest importance to the clause in the memorandum of association—the clause which says that it shall be one of the objects of the company to pay out of its funds brokerages for the issuing of the capital. It is an authority to the directors to apply the money of the company in that way if the directors in their judgment should think it expedient But to suppose that a clause is any the better for being in the memorandum would be a grievous legal mistake. The directors are authorised by the articles of association to do it, and they have done it. Now it is said not only that the directors are liable for

misapplying the funds of the company, but that the recipients of the money are liable to repay the money. That is a step further than any case has gone yet. I do not mean to say as a matter of law that a company cannot maintain an action at law to recover money which is its own, if it is improperly in the hands of other people. I daresay it can. But I am addressing myself to the root of this question, not to the question of remedy—whether it is legal or equitable. I am addressing myself to the question whether there is anything wrong in this payment of brokerages, or whether there is anything *ultra vires*. I cannot, as I have already said, come to the conclusion that there is anything wrong in it at all. My brothers have put a case, that of paying newspapers for advertising a company, and Mr. Quin felt that the analogy was rather close, and he went the whole length of saying that that is an illegal payment, and that the company could recover back from the newspapers money paid for advertisements. All I can say is, that it startles me to hear any such doctrine. No court has ever sanctioned such a theory, and I do not suppose that any court ever will, and, for anything I know, money may be paid out of capital for such a purpose. But then Mr. Swinfen Eady says that the present point has been decided by Kay, L.J. (then Kay, J.) in *Re The Faure Electric Accumulator Company* (59 L. T. Rep. 918; 40 Ch. Div. 141), and also by this court in *The Lydney and Wigpool Iron Ore Company* v. *Bird* (55 L. T. Rep. 558; 33 Ch. Div. 85). Now as regards *The Lydney, &c., Company* v. *Bird*, although there is that expression in the judgment of the court (on page 95 of 33 Ch Div.) to which Mr. Swinfen Eady referred, and to which I adhere, it has application of course to the circumstances of that case, and the circumstances of that case have not the slightest resemblance to the circumstances of this case. There was a person named James Bird, who was a promoter of the company, and he secretly made a profit at the expense of the company of 10,800*l.* He was made liable for it. He said: "I have spent 5000*l.* as a consideration which I gave to William Bird for guaranteeing me that shares should be taken up in this company." We disallowed James Bird that bill. The whole thing was a juggle from beginning to end, and we disallowed it on the ground that it was an improper transaction, and so it was. It has nothing whatever to do with, and is far away and remote from, such a case as this, where there is no juggle and no impropriety at all. As regards *Re The Faure Electric Accumulator Company* (*ubi sup.*), no doubt Kay, J., as he then was, did apparently hold that these brokerage payments were illegal, being paid out of capital, and he made the directors there liable for them. If that decision is understood as going as far as to compel us to hold that these payments are illegal, I should say that I dissent from it, and that it goes a great deal too far. I doubt very much, however, if you look at the facts, that the learned judge did intend to go as far as that. I doubt whether he regarded the commissions there as ordinary commissions of a reasonable amount, payable in the ordinary course of business. I think that he treated them rather as improper payments, rather in the shape of bribes. I have not looked at the exact amount of the commission, but I think that was what was running in his head. Of course, if he took that view, he was perfectly justified in holding the directors liable to replace the money which they had so misapplied. If it is to be understood as going further, then I say that I dissent from it. It appears to me that there is neither principle nor authority to support such an appeal as this, and that therefore it must be dismissed with costs. I should just add that in the *Lydney* case (*ubi sup.*) the money sought to be recovered was not money which was paid by the company for placing shares, and it was money which they objected to pay in that way. It is wide of this case.

Lopes, L.J.—I am of the same opinion. It is said that these payments of commission to brokers for placing shares of the company are *ultra vires*, and therefore illegal. Now, so far as I can ascertain, no case hitherto seems to have gone that length. The case chiefly relied upon was *Re The Faure Electric Accumulator Company* (*ubi sup.*), and I cannot help thinking, after reading that case as well as I can, that that case is different, and that the learned judge, Kay, J., proceeded upon different grounds. I think that what he thought was this: he thought that the payments of commission to brokers there were not *bonâ fide* payments for work and labour done—that they were not payments in the ordinary way of business, but rather in the nature of bribes. I think, if the case is carefully read, that that is the conclusion that anybody so reading it would arrive at. I do not think for one moment that he regarded the payments there in the same light as we are justified in regarding the payments here. And it is not for one moment contended here but that these payments to the brokers were at any rate *bonâ fide* and honest, and were really made in respect of services rendered. In the result as regards these payments I come to this conclusion, that, in any case where it is made out that the services of the brokers are reasonably necessary, that the brokers are properly employed in the issue of the capital of the company, and that the payment of a commission of so much per share is a fair and just payment for services rendered, I cannot see any ground, either of reason, of justice, or of principle, why the payment should not be held to be not *ultra vires* and unimpeachable. I think, therefore, that the decision of the court below was right, and that this appeal should be dismissed with costs.

Rigby, L.J.—I am of the same opinion. I do not think that there is anything in the case of *The Lydney and Wigpool Iron Ore Company* v. *Bird* (*ubi sup.*) that would at all justify the decision that we are asked to arrive at in this case. There a sum of 10,800*l.* of concealed property was taken by a promoter out of the capital of the company, under an appearance which was different from the reality—that appearance being that it was *bonâ fide* purchase money. There the only question was, could the promoter be allowed, out of that concealed property, a sum which he paid to his brother for guaranteeing shares—an absolutely different case from the present? With reference to the case of *Re The Faure Electric Accumulator Company* (*ubi sup.*), I observe that that case is a very peculiar one in some respects. First of all, the man who cast doubt on the company in that case was the broker himself, who apparently had in his pocket an offer from his client to take shares. I say "apparently," for I think that that

was the fact in the case. I do not think that the broker could have been successful, and for that work he got paid upwards of 2000*l.* No doubt, looking at it as a percentage on the shares of the company—the nominal value of the shares—that might not be outrageous. But to suppose that a company can fairly pay upwards of 2000*l.* for work in that way and call it commission, is at any rate a very different state of things from that which we have to deal with here. In the present case there was actual work done in respect of the shares, and the brokers were paid what appears to be shown, or is allowed to be, an ordinary brokerage for the work that they did. I confess that I am not prepared to hold that any expenditure by a company with a view to having its capital placed is necessarily wrong. If you can place the capital by way of advertisement, I do not see why you cannot incur, in the regular way of expenditure, any brokerage to brokers for procuring applications for shares. I think that on that ground the action altogether fails, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Lumley* and *Lumley*.

Solicitor for the respondents, *H. B. Wade*.

Friday, July 26.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE OWNERS OF CARGO ON BOARD THE S.S. MAORI KING *v.* HUGHES AND ANOTHER. (*a*)

Shipping—Bill of lading—Implied warranty—Carriage of frozen meat—Fitness of refrigerating machinery for the voyage—Practice—Trial of preliminary point of law—Appeal—Postponement of trial of issues of fact.

Hard-frozen meat was shipped on board a vessel provided with refrigerating machinery, for carriage from Australia to London, under a "refrigerator bill of lading" by which the shipowner agreed to deliver the hard-frozen meat in good order and condition at London.

Held, that, in the absence of anything to the contrary contained in the bill of lading, there was implied in it an absolute warranty by the shipowner that the refrigerating machinery in the ship was fit, at the time of shipment, to preserve the hard-frozen meat under the ordinary circumstances of an ordinary voyage from Australia to London.

Held also, that when a preliminary point of law is ordered by the judge to be tried before the trial of issues of fact, the trial of those issues will not take place until the final determination of the preliminary point of law.

THIS was an appeal from the judgment of Mathew, J. upon a point of law ordered by him to be tried before the trial of the issues of fact in the action.

The action was brought in respect of the loss of a cargo of frozen meat shipped by the plaintiffs, under a bill of lading, on board the defendants' ship *Maori King* at Hotson's Bay, Melbourne, Australia, for carriage to London.

Shortly after starting on her voyage, the refrigerating machinery of the ship broke down, and though it was repaired at Sydney, New South Wales, the cargo became so damaged in consequence of the breakdown that it had to be sold immediately at Sydney at a loss.

Mathew, J. ordered that the question whether there was in the bill of lading an implied warranty that the refrigerating machinery of the ship was reasonably fit at the time of shipment for the carriage of the hard-frozen meat from Australia to London should be tried before the trial of the issues of fact in the action.

The following is a copy of the bill of lading under which the frozen meat was shipped, so far as is material to this action.

Refrigerator Bill. Freight payable on delivery. Shipped in apparent good order and condition . . . on board the steamship *Maori King* . . . for London, with liberty to receive and discharge goods at any intermediate port . . . 4553 carcases of hard-frozen mutton . . . to be delivered (subject to the exceptions and conditions hereinafter mentioned) in the like good order and condition . . . at the aforesaid port of London. . . . Steamer shall not be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation, or other appliances, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners, nor for any other cause whatsoever. . . . Loss or damage resulting from any of the following causes or perils are excepted, viz.: loss or damage from coaling on the voyage, rust, vermin, leakage, sweating, evaporation, or decay . . . accidents to or defects in hull, tackle, boilers, or machinery or their appurtenances, barratry, jettison, neglect, default, or error in judgment of the master, mariners, engineers, or others in the service of the owners.

For the carriage of frozen meat under such a bill of lading as the above, it is customary for the shipowner to charge a higher rate of freight than for carrying ordinary goods, and the plaintiffs did in the present case pay an increased freight in respect of their shipment of frozen mutton.

July 2.—Pickford, Q.C. and *T. E Scrutton* for the plaintiffs.—Apart from the bill of lading there was a general warranty of the seaworthiness of the ship, and that would include the refrigerating machinery. There was an obligation on the shipowner to provide a seaworthy ship to carry the cargo safely to its destination, and having regard to the fact that the cargo was frozen meat which could not be carried at all except by means of refrigerating chambers, the warranty of seaworthiness would necessarily include the refrigerating apparatus, which for this particular cargo was an absolutely necessary part of the ship. When there is a contract to carry goods in a ship, there is, in the absence of a stipulation to the contrary, an implied engagement or warranty on the part of the shipowner that the ship is reasonably fit for the purpose of carrying the goods, and not merely fit to encounter the perils of the seas, but fit to carry out the contract the shipowner has made:

Tattersall v. *The National Steamship Company Limited*, 50 L. T. Rep. 299; 12 Q. B. Div. 297.

The ship in that case was perfectly sound, but could not carry the cargo of cattle by reason of not having been disinfected, and the plaintiff was held entitled to recover. The same principle was laid down in *Stanton* v. *Richardson and others*. (30

(*a*) Reported by W. W. ORR and E. MANLEY SMITH, Esqrs., Barristers-at-Law.

L. T. Rep. 643; L. Rep. 9 C. P. 390) where the ship was perfectly fit and seaworthy except for the carriage of wet sugar—which was the cargo in question—and this was held to be a breach of the warranty of seaworthiness entitling the charterer to recover. In the second place—assuming that there is a general warranty of seaworthiness—there is nothing in the bill of lading to exclude the warranty. Having got that general warranty, it remains to consider the exceptions in the bill of lading. These exceptions only apply to matters arising after the sailing of the ship which complies with the above warranty:

Steel v. *The State Line Steamship Company*, 37 L. T. Rep. 333; 3 App. Cas. 72;
The Glenfruin, 52 L. T. Rep. 769; 10 P. Div. 103;
The Cargo ex Laertes, 57 L. T. Rep. 502; 12 P. Div. 187.

Referring to the bill of lading, the provision that the steamer shall not be liable for damage arising from failure or breakdown of machinery does not at all conflict with the original and general warranty of seaworthiness, which is in all such contracts; and the second class of exceptions, namely, accidents to or defects in the machinery, &c., only applies to a ship which complies with the previous part, that is, a seaworthy ship. For these reasons the plaintiffs are entitled to recover in respect of this loss.

Joseph Walton, Q.C. and *James Fox* for the defendants.—The question must depend on the bill of lading. The paragraph therein, that the "steamer shall not be accountable for any loss or damage arising thereto from failure or breakdown of machinery, insulation, or other appliances . . . . or any other cause whatsoever," clearly protects the shipowner from liability in this case. Legally the shipowner is to be free from any claim arising from the condition of the meat, or loss or damage to it, and there is no implied warranty to the contrary, for the clause was intended to protect the shipowner from liability for any damage or loss arising from the meat getting out of condition. There is no warranty that the refrigerating apparatus should be free from all latent defects; but the contract of the shipowner is of a double kind: the ship must be such as to resist wind and water, and be fit to carry the goods against wind and water, and the ship must not be such as to impregnate the cargo, as it was in the case of *Tattersall* v. *The National Steamship Company* (*ubi sup.*), which has really no bearing on this case. That, however, is not this case. The ship here was perfectly right and fit to receive the cargo in every sense; was sound and fit to resist wind and water, and was not condemned as in *Tattersall's* case (*ubi sup.*). All that happened was, that the refrigerating machinery, which had to go on during the voyage, broke down. That machinery was not indispensable for the carriage of the meat, and formed no part of the carriage, but was merely necessary for the safe keeping of the meat. There is a two-fold duty here—the duty of the carrier and the duty of the refrigerator. The duty as to the carriage is on the shipowner, and he undertakes not only to carry, but also to do all he can to refrigerate the meat; but he does not in any sense warrant that there shall be no breakdown in the machinery for that purpose. The case of *Sansinena and Co.* v. *Houston and Co.* (66 L. T. Rep. 246; and in the House of Lords, 68 L. T. Rep. 567), does not apply here, as that case arose under a very special contract. The defendants are right upon both points, that there was no general warranty of seaworthiness as to this machinery, and that the case comes within the exceptions of the bill of lading.

Pickford, Q.C. in reply.

July 2.—MATHEW, J.—This is an action brought to recover damage alleged to have been caused to a cargo of frozen meat on the ground of the breakdown of the refrigerating machinery. Before the investigation of the facts of the case it has been considered desirable by the parties that the question of principle should be determined between them, namely, whether or not the loss was caused by breach of the warranty of seaworthiness. That turns upon the terms of the bill of lading. The bill of lading was in some respects in the ordinary form. It contains as usual the positive obligation of the shipowner. It refers to the description of the cargo as having been shipped in apparent good order and condition, and also to delivery, subject to the exceptions and conditions mentioned, in like good order and condition. This stipulation places an obligation on the shipowner to provide a ship fit to carry the cargo to its destination. The exceptions refer to the incidents that may occur in the course of the voyage subsequent to the sailing of the ship. These, when construed, are not to be inconsistent with this obligation as a paramount obligation in the shipowner to provide a fit and proper ship. That this is the true mode of construction, and that the exceptions in ordinary bills of lading do not apply until the voyage has been entered upon, is sufficiently shown by the cases of *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 App. Cas. 72); *Tattersall* v. *The National Steamship Company Limited* (50 L. T. Rep. 299; 12 Q. B. Div. 297); *The Glenfruin* (52 L. T. Rep. 769; 10 P. Div. 103). The plaintiffs contended that the exceptions in the bill of lading were to be construed in this ordinary way, and that they were all consistent with the primary obligation on the shipowner to provide a seaworthy ship fit to carry the cargo to its destination. For the defendants it was said that the exceptions in the particular case were so expressed as to qualify or abrogate this ordinary warranty of seaworthiness, and that in the events that occurred the defendants were not liable, and that at any rate with respect to this question of principle they were not liable for any breach of the suggested warranty of seaworthiness. The bill of lading contains a number of clauses not material to this particular question, but the clause relied upon by the defendants was this: "Steamer shall not be accountable for the condition of goods shipped under the bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners, nor for any other cause whatsoever." It is said that it is impossible to give full effect to the language of the clause without coming to the conclusion that any undertaking as to seaworthiness of the ship was cancelled. It is noticeable about the clause that

it only applies to the servants of the owners when the question of negligence is referred to, and does not refer to any obligation on the owners themselves. Is that clause consistent with the obligation of the shipowner to provide a seaworthy ship? Clearly, it appears to me, it is, and that full effect will be given to the clause by construing it to apply only to the incidents of the voyage after the ship has sailed in a seaworthy condition. The general phrase "for any cause whatsoever" really conveys no clear set of ideas to anybody's mind, but they come under the description of the other exceptions naturally and easily, namely, cases arising after the ship has sailed in a seaworthy condition on her voyage. Attention was called to another portion of the bill of lading. The clause in question is clearly applicable to this peculiar cargo—a cargo of frozen meat, which could never be carried safely to its destination without being kept in a frozen condition. The other clause is a clause applicable to the ship under all circumstances, and with any cargo on board, and this is the form with which we are familiar. Attention was called to this portion of it: "defects in hull, tackle, boilers, or machinery, or their appurtenances, neglect, default, or error in judgment of the master, mariners, engineers, or others in the service of the owners." It is said those general words rescind and abrogate the contract of seaworthiness Defects in hull at the time the cargo was put on board are specially and particularly excepted from the obligation of the shipowner; but in construing these clauses in this way we must bear in mind the history of each of them. They were introduced to protect the shipowner where a decision of the court had pronounced that he was not free from the obligation of the bill of lading, and "defects in the hull" were no doubt introduced in the hope that, however that defect was caused, the shipowner would be exonerated. But these words "defects in the hull and machinery," if they stood alone, would not protect the shipowner where the defect was due to the negligence of those in charge of the vessel. To save the owner from that liability, the other words referring to the negligence of those in charge of the ship have been introduced. Full effect may therefore be given to the whole clause, taking every portion of it into consideration, by this interpretation, that it was meant to protect the shipowners from a defect in the hull and machinery, even where the negligence of those on board was the cause of that defect. With regard to the bill of lading, so far as I have dealt with it, the plaintiffs would appear to be entitled to insist upon the existence of a warranty. An alternative view, however, was put forward by the defendants, and it was said that the interpretation of a document of this kind depends upon all the circumstances, and that everything has to be looked at; that this is a very peculiar bill of lading and ought to receive a peculiar construction. It is a bill of lading applicable to frozen meat, and a bill of lading which imposes upon the shipowner a provision for the safe carrying of that cargo of frozen meat. It was said, and undoubtedly it is true, that the owner of the ship is responsible, under his warranty of seaworthiness, to provide a ship fit to encounter the ordinary sea perils of the voyage. In this case he has to do something more—he has to provide for the safety of the cargo. How is he to do that? It is said that it is most unreasonable to suppose that he would enter into a positive warranty that the machinery should be fit, and that the reasonable interpretation is that he only intended to promise that due care should be taken to provide that machinery; and it was said what a hardship it would be on the shipowner to suppose that anybody would enter into that obligation; this is most complicated machinery, and it is very unlikely that he would do more than undertake to employ proper persons to provide the machinery, and proper persons to look after it; and that ought to be the proper meaning of the bill of lading. If there were any authority for that, I should be prepared with great deference to follow it, but there is not the shadow of authority for saying that a contract of this kind involves that two-fold obligation. Again, they say the contract was entered into by the shipowner as owner of the ship in one capacity, and in another capacity as owner of the store itself on board ship; that there was a storehouse on board, which he undertook to keep at a proper temperature, and that he ought to take due and proper care. Nothing is clearer than this, that, if the shipowner desires that his obligation shall not go beyond the duty of taking due and proper care, he is at liberty to say so in his bill of lading, and there are instances, such as the case of *The Cargo ex Laertes* (57 L. T. Rep. 502; 12 P. Div. 187), where that was the contract. There there was a warranty, first, that the ship should be seaworthy "only so far as ordinary care can provide," and the further warranty against patent defects only, and not against latent defects. There was a latent defect in the shafting, and in consequence the ship broke down in the course of the voyage. It was held that a contract of that sort would abrogate, as it is clear it must, the ordinary warranty of seaworthiness. There is no difficulty at all about making that contract if a shipowner and the charterer or the freighter desire to do so. The only thing to be borne in mind is that the obligation to provide seaworthiness is reflected in the policy of insurance. Proper care must be taken that the underwriter enters into that risk under a properly framed policy of insurance. Is there any indication here that there was any such intention as was clearly disclosed in the case I refer to? None. The contract stands as an ordinary contract in this respect. There is no indication that the mere obligation to take care should be sufficient. The argument of hardship and the difficulty that the shipowner would be placed in would be equally applicable in the case of a sailing vessel, and still more clearly applicable in the case of a steamer, where the machinery is naturally complicated. Nevertheless the warranty of seaworthiness is implied exactly as in the case of a sailing vessel. The object of the warranty of seaworthiness is to prevent troublesome questions whether care has been taken or not. It is clear, if proper care be taken, a seaworthy ship can be produced, and if somebody is to run the risk in the matter it is considered fair and reasonable that that risk should be borne by the shipowner who knows, or ought to know, what he is about, and who has control of the ship, and not upon the person who enters into the contract. This argument of hardship comes to

nothing, and the second ingenious way of putting the case for the defendants fails as the first. My judgment upon the point of principle between the parties must therefore be for the plaintiffs. All other questions will be reserved.

Judgment for plaintiffs.

The defendants appealed.

July 26.—*Moulton*, Q.C. and *Joseph Walton*, Q.C. (*James Fox* with them) for the defendants.—It is submitted that, under the terms of the bill of lading, the risk of the machinery breaking down was to be borne by the shippers. The written language of the bill is sufficient to exempt the defendants. "Failure" of the machinery includes a breakdown arising from an original defect, as well as from a defect which comes into existence subsequently to the commencement of the voyage. The breakdown, as a matter of fact, occurred a fortnight after the voyage had commenced. There can be no more implied warranty of the fitness of the refrigerating machinery contained in a ship than of its fitness if it were in a warehouse. Mathew, J. held that the ship was not seaworthy. A ship becomes none the less seaworthy by her refrigerating machinery breaking down. The implied warranty that the ship was seaworthy had nothing to do with this machinery. The defendants were only bound to do all that reasonable care and skill could do to supply good machinery. There was no absolute warranty of fitness. Moreover, the bill of lading provides that, whatever be the cause of damage to the cargo, the ship is not to be liable.

Bigham, Q.C. and *T. E. Scrutton* for the plaintiffs.—The bill of lading contains an absolute contract by the defendants to deliver the hard-frozen mutton in good order and condition. As there is an implied warranty that the ship is seaworthy and fit to carry the cargo to its destination, so also there is implied a warranty that there is refrigerating machinery in the ship before the commencement of the voyage fit to keep the meat good; because such machinery, as both plaintiffs and defendants knew when they entered into this contract, is absolutely necessary for the carriage of frozen meat from Australia to England. The exceptions in the bill only apply to things that may happen after the voyage has commenced.

James Fox replied.

Lord Esher, M.R.—The question in this case is whether, under the circumstances that existed at the time when the contract for the carriage of this frozen meat was made, there is contained in this bill of lading a warranty that the refrigerating machinery of the ship was at the time of shipment in such a condition as to be fit, on an ordinary voyage and under ordinary circumstances, to carry the frozen meat to Europe. In other words, the question is whether by this bill of lading the shipowner has not promised absolutely to the shipper that the refrigerating machinery is not in that condition. Now the bill is headed with the words, "Refrigerator Bill." These words mean necessarily, in my opinion, that there is on the ship some kind of refrigerating machinery for keeping frozen the 4553 carcases of hard-frozen mutton described in the bill of lading. The obligation to have such machinery on board the ship is to be implied from the bill of lading, because it must evidently have been in the contemplation and intention of both parties that such an obligation should be a part of the contract of affreightment. Now take the case of the shipper who desires to send frozen meat from Australia to England. He knows that, if nothing is done, the meat will decompose on the voyage. He therefore must stipulate that there shall be refrigerating machinery on board the ship to preserve the meat. For such a ship he pays, not the ordinary freight for carrying goods, but an increased freight, and the shipowner must know that the shipper would not pay that increased freight for the carriage of his frozen meat unless there were on the ship refrigerating machinery capable on an ordinary voyage of keeping the meat frozen. Both parties must have contemplated that there should be refrigerating machinery on board at the time of shipment, and that it should be in such a condition as I have described; because machinery that will not work is useless. It is not true to say that both parties contemplated that, whatever accident might happen, the machinery should keep in proper condition, and that the meat should remain frozen during the whole voyage. The shipowner would never agree to such a stipulation as that. But, as a matter of business, it seems clear to me that both parties must have intended that the machinery supplied should be at the commencement of the voyage fit for the object for which it was supplied, and for which the payment was made, and that that is an implication which must be read into the bill of lading so as to become part of the contract. It was suggested that if we hold that stipulation to be implied in this contract, we should have to imply a similar stipulation in the case of storage in a warehouse and in other circumstances. We say nothing about that state of circumstances. We are here dealing with the case of machinery supplied by a shipowner and paid for by the shipper for the purpose of a voyage from Australia to England. The principles as to implying a condition or a warranty in a contract apply to a hundred other contracts which have nothing to do with the contract which we are now considering, and in each case as it arises the court must determine whether any such implication should be made. In the present case I have no doubt that, according to the ordinary rules as to implied stipulations in a contract, the implication which I have mentioned should be made. But that applies only to the state of things at the commencement of the voyage, not to things which may happen after the voyage has begun. Now there are several exceptions in this bill of lading. If any of them were inconsistent with the implied stipulation which I hold to be part of this contract, then no such implication should be made. But they are not inconsistent. As in most bills of lading they are exceptions with regard to matters which may happen during the voyage. They are all exceptions on the obligation of the shipowner to deliver the goods at the end of the voyage in the same good order and condition in which they were delivered to him before the commencement of the voyage. They do not apply to the primary warranty as to the condition of the machinery at the time when the ship started on her voyage. I

agree with my brother Mathew in his holding that there was an implied term in this bill of lading that the refrigerating machinery at the time of shipment was fit to carry frozen meat to Europe on an ordinary voyage made under ordinary circumstances. The only criticism that I make on his judgment is this, that he used phraseology that might lead people to think that he was considering the question of the seaworthiness of the ship. Now the inefficiency of this machinery did not in any way affect the seaworthiness of the ship. But the learned judge was referring, not to the seaworthiness of the ship, bnt to the seaworthiness of the machinery, independently of the ship. Seaworthiness is a nautical word, and was not quite the right word to use with regard to this refrigerating machinery. But though it was a wrong phrase to use here, what he meant was that the machinery was not fit to carry frozen meat from Australia to England under the ordinary conditions of an ordinary voyage. I have no doubt that the judgment of the learned judge was correct in that respect, and therefore this appeal must be dismissed. That judgment is not a final but an interlocutory judgment, and an appeal from such an interlocutory judgment as that is an interlocutory appeal. If there should be an appeal from this court to the House of Lords, the learned judge who tried the preliminary question will not try the issues of fact in the action until the final determination by the House of Lords of the preliminary question of law.

Kay, L.J.—In this case we have to deal with a bill of lading given on the shipment of frozen meat. At the beginning of the bill are the words "Refrigerator Bill." Now it is stated that upon such a bill as this, relating to the carriage of frozen meat, a higher rate of freight would be charged than for ordinary goods. The bill states that the goods to be carried from Australia to London consisted of hard-frozen mutton, and it expressly agrees that this mutton, so shipped in a refrigerator ship, shall be delivered, subject to the exceptions and conditions thereinafter mentioned, in the like good order and condition. Then come a set of conditions which relate solely to things that might happen during the voyage, and do not relate to the state of the ship at the time when the goods were received on board. Therefore, a defect in the state of the ship when the goods were put on board would not, or, as it is enough to say now, might not, be a breach of any one of these conditions. Having stated so much. I must say that I cannot help feeling that the question submitted to the learned judge in the court below, upon which this appeal has been brought, may never arise at all in this action. But, however that may be, the question now before the court seems to me to be, not as to the seaworthiness of the ship properly so called, but as to whether the ship at the time of shipment was provided with the proper appliances and was in such a condition as to enable the goods to be carried in a hard-frozen condition and to be delivered in the like condition at the end of the voyage. Mathew, J. has treated the question as being one whether or not there was an implied warranty of that kind. The cases to which he referred seem to treat a matter of that kind as though it were within the ordinary warranty of the seaworthiness of a ship. To take the case which he refers to of *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 App. Cas. 72), Lord Cairns, L.C. there says: "I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy." Then further on he says: "It must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there can be no doubt that this would be the meaning of the contract, but it appears to me that the question is really concluded by authority." Then Lord Blackburn, in the same case at the beginning of his speech, says this: "I take it, my Lords, to be quite clear, both in England and Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies the ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." Now I read that because I understand that one of the arguments on behalf of the defendants is, that they never did contract absolutely that the ship was at the time of the shipment fit for its purpose. It is said that all that the defendants contracted was to use due diligence to make her fit for that purpose. Now Lord Blackburn distinctly deals with that question, and says that the contract is not what it is now alleged to be. The contract is ordinarily spoken of as one of seaworthiness. That is not accurate language to use in the present case. It is not a question, properly speaking, of the seaworthiness of the ship. The question is commonly called, says Lord Blackburn, a question of seaworthiness, but the warranty implied is not an engagement merely that the shipowners will do their best to make the ship fit for the purpose of a particular voyage, but that she is absolutely fit for that purpose at the time of the shipment of the goods. The contract here is contained in a bill of lading called a "Refrigerator bill." It is a contract to carry "hard-frozen mutton," and it provides that, subject to certain accidents which may happen during the voyage, this hard-frozen meat shall be delivered in the same good order and condition as that in which it was shipped. From this it clearly must be implied that there is what Lord Cairns called "a representation and an engagement—a contract—" that the ship at the time of shipment was in a proper condition to carry out the particular voyage which is contracted for by the bill of lading. Now in ordinary refrigerator ships there is machinery which keeps the meat cold throughout the voyage, and enables the shipowner to fulfil his contract and deliver

the meat in good condition. If that machinery, at the time of shipment, before the commencement of the voyage, should not be in a condition to perform its work, there would be, in my opinion, a breach of the implied contract to provide a ship fit for the service which this bill of lading contemplates. That breach would not come within any of the exceptions named in the bill. I therefore agree that this appeal fails and must be dismissed.

SMITH, L.J.—I am of the same opinion. I think that my brother Mathew arrived at the right conclusion, namely, that there is an implied term in the undertaking contained in this bill of lading that the *Maori King* and her refrigerating machinery were, at the time of the shipment, fit to carry the frozen meat to England. The question turns on the meaning of a contract of carriage by sea, and I refuse to discuss other kinds of contracts, because different considerations apply to contracts of sea carriage from those which apply to contracts relating to matters on land. By the first part of the bill of lading the shipowners have contracted with the shippers to carry hard-frozen mutton from Australia to England, and to deliver it there in the like good order and condition as it was in when put on board their ship. Is there in such a bill of lading as that any implied warranty that the ship, or that part of the ship in which the shipowner agreed with the shipper he would carry the goods, was fit for the purpose for which both parties were contracting when this bill of lading was given? Both parties knew that refrigerating machinery must of necessity be used, or the meat would decompose, and would have to be thrown overboard. Was there any warranty that that part of the ship in which the meat was to be carried was fit, when the ship set sail, for the purpose for which the contracting parties were dealing? I am of opinion that there was. Now, unless the plaintiffs can succeed in making out that, as Mathew, J. has held, there is this implied warranty, it is very probable that the defendants would have an answer to this action in the exceptions contained in the bill of lading. There has been a failure or breakdown of the machinery on the voyage, so that the great point which the plaintiffs wish to establish now is that there was an implied warranty that the ship and her machinery should be absolutely fit for the contemplated voyage before the voyage began. I am of opinion that there is such a warranty. Reference has been made to words which I used some years ago in the case of *Tattersall* v. *The National Steamship Company Limited* (50 L. T. Rep. 299; 12 Q. B. Div. 297); but I think that I really said no more in that case than what was laid down by Lord Cairns and Lord Blackburn in *Steel* v. *The State Line Steamship Company* (*ubi sup.*). I will not refer to what was said by them, because Kay, L.J. has already cited those words. Holding as I do that this warranty is implied by the first part of the bill of lading, I now come to the rest of the bill to see whether there is anything there to show that this warranty cannot be implied. The exceptions from the obligation on the shipowners to deliver the meat in good order and condition only apply to matters which might happen during the voyage after the ship has set sail. Therefore none of them have any effect on the implied warranty as to the fitness of the machinery before the commencement of the voyage. They are no answer to the plaintiffs' contention here. For these reasons I think that my brother Mathew was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitors for the defendants, *Parker, Garrett,* and *Parker.*

July 12 *and* 30.

Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THOMAS *v.* LULHAM. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Landlord and tenant—Ejectment—Forfeiture by nonpayment of rent — Distress — Waiver — Common Law Procedure Act 1852 (15 *&* 16 *Vict. c.* 76), *s.* 210.

The levying of a distress by a landlord for arrears of rent is not such a waiver of his right of forfeiture as to prevent him from bringing an action in ejectment under sect. 210 *of the Common Law Procedure Act* 1852.

THIS was an appeal from the judgment of Mathew, J. at the trial of the action without a jury.

The action was brought to recover possession of a house, No. 19, New Oxford-street, and 80*l.* 14*s.* 4*d.* arrears of rent due in respect of the said house.

By a lease dated the 14th Jan. 1884 the plaintiff demised the said house to the defendant for the term of twenty-one years, at the yearly rent of 130*l.*, payable on the usual quarter days. The lease contained a covenant by the defendant to pay the agreed rent, and there was a proviso for re-entry if the rent should remain unpaid for twenty-one days after it had become due, whether demanded or not.

The quarter's rents which became due at Lady-day, at Midsummer, and at Michaelmas 1894, remained unpaid, and on the 22nd Nov. 1894 the plaintiff put in a distress upon the demised premises.

This distress, after payment of charges, realised only a very small sum, and a balance still remained due to the plaintiff in respect of the three quarters' rent of 80*l.* 14*s.* 4*d.*; that is to say, more than half a year's rent still remained due.

On the 26th Nov. the plaintiff issued the writ in this action, claiming possession of the premises and arrears of rent.

By sect. 210 of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76) it is provided as follows:

> In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessee to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessee shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises . . . and if it shall be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due and that the lessee had power to re-enter, then and in every such case the lessee shall

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made.

At the trial of the action Mathew, J. gave judgment for the plaintiff for the arrears of rent, but he gave judgment for the defendant upon the claim for possession, on the ground that by distraining the plaintiff had waived his right of re-entry.

The plaintiff appealed.

July 12.—*Cavanagh* for the plaintiff.—The action was rightly brought claiming possession. Half a year's rent still remained due when the writ was issued and the case is therefore within sect. 210. The levying of a distress which still left half a year's rent due was not a waiver of the landlord's right of re-entry:

Brewer d. *Lord Onslow* v. *Eaton*, 3 Doug. 230.

The case of *Cotesworth* v. *Spokes* (4 L. T. Rep. 214; 10 C. B. N. S. 103) which was relied on by the defendant is not really against the plaintiff, because here more than half a year's rent was actually in arrear when the writ was issued. In that case less than half a year's rent was due when the action was brought.

Æneas Mackintosh for the defendant.—The distraint was a waiver of the plaintiff's right of re-entry. The statute does not apply when a distress has actually been levied. The "sufficient distress" spoken of in sect. 210 means distrainable goods sufficient to satisfy the rent. The plaintiff when he saw that there were not enough goods on the premises to satisfy the rent should have withdrawn without distraining if he wished to preserve his right of re-entry. The section says nothing about selling the goods on the premises. It is submitted that the language of Williams, J. in *Cotesworth* v. *Spokes* (*ubi sup.*) is in favour of the defendant's contention here.

Cur. adv. vult.

July 30.—KAY, L.J. delivered the following written judgment:—The statute 15 & 16 Vict. c. 76, s. 210, seems to me to mean that a landlord who has power to re-enter for nonpayment of rent may recover in ejectment, notwithstanding that he has distrained for such rent if such distress did not produce sufficient to pay such rent, but left half a year's rent still due. In this case the landlord had a right of re-entry, if any quarter's rent should be in arrear for twenty-one days. Three quarters' rent were due; the landlord distrained. The distress was not sufficient to pay one quarter, therefore when he brought the action half a year's rent was due, and the statute applies and enables him to recover notwithstanding the distress. This was the construction put upon the statute in *Brewer d. Onslow* v. *Eaton* (*ubi sup.*). It was argued that putting in the distress waived the right of re-entry at common law, and that the statute does not apply where a distress has actually been levied. The material words are "if it shall be . . . proved upon the trial . . . that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due." How could it be said that no sufficient distress was to be found without distraining? Goods on the premises are not a distress until they are distrained, and the landlord cannot tell what is to be found on the premises without putting in a distress. He has no right to enter merely to see what goods are there. The statute evidently contemplates an actual distress, and expressly authorises the ejectment under the power for re-entry, notwithstanding such distress, if half a year's rent remains due. But reliance was placed upon the language used by the late Williams, J. in his judgment in *Cotesworth* v. *Spokes* (*ubi sup.*). In that case a lessor having a power of re-entry distrained for three quarters' rent, and after realising the distress less than half a year's rent remained due. He then brought ejectment, but it was held that, as half a year's rent was not due, the case was not within the statute, and the action was not maintainable. The power of re-entry by the terms of the lease was, if a quarter's should be in arrear for twenty-one days. The three quarters' rent were due at Michaelmas 1860, *i.e.*, Sept. 29. The distress was put in on the 2nd Oct., that is within twenty-one days from that date. Ejectment was brought on the 2nd Nov., after the expiration of twenty-one days, but part having been paid by the distress there was not a right of re-entry for half a year's rent at the end of the twenty-one days after Michaelmas, and Williams, J. said that the distress was a waiver because it was for the rent up to Michaelmas, as to the last quarter of which there was no right of re-entry at the time of the distress, because the twenty-one days had not expired. But if the distress had been confined to the rent due at Midsummer there would have been no waiver, because as to that the forfeiture had actually occurred. It is unnecessary to express any opinion as to this part of the judgment which was not the ground of the decision. In the case now before us three quarters' rent were due on the 29th Sept., and the distress was put in on the 22nd Nov., more than twenty-one days after the last of the three quarters' rent became due. Therefore that point does not arise.

SMITH, L.J. delivered the following written judgment:—This is an action of ejectment by a landlord against his tenant, and the circumstances are these: In the year 1884 the plaintiff demised to the defendant, 19, New Oxford-street, for the term of twenty-one years, at the rent of 130*l.* payable on the usual quarter days, with a proviso for re-entry if the rent remained unpaid for twenty-one days after it became due, whether demanded or not. Upon the 25th March 1894, the quarter's rent became due and remained unpaid, and at Midsummer and at Michaelmas 1894 two further quarters' rent also became due and remained unpaid. Upon the 22nd Nov. 1894 the plaintiff distrained, but was only able to realise such an amount as left more than half a year's rent still due; and he thereupon upon the 26th Nov. 1894 issued a writ in ejectment against the defendant. My brother Mathew has held that by distraining upon the 22nd Nov. 1894 the plaintiff had waived the forfeiture, and he has given judgment for the defendant. It is conceded by the plaintiff that at common law the distress operated as a waiver of the forfeiture which occurred on the nonpayment of the rent, and the question is whether, notwithstanding this distress, the plaintiff, by reason of the provisions of sect. 210 of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76), is entitled to maintain this action. This section, which is a re-enactment of the

4 Geo. 2, c. 28, s. 2, enacts that in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear and the landlord hath a right by law to re-enter for nonpayment thereof, such landlord may without any formal demand or re-entry serve a writ in ejectment . . . and if it be proved upon the trial that half a year's rent was due before the writ was served and no sufficient distress was to be found upon the demised premises countervailing the arrears then due and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made. To bring himself within the section the landlord must prove (1) the relationship of landlord and tenant; (2) that he has by law the right to re-enter for nonpayment of rent; (3) that having distrained he has been thereby unable to satisfy the rent due; and (4) that there was half a year's rent due when he served the writ of ejectment. Upon proof of these by the landlord, then in my judgment the section enacts that he may proceed against his tenant and recover in ejectment, whether he had legally demanded the rent or not. But to avail himself of the section the above-mentioned four requisitions must be proved. That this is the true reading of the section appears from the case of *Brewer* d. *Lord Onslow* v. *Eaton* (*ubi sup.*) in the year 1783, where Lord Mansfield and the Court of King's Bench upon the 4th Geo. 2, c. 28, s. 2 (an equivalent section to sect. 210 of the Common Law Procedure Act 1852), held that, though at common law the distress would have operated as a waiver of the forfeiture incurred by the nonpayment of the rent, yet in a case which came within the statute it was not so, for the statute required the landlord to prove on the trial that no sufficient distress was to be found on the premises countervailing the arrear due, and that a distress which it was necessary for the landlord to make in order to complete the title given him by the statute was no waiver. It is said, however, that this case was overruled by the Common Pleas in the case of *Cotesworth* v. *Spokes* (*ubi sup.*); but this is not so. This case decided that, for a landlord to bring himself within the section, he must prove that half a year's rent was in arrear at the time of the service of the writ. A passage at the end of the judgment (which was delivered by Williams, J.) was pressed upon us to show that the forfeiture was waived in the present case by what the landlord had done; but in my judgment, though the passage is hard to understand, it does not decide this, and I must point out that it was not competent for the Court of Common Pleas to overrule the Court of King's Bench, and it is not correct to say that it has done so. It should be noted that in *Cotesworth* v. *Spokes* the distress was within the twenty-one days, which is not so in the present case; but be this as it may, in my judgment the case leaves that of *Brewer* d. *Lord Onslow* v. *Eaton* (*ubi sup.*) untouched upon the point now under consideration. The Court of King's Bench put the true construction upon the section, which has apparently been acted upon for over 100 years, and as the plaintiff has proved the requirements of sect. 10, he is entitled to judgment, and this appeal must be allowed and judgment given for the plaintiff with costs here and below.

Lord ESHER, M.R.—I agree with the judgments that have been delivered.

Appeal allowed.

Solicitor for the plaintiff, *Alfred James Thomas.*
Solicitor for the defendant, *Arthur Mewburn Walker.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, July 17.

Re BURROWS; CLEGHORN *v.* BURROWS. (*a*)

Will — Construction — Gift to daughter in case she had issue living at stated time — Child en ventre sa mère *at time.*

A testator by his will gave his residuary estate to trustees upon trust to pay the income to his wife during her life, and after her decease he gave one moiety of his residuary estate to his daughter (then a married woman) absolutely in case she had issue living at the death of his wife, but in case she had no issue then living, then he disposed of such moiety otherwise. The testator's wife survived the testator and died, and on the day following her death the daughter gave birth to a living child.

Held, that the daughter had issue living at the death of the wife, and that she was entitled to a moiety of the residuary estate.

JOHN VALENTINE BURROWS, by his will dated the 24th Oct. 1893, devised and bequeathed his residuary real and personal estate to trustees upon trust to pay the income thereof to his wife for life, and upon her death as to one moiety for his son and his issue as therein mentioned, and as to the other moiety he gave the same to his daughter Kate Cleghorn (the plaintiff) for her absolute use and benefit "in case she has issue living at the death of my wife," but in case she had no issue then living, then he directed his trustees to pay the income of that moiety to her for her life, and then to her husband for his life, and after his decease he gave the same moiety equally between the children of his son absolutely.

The testator died on the 26th Nov. 1894, and his widow died on the 5th March 1895. At the time of the widow's death Kate Cleghorn had no child born, but she was then *enceinte*, and on the day following the widow's death she gave birth to a living child

The plaintiff took out a summons to have it declared that, upon the true construction of the will and in the events which had happened, she was entitled to a moiety of the testator's residuary estate absolutely.

Mulligan, for the plaintiff, contended that, as the child was *en ventre sa mère* at the death of the testator's wife, it was a living child, and the plaintiff was entitled absolutely.

Gurdon for the defendants.—Although a child *en ventre* is looked upon as existing for the purpose of receiving a benefit, it is not looked upon as existing for any other purpose:

Blasson v. *Blasson* 2 De G. J. & S. 665;
Theobald on Wills, 4th edit., p. 259.

In the present case the child takes no benefit.

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

and to hold that it was a living child will be for the mother's benefit only. The term used by the testator is "issue" and not "child," and means that there must be a child born at the period when the gift is to take effect. He also referred to

Clarke v. *Blake*, 2 Bro. C. C. 320;
Doe v. *Clarke*, 2 H. Bl. 399.

Mulligan, in reply, referred to

Thellusson v. *Woodford*, 11 Ves. 112.

CHITTY, J., after stating the facts, proceeded:—The child was *en ventre sa mère* at the time of the death of its grandmother, and was plainly then living so as to bring it within the words of the will "in case she has issue living." But then it is said that the word "issue" imports more than the word "child," and that it means that there must be a child born at the period when the mother is to take; but it appears to me that that distinction between the two words is too refined. Then it is said that the rule is that the child *en ventre sa mère* is not deemed to be living except where there is a benefit passing directly to the child, and, as the mother and not the child in this case takes the benefit, the gift over takes effect. But the question is covered by authority. In *Thellusson* v. *Woodford* (*ubi sup.*) Lord Eldon in his judgment, referring to the case of *Gulliver* v *Wickett* (1 Wils. 105), says: "In which case the devise was to a child *en ventre sa mère*, and to go over if that child should die under the age of twenty-one leaving no issue. In the construction of that limitation expressly to a child *en ventre sa mère*, suppose that child had at the age of twenty married, and died six months afterwards leaving his wife *enceinte*; that property absolutely given to him would not be divested merely because the child was not born till three months after his death." The hypothetical case put by Lord Eldon is exactly this present case, for the second child *en ventre sa mère* was not to take for his own benefit, but for that of his father, there being a gift over in the event of the first child *en ventre sa mère* leaving no issue. The opinion of Lord Eldon, as he expressly puts the case of leaving no "issue," extends to this case. In *Thellusson* v. *Woodford* the unanimous opinion of the judges was pronounced by Macdonald, C.B., and in the course of it, referring to *Gulliver* v. *Wickett*, he says: "The devise was to the wife for life, then to the child, with which she was supposed to be *enceinte*, in fee, provided that if such child should die before twenty-one leaving no issue, the reversion should go to other persons named. The court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child *en ventre sa mère*, being *in futuro*, would have been a good executory devise. In *Doe* v. *Lancashire* (5. T. R. (B. R. 49) the Court of King's Bench has held that marriage and the birth of a posthumous child revoke a will in like manner as if the child had been born in the lifetime of the father. In *Doe* v *Clarke* (*ubi sup.*) Eyre, C.J. holds that, independent of intention, an infant *en ventre sa mère* by the course and order of nature is then living, and comes clearly within the description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases in which a provision has been made for children generally and where the testator has been supposed to mark a personal affection for children who happened to be actually born at the time of his death." Eyre, C.J. at the conclusion of the judgments in *Doe* v. *Clarke* remarked: "The two classes of cases in equity proceed on a distinction which has always appeared to me extremely unsatisfactory and unfit to be the ground of any decision whatever." It is right that I should notice the case of *Blasson* v. *Blasson* (*ubi sup.*) which has been cited. The question there was, as I read the case, on the words "born and living"—words which seem to show that the testator contrasted birth with life. It was necessary there that the child should be both born and living, and the judgment of the Lord Chancellor is, in my opinion, directed solely to the word "born," and the passages cited by him from the Digest and John Voet relate to born and unborn children, and not to unborn children as living or not. That case, therefore, is clearly distinguishable from the present. I hold, therefore, that the testator's daughter Kate had issue living at the death of her mother, and that she is therefore absolutely entitled to the moiety given her by the will.

Solicitor: *William Morley*, for *Dale*, Leeds.

Wednesday, May 29.

(Before KEKEWICH, J.)

THOMSON *v.* TRUSTEES, EXECUTORS, AND SECURITIES INSURANCE CORPORATION. (*a*)

Company—Assets—Shares in another company—Reduction of capital—Ultra vires—*Companies Act* 1867 (30 & 31 *Vict. c.* 131), *s.* 9—*Companies Act* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

The defendants, a financial corporation, held shares in a railway company. As the railway company had not sufficient capital to complete the line and were in danger of losing their concession, the shareholders, including the corporation, agreed to surrender part of the shares in pursuance of a scheme to raise further capital for the completion of the line.

Held, that the agreement was not ultra vires; *that the surrender of part of their railway shares by the corporation was not a reduction of capital, but was a mode of carrying on their business within the memorandum of association with which the court would not interfere.*

THIS was an action brought by the plaintiff, a shareholder in the defendant corporation, on behalf of himself and all other shareholders, against the corporation, and the plaintiff claimed a declaration that an agreement, dated the 14th May 1895 was *ultra vires*, and an injunction to restrain the corporation from carrying it into effect.

It appeared that the corporation were the holders of 6325 fully paid-up shares of 5*l.* each in the Corunna, Santiago, and Peninsular Railway Company Limited, a company formed to construct a railway in Spain.

The railway company not having sufficient money to complete the line, a scheme was proposed to raise further capital, namely, to borrow money from a bank on the guarantees of certain persons; the guarantors, in consideration of their guarantee, having transferred to them by the

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

shareholders part of the issued share capital of the railway company.

In pursuance of this scheme, by an agreement made the 14th May 1895, between the corporation of the one part and the railway company of the other part, it was agreed that the corporation would, at the request of the company, contribute and transfer, as the company might direct, 2000 shares of the nominal value of 10,000*l.*

The corporation was formed in 1887, and was empowered by the memorandum of association to carry on financial operations of every kind.

After the issue of the writ the plaintiff gave notice of motion for an injunction to restrain the corporation from transferring the 2000 shares under the agreement on the ground that there was no consideration, and that the agreement was in effect a surrender of part of the assets of the corporation, and was *ultra vires*.

The motion was by consent treated as the trial of the action.

Evidence was given that the agreement was for the benefit of the corporation, and that unless it was adopted the railway company would not be able to complete the line, and would lose the concession granted by the Spanish Government, and the shares would become valueless.

E. B. Cooper for the plaintiff.—This is a proposal to reduce the capital of the corporation, and is *ultra vires*:

Companies Act 1867, s. 9;
Companies Act 1877, s. 3.

Renshaw, Q.C. and *A. R. Kirby* for the defendants.—The corporation are empowered by their memorandum of association to carry on financial operations of all kinds. The adoption of the scheme will prevent a loss to the corporation on these shares, and the court will not interfere with the internal arrangements of the company;

Taunton v. *Royal Insurance Company*, 2 H. & M. 135.

KEKEWICH, J.—It seems to me that what is proposed to be done by the corporation is not a reduction of capital; and if it is not a reduction of capital, it clearly comes within their powers. No doubt the Legislature is extremely jealous of anything like a reduction of capital. By the very strict rules which have been enacted the Legislature has shown that capital is not to be reduced except by following those rules; but they were never intended to paralyse the ordinary business of a limited company; and there must be some elasticity in construing them with reference to the ordinary business of such a company. It seems to me that, if I were to hold this to be a reduction of capital, I should be obliged to say that whenever a company parts with any assets, whether held as an investment or as a security, the capital is reduced. In one sense it is, but not in the sense in which you really reduce the capital—that is the trading capital—of a corporation. Take this illustration: A company is allowed to invest money on mortgage of land; the land unfortunately becomes depreciated, and not lettable, and the company is not realising a benefit from the mortgage, and is not likely to do so. The mortgagor says: "If you will only release a few acres, I think I should lay out some roads, and so forth, and the result will be that in the course of a few years the estate, which would still remain subject to your security, will be very much improved." The company think it may be only an off-chance, but still it is worth trying; they honestly think that by giving up some part of their security they may gain a benefit. To say that is a reduction of capital, which cannot be sanctioned without coming to the court on a petition and writing the words "and reduced" seems too extravagant. Yet that is on precisely the same lines as this case. This is, in a sense, an investment or security which the company has as part of its assets. Its assets are employed in its business. This being a financial company, I think it has power to do what it thinks right in order to advance its interests within what ordinary men would call their ordinary business. This motion being treated as the trial of the action, I give judgment for the defendants; and the judgment should be prefaced with the words, "The court being of opinion that there is nothing to prevent the defendant company from entering into and carrying out the agreement of the 14th May 1895." The plaintiff must pay the costs of the action.

Solicitors: *Ashurst, Morris, Crisp*, and *Co.*; *Slaughter* and *May*.

Saturday, June 15.

(Before KEKEWICH, J.)

DAVIES v. VALE OF EVESHAM PRESERVES LIMITED, (a)

Practice—Receiver and manager—Continuation of receiver—Form of judgment.

Where a receiver was appointed generally and not merely until judgment or further order, but was directed to act as manager until a certain date, the minutes of judgment proposed to "continue the receiver and manager."

Held, that it was not necessary to continue the receiver, and that the proper form was to extend the time during which the receiver was to act as manager until a date to be fixed by the court.

AN interlocutory order had been made in a debenture-holders' action appointing a receiver and manager. The receiver was appointed generally and not merely until judgment or further order, but was directed to act as manager until the 30th June. The minutes of judgment proposed to "continue the receiver and manager": (*cf.* Palmer on Companies, 5th edit., p. 622, form 434; also note p. 618, form 427; *Underwood* v. *Underwood*, 60 L. T. Rep. 384; Seton on Decrees, 5th edit., vol. 1, pp. 635-637; vol. 2, p. 1685, form 3.)

Ashton Cross for the plaintiff.

F. T. Duka for the defendants.

KEKEWICH, J.—It is improper to continue the receiver, as he is still in office by reason of the former order which need not be repeated by the judgment, and the proper form is simply to extend the time during which the receiver is to act as manager until a certain date, which I fix as the 30th Nov.

Solicitors: *Richard White*, for *Hartland, Isaac*, and *Watkins*, Swansea; *J. A. Smith*.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

June 19, 21, *and July* 5.

(Before KEKEWICH, J.)

Re MORLEY; MORLEY *v.* HAIG. (*a*)

Tenant for life—Remainderman—Capital—Income—Policy—Premiums—Mortgage—Interest—Apportionment.

A. at the time of his death was entitled to certain policies of assurance on the life of B., subject to a mortgage to the office on the policies for securing the repayment of a sum of money with interest at 4 per cent. per annum.

By his will made Aug. 7, 1885, *A. gave his real and personal estate to trustees in trust for sale and conversion, and to invest the proceeds and pay the income to certain persons for life and then over. The testator died on the 20th June* 1890. *The will was proved by one executor. The executor did not sell the policies, but retained them, and paid the premiums on the policies and the interest on the mortgage out of the income of the estate until the death of B. in March* 1895. *The mortgage was paid off, and the balance of the policy moneys was in the hands of the executor. On summons:*

Held, that the yearly sums expended in keeping down the interest and premiums ought to be recouped to the tenants for life out of the moneys preserved by such expenditure, together with interest at 4 per cent., and the balance must be apportioned between capital and income on the principle laid down in Re The Earl of Chesterfield's Trusts (49 *L. T. Rep.* 261; 24 *Ch. Div.* 643).

ROBERT GEORGE MORLEY was at the time of his death absolutely entitled to three policies of assurance on the life of Henry Ridley Ellington, effected in the Equitable Assurance Office for sums amounting to 3500*l.*, subject to a mortgage to the office on the largest of the three policies for securing the repayment of 3000*l.* with interest at 4 per cent. per annum.

By his will, dated Aug. 7, 1885, Morley, after certain specific bequests, devised and bequeathed his real and personal estate to trustees in trust for sale and conversion, with power to postpone such sale and conversion during such period as they should think proper, and in the meantime to expend out of the income or capital of his estate such money as they might think fit for premiums on policies or otherwise; and he directed his trustees to stand possessed of the proceeds of such sale and conversion upon trust after payment of his funeral and testamentary expenses, debts and legacies, to invest the same and pay four-twelfths of the net income to his wife during widowhood, and subject thereto to stand possessed of the said trust premises and the net income thereof in trust for his children, the share of each son to bear to that of each daughter the proportion of five to three, the share of each daughter being settled upon her for life, with remainder to her children and remoter issue, with a clause of accruer to the testator's other sons and daughters in case of failure of the trusts of such daughter's share, and a moiety of the share of any son being settled upon him for life, with remainder to his wife and children, with a clause of accruer of such moiety to the testator's other sons and daughters in case of failure of the trusts of such moiety. By a codicil the testator declared that the share of income of his residuary estate payable to his wife should be one moiety during her widowhood, and that subject thereto the trust premises and the income thereof should be divisible among his children in certain proportions therein specified in lieu of the proportions mentioned in his will. The testator died on the 20th June 1890, leaving his wife, and two sons and two daughters, all of whom attained the age of twenty-one, him surviving.

The will was proved by one of the executors. At the time of the testator's death the surrender value of the policies, less the mortgage debt and interest, amounted to 3773*l.* 1*s.* 8*d.*

The executor and trustee of the will did not sell the policies, but for the benefit of the estate retained them until the death of Ellington, the person assured.

Ellington died on the 14th March 1895. From the death of the testator until the death of Ellington, the executor paid the premiums on the policies, and the interest on the mortgage out of the income of the testator's estate.

On the 10th May 1895 the sum of 6015*l.* 17*s.* 9*d.* was paid to the executor and trustee in respect of the policies, being the balance after the principal and interest on the mortgage debt amounting to 3077*l.* 17*s.* 3*d.* had been satisfied. This was a summons taken out by the widow and children of the testator against the executor and trustee to determine the relative rights of the tenants for life of the testator's residuary personal estate and the remaindermen to and in the surplus of the policy moneys, and in particular whether the respective tenants for life were entitled to be recouped out of the said surplus moneys, the amount applied in payment of the premiums and mortgage interest from the testator's death; and whether they or any of them were entitled to any and what compensation or equivalent for the income which they would have derived from the proceeds of sale or conversion of the testator's interest in the policy, had the same been sold or converted immediately after his death.

Renshaw, Q.C. and *Dauney* for the plaintiffs.—The plaintiffs are entitled to be repaid the premiums on the policies and the interest on the mortgage paid out of income. The policy moneys should be apportioned as between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would with the accumulations of interest have produced at the day of receipt the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income:

Re Earl of Chesterfield's Trusts, 49 L. T. Rep. 261; 24 Ch. Div. 643;
Beavan v. *Beavan*, 49 L. T. Rep. 263; 24 Ch. Div. 649;
Re Hengler; Frowde v. *Hengler*, 68 L. T. Rep. 84; (1893) 1 Ch. 586;
Re Flower; Matheson v. *Goodwyn*, 62 L. T. Rep. 216; 63 L. T. Rep. 201;
Re Hobson; Walker v. *Appack*, 53 L. T. Rep. 627; 55 L. J. 422, Ch.;
Wright v. *Lambert*, 6 Ch. Div. 649;
Re Foster; Lloyd v. *Carr*, 63 L. T. Rep. 443; 45 Ch. Div. 629.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Warrington, Q.C. and *E. W. Lavington* for the defendant.—The plaintiffs are entitled to be repaid the premiums, but not the interest on the mortgage. We admit the policy moneys should be apportioned according to the rule in the cases referred to.

Cur. adv. vult.

July 5.—KEKEWICH, J.—It is reasonably clear and was conceded in argument that the relative rights of the tenant for life and remaindermen must be adjusted according to the rule in *Chesterfield's* case (49 L. T. Rep. 261; 24 Ch. Div. 643). If, apart from the decision in *Re Hobson* (53 L. T. Rep. 627; 55 L. J. 422, Ch.), there remained any doubt respecting the applicability of that rule to a case like the present, that decision would wholly remove it. The rule is applicable to circumstances of considerable variety, as is illustrated by *Re Hengler* (68 L. T. Rep. 84; (1893) 1 Ch. 586), and the real question in each case must be how to make it work justly between the parties interested according to the special facts. Here the special facts are that the reversionary interest in question was a policy subject to a mortgage, and that the interest on that mortgage as well as the premiums on the policy were from time to time paid out of the income to which the tenant for life would otherwise have been entitled. The mortgage itself has now been paid out of the money received under the policy together with a small amount of interest which may be ignored, and we are dealing with the balance of the policy moneys remaining after discharge of the mortgage, and no more. But for the necessity of making some special provision in respect of the interest and premiums, the application of the rule would be easy. One would calculate what sum, if invested at 4 per cent. interest at the date of the testator's death, would produce the amount of this balance, and that sum would be capital to be invested for the benefit of the estate, and the rest would belong to the tenant for life. In fact, however, the tenant for life has received year by year less than she was entitled to by reason of part of the income having been taken to keep down the interest and premiums, and adjustment must now be made on the footing that those yearly sums ought to be recouped to her out of the money preserved by such expenditure, that is, the policy moneys. Of course they ought to be recouped with interest, and I think that interest ought to be calculated at 4 per cent. I hesitated about the figures, but it is to be observed that I am here dealing not with the rate which trustees with restricted powers of investment might have earned, but with the rate which an absolute owner free to deal as she pleased might have obtained for her money. These sums therefore will have to be deducted in her favour from the net policy moneys, and the balance must be apportioned between capital and income on the principle above explained. Except for the necessary subtraction in the first instance of the costs of these proceedings the arithmetic might all be worked out in a schedule to the order, but, as it is, the order can only direct how the rule shall be applied to the yet unascertained sum which will remain after subtraction of the taxed costs from the existing balance less the sums—which can be easily calculated—payable to the tenant for life on adjustment of capital and income accounts.

Solicitor: *C. W. Dommett.*

July 10, 11, *and* 12.

(Before KEKEWICH, J.)

Re GOODENOUGH; MARLAND *v.* WILLIAMS. (*a*)

Tenant for life — Remainderman — Capital — Income—Apportionment—Interest—Rate of.

A question arose in this case as to the rate of interest to be charged by the court in the Chancery Division where a fund was being apportioned between capital and income in accordance with the rule laid down in Re The Earl of Chesterfield's Trusts (49 *L. T. Rep.* 261; 24 *Ch. Div.* 643).

Held, that to fix 4 per cent. as the court rate of interest to be charged in such cases enured very greatly to the benefit of the tenant for life; 4 per cent. had been for generations regarded as the rate to be allowed by the court in the Chancery Division unless 5 per cent. was chargeable for special reasons; but, in view of the impossibility of ordinary prudent persons being able to obtain even 3 per cent. interest, the sum must be ascertained on the footing that 3 per cent. was the proper rate of interest instead of 4 per cent. as in Re The Earl of Chesterfield's Trusts; *the time had arrived when 4 per cent. interest, except as a penal rate, ought not to be allowed.*

BY the marriage settlement, made the 30th Aug. 1830, of Dr. and Mrs. Hawkins a sum of Bank Annuities amounting to 10,000*l.* was assigned to trustees upon trust to pay the dividends to Dr. Hawkins for life, and after his death to his wife for life, and after the death of the survivor upon trust for the children of the marriage as Dr. Hawkins and his wife or the survivor should appoint, and if there should be no children of the marriage, in trust for Archdeacon W. Goodenough, the testator, his executors, administrators, and assigns, for his or their absolute use and benefit, as part of his personal estate and effects, to be transferred and disposed of accordingly.

There were no children of the marriage. The Bank Annuities were now represented by 10,000*l.* Two and Three-Quarter per Cent. Consols.

Archdeacon Goodenough by his will, made the 1st May 1847, gave the residue of his property to trustees upon trust to pay the income to his daughter Mrs. Hawkins for life for her sole and separate use without power of anticipation, and after her death in the lifetime of her husband, for her appointees by will or codicil, with a gift over in default of appointment. The will also contained a power to continue "trust moneys and personal estate upon their present investments" and to vary investments, and a power to invest in Government and real securities. The testator appointed Mrs. Hawkins and F. Weedon his executors.

Mrs. Hawkins died in the lifetime of her husband. Archdeacon Goodenough died on the 13th Dec. 1854, and his will was proved on the 13th Jan. 1855.

By her will, dated the 26th March 1867, Mrs. Hawkins appointed, gave, and bequeathed the residue of the property and effects over which by the will of Archdeacon Goodenough or otherwise she had a power of disposition to Dr. Hawkins absolutely, and appointed him sole executor.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Mrs. Hawkins died on the 5th Sept. 1878, and her will was proved on the 22nd Jan. 1879.

Dr. Hawkins by his will appointed the defendant E. W. Williams sole executor, and died on the 7th Dec. 1894.

This was a summons taken out by the trustees of the will of Archdeacon Goodenough to determine (among others) the following question, namely, whether E. W. Williams, as legal personal representative of Mrs. Hawkins, was entitled to any and what part of the capital of the said sum of 10,000*l.* Consols, the reversion wherein on the death of Mr. and Mrs. Hawkins formed part of the estate of Archdeacon Goodenough, and had not been sold as directed by his will.

H. Robertson and *Crawley* for the trustees of the will.

Badcock for the defendant E. W. Williams.

Marten, Q.C. and *W. G. Lemon*; *Renshaw*, Q.C. and *Methold*; *Bramwell Davis*, Q.C. and *Leonard Potts*, for legatees under the will of Mrs. Hawkins.

KEKEWICH, J. (without calling on Badcock for a reply).—The case is governed by *Re The Earl of Chesterfield's Trusts* (49 L. T. Rep. 261; 24 Ch. Div. 643), and the contingent interest of the testator in the fund ought to have been converted, and the legal personal representative of Mrs. Hawkins is entitled to an apportioned part of the capital of the fund on that footing. Then comes what to my mind is a very important question. The rule in the *Earl of Chesterfield's* case is to take such a sum as at the date of the death of the testator, if the same were invested and the resulting income accumulated, would at 4 per cent. interest yield the sum which has to be paid. This hypothetical sum is treated as capital, and the rest as income. But, as was pointed out by Kay, L.J. in *Re Hobson*; *Walker* v. *Appack* (53 L. T. Rep. 627; 55 L. J. 422, Ch.), it does in most cases enure very greatly to the benefit of the tenant for life. But it is obvious that an alteration in the rate of interest will make an enormous difference. It has always been 4 per cent., and I followed that a few days ago in a case in which I thought I was not at liberty to make any alteration, more especially as the point was not argued. It is no doubt part of the general question what rate of interest ought now to be regarded as the court rate to be allowed in analogous cases to the one before me, or charged against trustees in respect of moneys for which they are liable. On this point I have expressed my opinion more than once. I thought, and I still think, that it is a question which ought to receive the views of all the judges of the Chancery Division, and be settled on a firm foundation as on a final opinion. It has occurred to me to think over the matter several times, but I am not aware of any proceeding by which it can be done. Judges can and do meet for the purpose of discussing matters of procedure, but they are not competent to decide questions of law or questions of this kind. In matters which actually determine their judicial proceedings the judges can only determine actual questions between the parties on their own responsibility and after argument. Although I have said once or twice I would not make a start, I have come to the conclusion that someone must, and that it may as well be myself as another. Subject, therefore, to what Mr. Badcock says, I am prepared to make a start in the present case. It is really a matter of very great importance. It is generally said that money doubles itself at 5 per cent. interest in fifteen years. If the interest is calculated at 4 per cent. the period is much longer, while at 3 per cent. the period would be very much longer. The result is that, if you want to find what sum will produce 100*l.* if invested and accumulated at 4 per cent., you get a very much smaller sum than if it was at 3 per cent. The result of adopting 3 instead of 4 per cent. will be very greatly in favour of capital as against income. Four per cent. has been for generations regarded as the rate to be allowed by the Court of Chancery unless 5 per cent. was chargeable for special reasons. Five per cent. was allowed by juries as the current rate of interest applicable to mercantile contracts, or fit to be allowed on the footing of damages. But we all know nowadays not only can trustees not get 4 per cent., or perhaps not more than 2¾ per cent. or even less, but ordinary people willing and able to go outside trust securities, and yet determined not to speculate, find it impossible to get more than 4 per cent. and are very glad to get that. I took the opportunity offered by the adjournment of looking at an authoritative statement as to Bank Stock. It is a security of the very first rank, only next to the public funds. At present prices the return is 2*l.* 9*s.* 3*d.* per cent. per annum for Bank Stock, and Consols at the present moment—that is, 2¾ per Cent. Consols, though afterwards reducible to 2½—stand at 107¼. It seems to me to be bordering on, if not an actual, absurdity to fix 4 per cent. as the court rate, where not only trustees, but an ordinary prudent investor determined not to speculate, cannot obtain that return. Unless, therefore, Mr. Badcock can convince me to the contrary, I propose in this case to ascertain the amount on the footing that 3 per cent. is the proper rate of interest instead of 4 per cent. as in *Re The Earl of Chesterfield's Trusts*.

Badcock.—At the date of the testator's death Three per Cent. Consols stood considerably below par. Further, the trustees had power to invest on real securities as well as in the funds, and might have invested so as to produce 4 per cent.:

Re Flower; *Matheson* v. *Goodwin*, 62 L. T. Rep. 216; 63 L. T. Rep. 201;
Re Hobson; *Walker* v. *Appack*, 53 L. T. Rep. 627; 55 L. J. 422, Ch.;
London, Chatham, and Dover Railway Company v. *South-Eastern Railway Company*, 64 L. T. Rep. 501; (1892) 1 Ch. 120.

KEKEWICH, J.—It is only fair to Mr. Badcock, and otherwise right, that I should say a few words with reference to his argument. I have considered the impropriety, if impropriety there be, of adopting a new rule in this particular case. It is a consideration of small importance that more than 3 per cent. could have been obtained on good security. The answer, which is satisfactory to me, is that it is not a question of investment, but is an arbitrary rule adopted by the court for the calculation of interest, and it is impossible from day to day to vary that rule. All that you do is to calculate what will be fair between the parties. If I could go upon any such rule as Mr. Badcock suggests, I should have to take 4 per cent. part of the time and 3 per cent. during the rest. It may in some cases press

hardly on the tenant for life, it may in other cases operate in favour of the tenant for life. That is the answer, so far as I am concerned, to that part of the argument. The argument *in personam* I confess hits me hard. I should not probably have done last week what I am doing now. But anybody who is accustomed to be in this court has known that it has been in my way for a long time. The consensus of opinion of the judges of the Chancery Division seems to me impossible to obtain. As regards the Court of Appeal, the point does not go to the Court of Appeal. It is not a point which is likely to be discussed there, although it may be. I thought over it to the best of my ability, and I have thought it my duty to have the courage of my opinion, and to say that the time has come when the judges should not talk of 4 per cent. or a higher rate of interest, when they know it is not the rate which money commands in the hands of those who have it to invest. If any other judge expresses even a doubt whether I am right, or thinks it is not right to follow my lead, I do not hesitate to say that I shall bow to his view and return to the former higher rate, because I think uniformity of practice is of much greater importance than justice in any particular case, but until anybody has differed I shall act upon it. [*Renshaw*, Q.C.—There is authority for 3 per cent.: (*Re Dracup*; *Field* v. *Dracup*, 69 L. T. Rep. 858; (1894) 1 Ch. 59.)] I am fortified in my opinion by that authority, and shall follow it. In the year 1895 the time has arrived when 4 per cent., except as a penal rate, ought not to be allowed.

Solicitors: *Frere, Forster*, and *Co.*; *Hepburn, Son*, and *Cutcliffe*; *R. S. Taylor, Son*, and *Humbert*; *Hunter* and *Haynes*.

Wednesday, July 31.

(Before KEKEWICH, J.)

LLOYD *v.* NOWELL. (*a*)

Vendor and purchaser—Specific performance—Conditional agreement—Waiver—Memorandum in writing—Statute of Frauds (29 *Car.* 2, *c.* 3).

Action by vendor for specific performance of the following agreement: "Subject to the preparation by my solicitor and completion of a formal contract, I am willing to sell to you the lease of 365, *Camden-road, for a term of twenty-eight years, at a rent of* 110*l. per annum, you paying me* 500*l. premium for same, and also paying the cost of new lease,* 100*l. paid (and receipt hereby acknowledged) as conditional deposit, the balance to be paid* 1*st day of Jan.* 1895, *and possession on completion. Plants and conservatory flowers to be included in price named." Signed by the vendor, and accepted by the purchaser.*

Held, that the condition was not for the benefit of the vendor only, and therefore he could not waive it; the condition being the essence of the contract, there was no memorandum in writing within the Statute of Frauds, and there must be judgment for the defendant.

THIS was an action brought by Edwin Lloyd, the vendor, against Joseph Dove Nowell, the purchaser, for specific performance of an alleged agreement for the sale of a leasehold house, No. 365, Camden-road. The alleged agreement was in the following terms:

365, Camden-road, Nov. 1, 1894.—Subject to the preparation by my solicitor, and completion of a formal contract, I am willing to sell to you the lease of 365, Camden-road, for a term of twenty-eight years, at a rent of 110*l.* per annum, you paying me 500*l.* premium for same, and also paying the cost of new lease, 100*l.* paid (and receipt hereby acknowledged) as conditional deposit. The balance to be paid 1st day of Jan. 1895, and possession given on completion. Plants and conservatory flowers to be included in price named.—E. LLOYD.—Accepted, Joseph D. Nowell.—Witness, George Squire Bontall.

The defendant subsequently repudiated the alleged agreement, and the plaintiff brought this action.

In his statement of claim the plaintiff waived his right to have a formal contract prepared by his solicitor.

The defendant pleaded that the Statute of Frauds (29 Car. 2, c. 3) had not been complied with, also that he had not waived the preparation or completion of a formal contract.

The defendant counter-claimed for the return of the 100*l.* deposit.

Warrington, Q.C. and *George Henderson* for the plaintiff.—There is a memorandum in writing within the Statute of Frauds:

Rossiter v. *Miller*, 39 L. T. Rep. 173; 3 App. Cas. 1124.

If the condition is a condition precedent, it is one in favour of the plaintiff, and can be waived:

Hawksley v. *Outram*, 67 L. T. Rep. 804; (1892) 3 Ch. 359.

Renshaw, Q.C. and *A. Beddall* for the defendant.—The condition is not in favour of the plaintiff only: "completion is by both parties."

KEKEWICH, J.—Lord Blackburn summarises the law applicable to all these cases in the following paragraph of his speech in *Rossiter* v. *Miller*, where he says at p. 1152 of 3 App. Cas.: "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up. That passage, according to my notion, is as accurate as Lord Blackburn's statements of the law generally, or perhaps I should say always, are. The question is not whether this agreement was made subject to something being done, but whether that is the essence of the contract, the point being whether the vendor may waive it as being a provision intended for his own benefit; and reference is made to *Hawksley* v. *Outram*, where there was a restraint upon trade introduced into a contract by the vendor's attorney, and it was held by Romer, J. that that was *ultra vires* the power, but the Court of Appeal thought that those for whose protection it was inserted might waive it. There could be no doubt in that case for whose benefit the term was inserted, being a condition on the sale of a business whereby the vendors agreed not to carry on a similar business within a certain radius. Can anyone doubt that such a condition is solely for the benefit of the purchaser, and in no way for the benefit of the vendor? and directly it is looked at from that point of view you see that the waiver may come in. How can I conclude that the "preparation by my solicitor and the completion of a formal

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

contract" is necessarily a term for the benefit of the vendor alone? We are all familiar with the disadvantage of having an open contract and the advantage of having a formal contract, an advantage intended mainly no doubt for the benefit of the vendor, his solicitor restricting the purchaser from going into matters of difficulty which may cause considerable expense and delay, although the title is good. But it is not solely for the advantage of the vendor; it may be of great advantage to the purchaser too to have the position defined, and it may be looked at from another point of view as well, which I take from the same speech of Lord Blackburn in *Rossiter* v. *Miller*. He says, at p. 1152 of 3 App. Cas.: "Parties often do enter into a negotiation meaning that when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract if on looking at the formal contract he finds that, though it may represent what he said, it does not represent what he meant to say." It seems to me that in this present case it is quite within the limits of imagination that both vendor and purchaser intended that there should be a possibility of seeing whether the formal contract was in accordance with what they meant to say. I cannot get out of the plain meaning of the words "I am willing to sell," not absolutely, but "subject to the preparation by my solicitor and completion of a formal contract." That means provided a contract is prepared by my solicitor, and then otherwise completed by myself, I will sell. It seems to me that provision goes to the root of the contract, and is not a stipulation which the vendor can waive, and say, "I will give up what we both agreed to be a term of the contract, and you shall fulfil the contract." On this ground I dismiss the action with costs.

Solicitors: *William Negus*; *Taylor* and *Taylor*.

QUEEN'S BENCH DIVISION.

Thursday, Aug. 1.

(Before Lord RUSSELL, C.J., POLLOCK, B., and WRIGHT, J.)

THE SOUTHERN COUNTIES DEPOSIT BANK LIMITED (apps.), *v.* BOALER (resp.). (*a*)

Practice — Companies — Appeal from justices — Recognisance—Company entering into—Liquidation—Ratification—20 & 21 Vict. c. 43, s. 3.

When a company is required to enter into a recognisance, such recognisance may be entered into by a director or member of the company acting for and on behalf of the company, and this has been the practice for many years.

If the company be in liquidation, a director or member has no longer authority to enter into a recognisance for the company, and the liquidator cannot afterwards ratify the act of a director or member who so enters into the recognisance after the liquidation.

CASE stated by the stipendiary magistrate for Brighton, the question now being whether a corporation can enter into a recognisance.

(*a*) Reported by W. W. OBR, Esq., Barrister-at-Law.

The appellant company was summoned by the respondent for having, on the 10th April 1895, refused to allow the respondent to inspect during business hours the register of the company on his tendering the statutory fee of 1*s*.

The company contended that, as they were in liquidation, such inspection could not be granted, but the magistrate held that the company was not in liquidation, on the ground that the proceedings which had been taken for the voluntary winding-up of the company were invalid.

He therefore held that inspection should have been granted, and he accordingly imposed a nominal fine, but granted this special case.

Subsequently, it was held in the Chancery Division, and affirmed by the Court of Appeal, that, although there was an irregularity, the resolution to wind-up the company was properly passed, and that the company, therefore, was in liquidation as from the 21st Jan. 1895.

By sect. 2 of 20 & 21 Vict. c. 43, upon the hearing and determination of any information or complaint in a summary way, justices on the application of a party aggrieved are to state a case for the opinion of the Superior Court; and by sect. 3:

> The appellant, at the time of making such application, and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognisance, . . with or without sureties, and in such sum as to the justice or justices shall seem meet, conditioned to prosecute such appeal, . . . and the appellant, if then in custody, shall be liberated upon the recognisance being further conditioned for his appearance before the same justice or justices, &c.

When the special case was demanded on behalf of the company, one Mr. Kirkwood, who had been a managing director of the company, entered into a recognisance under sect. 3, on behalf of the company, on the 2nd May 1895, and in this recognisance he described himself as managing director of the company.

When the case came before a divisional court, the respondent in person took a preliminary objection that, as a liquidator had been appointed, the right of a director to enter into a recognisance on behalf of the company had ceased. To this it was answered that a company need not enter into a recognisance at all. The question was then reserved for a court of three judges, so as to have a decision as to the practice in regard to recognisances by companies.

The respondent in person.—The company passed a resolution for voluntary winding-up on the 4th Jan. 1895, which was confirmed on the 9th Jan., and, as the proceedings in the Chancery Division have settled, the company was in liquidation as from the 21st Jan. 1895. This recognisance was entered into on the 2nd May 1895, and it purports to be so entered into by Mr. Kirkwood, who describes himself therein as a managing director of the company. As a liquidator had been appointed, Mr. Kirkwood had no right to represent the company at that date. [He was stopped.]

Levett, Q.C. (*W. E. Vernon* with him), for the liquidator:—Two points arise here. In the first place, can a corporation enter into a recognisance at all? In other words, does sect. 3 apply to a corporation? We submit that it does not apply and that no recognisance at all is required in this

case. The word "appellant" in the section cannot be used so as to include a corporation, and the section when fairly read makes it clear that it cannot be held to include a corporation. This appears especially from the latter part of the section, where we have the words, "the appellant, if then in custody." The word "appellant" here must mean an appellant who is capable of being taken into custody, which cannot apply to a corporation. [Lord RUSSELL, C.J.—The practice has been all the other way. WRIGHT, J.—The practice for many years past has been that a corporation has been allowed to enter into a recognisance, and may do so by a director. In Pritchard's Quarter Sessions, p. 675, I find this statement: "There seems to be some doubt whether a corporation can, strictly speaking, enter into a recognisance, though this difficulty is in practice evaded by one or more members of the body entering into one for it." After the liquidation, however, whether voluntary or otherwise, no one can act for the company except the liquidator.] We submit, in the second place, that if a recognisance was necessary, this is a proper recognisance entered into for the company. If Mr. Kirkwood had no authority to act for the company when he entered into the recognisance, we now on behalf of the liquidator of the company, adopt and ratify what was done, and that cures any defect which existed by reason of the recognisance not having been by the liquidator.

Lord RUSSELL, C.J.—It appears that the practice has been for a great number of years past, because of the difficulty as to corporations entering into recognisances, to accept the recognisance of some person who is a director or member of the corporation. That has not been done in this case effectively, because we now know that the liquidation was complete on the 21st Jan. 1895, and on the 2nd May 1895 this recognisance was entered into by Kirkwood, describing himself as managing director, and acting for and on behalf of the company. He had no authority to assume that position. That being bad, the defect could not be cured, and there was no power to ratify afterwards. I do not think the doctrine of ratification applies to such a case at all.

POLLOCK, B.—I think it is of great importance that the practice as to recognisances by companies should be observed. According to that practice a recognisance may be entered into by a director or member for the company.

WRIGHT, J.—The Divisional Court only reserved this question to have an authoritative decision as to the practice in regard to recognisances by companies. I think it is quite clear that the usage has been for many years that a recognisance can be entered into on behalf of a company by a director or member acting for the company. In this case, in consequence of the liquidation, the person (Mr. Kirkwood) who entered into the recognisance had not at the time power to enter into it for the company.

Appeal dismissed with costs.

Solicitors for the appellant company, *Ashurst, Morris, Crisp,* and *Co.*

Thursday, June 20.

(Before MATHEW, J.)

THE UNION MARINE INSURANCE COMPANY LIMITED v. BORWICK. (a)

Marine insurance—Collision clause in policy—Collision with "pier or similar structure"—Vessel driven on to sloping bank or toe of breakwater.

A policy of re-insurance contained a collision clause "against risk of loss or damage through collision with (inter alia) *piers, or stages, or similar structures."*

Two vessels covered by this policy drifted through the violence of a storm on to the toe of a breakwater, which consisted of a long sloping bank of large stones or boulders dropped into the sea for the purpose of forming a bed or mound on which the breakwater was to rest, and these loose boulders slope down from the jetty or breakwater itself for some distance into the sea. The vessels were driven broadside on to this bank of stones. their keels being the parts that struck against the boulders, and they went to pieces on the boulders.

Held, that what took place was a "collision," and that the loss was a loss or damage from collision "with a pier or similar structure" within the meaning of the clause, as the toe of the breakwater formed a part of the jetty or breakwater itself.

ACTION tried before Mathew, J., sitting without a jury for the trial of commercial causes.

The plaintiffs are an insurance company carrying on business at Liverpool, and the defendant is an underwriter at Lloyd's, and the question in the case arose upon the construction of a clause in a contract of re-insurance called a "collision clause," dated the 20th July 1894, and underwritten by the defendant and others.

The plaintiffs were original insurers of the barque *Kirkmichael* in the sum of 1000*l.*, under a policy for a voyage from Liverpool to Melbourne dated the 6th Dec. 1894, and 150*l.* under a policy dated the 20th Dec. 1894, and the plaintiffs were legally liable for and have paid a total loss to their assured under both such policies.

The plaintiffs were also original insurers of the barque *Osseo* in the sum of 2500*l.*, under a policy for a voyage from the West Coast of South America to Liverpool, dated the 18th June 1894. and they were legally liable for and have paid their assured a total loss under such policy.

On the 20th July 1894 a contract described as a "collision contract" was entered into between the plaintiffs and the defendants and other underwriters. Floating policies in conformity with this contract, and covering the risks thereby agreed to be undertaken, were duly granted to the plaintiffs periodically by the defendant and the other parties to that contract, and declarations of the plaintiffs' risks thereby re-insured were duly made thereunder. The plaintiffs duly declared the risks taken by them on the *Kirkmichael* and *Osseo* respectively under the policy granted by the defendant and others which was then current and in force.

On the 20th Dec. 1894 the *Kirkmichael* left Liverpool with a general cargo on board on a voyage thence to Melbourne.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

On the 21st Dec., owing to stress of weather, the master decided to run back for Holyhead harbour, and while making for the harbour the ship became unmanageable, owing to the hurricane that was then blowing, and drifted towards the breakwater, and about 10.30 a.m. on the 22nd Dec. the ship drifted broadside on to the breakwater and became a total wreck, her bottom being battened in on the boulders lying outside the breakwater.

On the 30th Dec. 1894 the *Osseo*, while on the voyage from the West Coast of South Africa to Liverpool with a cargo of nitrate, ran on the same breakwater, and was wrecked and almost at once went to pieces upon the breakwater about four o'clock in the morning of the 30th Dec.

The Holyhead breakwater is about two miles long, and was constructed by tipping into the harbour some six million tons of large stones or boulders quarried from the neighbouring mountain, and these formed a rubble mound or bed on which the breakwater was to be constructed. This bed is about 250 feet wide at the level of low water, and 450 at the base, which is in about fifty feet of water, and the breakwater slopes in varying degrees of inclination from the top to the bottom. The breakwater was formed by running out different roads of staging, and from the two inner roads of this staging on the harbour side the stone was deposited to the level of about high water neap tides, and protected from the influence of the sea by the stone dropped from the outer roads which were kept higher. From the outer roads on the sea side the stone was deposited until it reached the top of the staging and formed the mass of the breakwater on the sea side. The outer roads being filled up the storm washed the stone seaward; the roads were again filled up to be again washed down, and this process continued until the sea shaped the mound to the form in which it now remains. These stones or loose boulders form the foundation of the breakwater, and as they slope down from the jetty into the sea they are called the "toe" of the breakwater, as distinguished from the jetty or breakwater itself.

The *Kirkmichael* drifted on to these boulders or the toe of the breakwater at a point about twenty yards from the parapet of the breakwater and 200 yards from the lighthouse end of the breakwater, and thus more than a mile from shore, and she struck the boulders with her keel, and became a total wreck.

The *Osseo* also struck this bank of stones or toe of the breakwater about fifty feet from the spot where the *Kirkmichael* was wrecked, and in almost the same manner, and became a total wreck.

The plaintiffs paid their assured under their policies in respect of each of the vessels as for a total loss, and they now sought to recover from the defendant under the collision clause in the contract of re-insurance of the 20th July 1894.

By the collision clause, clause 3 in the contract of re-insurance the defendant insured "against risk of loss or damage through collision with any other ship, or vessel, or ice, or sunken or floating wreck, or any other floating substance, or harbours, or wharves, or piers, or stages, or similar structures, and including any running-down clause, as per original policies.

Bigham, Q.C. (*T. G. Carver* with him) for the plaintiffs.—The only question here is whether the facts proved constitute a collision with a "harbour pier, wharf, or other similar structure." We submit that they do, and we contend that this was a collision and not a stranding as may be suggested for the defendant. In the case of *The Munroe* (70 L. T. Rep. 246; (1893) P. 248), which was a pure question of fact, as this is, and in which the words of the policy were "any loss or damage through collision with (*inter alia*) any sunken wreck," the steamer ran aground, and as the tide fell she settled on the wreck of a sunken vessel and damaged herself, and afterwards shifted her position and settled again on some iron which had formed part of the cargo of another wrecked vessel and was further damaged, and Barnes, J. held that that amounted to a collision with a "sunken wreck." In the present case both these vessels came to their end by striking on the bank or toe of the breakwater, and that was collision with a "pier or similar structure" within the meaning of this collision contract.

Joseph Walton, Q.C. and *J. A. Hamilton* for the defendant.—In the case of neither of these ships was there a total loss through collision with a "harbour, wharf, pier, stage, or similar structure." There is no direct authority on the point, as the case of *The Munroe* (*ubi sup.*), though it may be an illustration, does not decide any question of law. That case turned entirely on the view the judge took of the facts of the case, and was a question of fact as this is. The question is whether under the circumstances, the loss in this case may fairly be described by the words used in the clause, and understood as such words must be when used in a policy of insurance. There is no doubt that both these ships finally struck, and were wrecked upon a bank of stones which had been constructed in making this breakwater, but what took place cannot properly be described as a "collision," because a "collision" implies a colliding against something, not necessarily projecting above the water, but a colliding or striking against it, instead of what we say took place here, a grounding upon or striking upon the bottom with the ship's bottom in the same way in which every wreck grounds upon the rocks when she strikes. There is a distinction from the fact that the vessels went aground upon a long sloping bank of stones, which were partly placed in the position in which they were by the action of the sea itself. As far as the toe of the breakwater itself is concerned, it is much more analogous to a part of the shore than to anything which is connoted by the terms "wharf, pier, stage, or similar structure." No doubt the jetty itself is a pier, but this mound of loose stones is not within the class of things contemplated by the clause, which implies dock walls and masonry structures. [Mathew, J.—Would it not be a perfectly correct description to say that these vessels struck on the breakwater of Holyhead and were wrecked?] No, this toe of the breakwater is really a part of the shore; it is a sloping shore formed no doubt artificially, but still it is the bottom of the sea, and the vessels simply took the ground, or were driven aground on this bank.

Mathew, J.—This case has been thoroughly discussed, and counsel have had every opportunity of dealing with any difficulties that occurred to

my mind. The argument addressed to me on behalf of the defendant would be an excellent one if the clause merely stood thus—"to cover any risk of loss or damage through collision." I think the argument would have been well founded in saying that there is a great deal against the view that what occurred in this case was what was intended to be covered by a clause in that form. But the clause is a far more extensive one, for it goes on to describe what is intended to be covered, namely, collision with substances of two descriptions—floating substances on the one hand, and permanent structures on the other. It goes on to say "collision with any other ship or vessel, or ice, or sunken or floating wreck, or any other floating substance"—words which are not applicable to this case. Then it goes on—"or harbours, or wharves, or piers, or stages or similar structures." The words in that enumeration applicable in this case are the words "piers or similar structures"—collision with a pier or similar structure. Now here, unquestionably, both vessels struck, to use popular language, on the breakwater, at Holyhead. All the evidence that was available has been given before me to show how the vessels struck and where they struck. The breakwater had been originally made where the water was over fifty feet deep, and it was made by a gradual accumulation of large boulders which form the toe of the breakwater, and behind that toe of the breakwater (put there for the protection of the breakwater) the jetty was subsequently erected. It seems to me that the pier and breakwater and toe are one and the same structure, the toe absolutely essential to the safety and the permanence of the jetty behind, and both these unfortunate vessels being caught in the storm and becoming unmanageable were driven as near to that jetty as they could get, namely, against the toe of the breakwater, and there went to pieces. I cannot help thinking that this phraseology "collision with any piers or similar structures" covers what happened to the ship in each case. I cannot follow the very fine distinctions that were sought to be drawn between the words "collision" and "striking," nor the suggestion that "collision" involves that the upper works of the ship must come in contact with something, or that it would not be proper to use the word "collision" if it appeared that the keel was the first part of the ship that struck against the pier. All that is very fine drawing, but it seems to me to be wholly unavailable to enable me to construe this clause in any other than its ordinary sense. Using language according to its popular meaning, I am satisfied that what occurred to these ships is within the language of the clause, and therefore my judgment must be for the plaintiffs for the amount which, I understand, has been ascertained and agreed upon between the parties.

Judgment for the plaintiffs with costs.

Solicitors for the plaintiffs, *Field, Roscoe,* and *Co.*, for *Batesons, Warr,* and *Wimshurst,* Liverpool.

Solicitors for the defendant, *Waltons, Johnson, Bubb,* and *Whatton.*

Thursday, July 11.

(Before Lord RUSSELL, C.J.)

ACTON *v.* THE CASTLE MAIL PACKETS COMPANY LIMITED. (*a*)

Carrier by sea—Passenger's luggage—Liability of shipowners for loss—Conditions on ticket limiting liability—Notice of conditions—Liability of shipowner for robbery of gold — Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502 (2).

Sect. 502 *of the Merchant Shipping Act* 1894 *provides that the owner of a British sea-going ship shall not be liable for the loss by robbery without his actual fault, of any gold, silver, jewellery, &c., taken on board his ship, the true nature and value of which have not been declared. This section applies whether the robbery be committed by a passenger for whose act the shipowner would not be otherwise responsible, or by one of the servants.*

A passenger from Durban to London by the defendants' ship received a ticket, which purported to be a receipt for the passage-money. On the margin of the ticket were the words "Issued subject to the further conditions printed on the back hereof," and on the face of the ticket there was written and printed matter which the passenger saw but did not read. There was also this clause, "The owners do not hold themselves responsible for any loss, damage, or detention of luggage under any circumstances," and on the back there was an indorsement, "Conditions and Regulations," one of which was that "it is hereby agreed by the person holding this ticket that the owners will not be liable in any way for the luggage of passengers unless the passenger choose to pay 1*s. per cubic foot for luggage put under the owners' charge." A box, part of the passenger's luggage, containing money, jewellery, and papers, was during the voyage stolen, it was supposed by one of the crew.*

Held, that the terms and conditions on the ticket constituted the terms of the contract between the passenger and the shipowners; that the passenger ought to have known that there were conditions, and that he had, under the circumstances, reasonable notice of the conditions, and was bound by them, although he had not read the same, and that he could not recover from the shipowners.

Held also, that, apart from the special contract, the passenger was disentitled from recovering that part of the goods which consisted of gold and silver by reason of sect. 502, *the value of the same not having been declared, and there being no actual fault on the part of the shipowners.*

ACTION tried before Lord Russell, C.J. without a jury.

The action was brought for damages for loss of the plaintiff's goods, chattels, moneys, and effects in the defendants' ship the *Tantallon Castle,* whilst on a voyage from Durban to London, and the plaintiff claimed 300*l.* damages.

The plaintiff sued the defendants, alleging that they are common carriers for hire, and that on the 4th May 1895 they received the plaintiff as a passenger for the purpose of being carried with his luggage in the defendants' ship, the *Tantallon*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

Castle, from Durban to London for reward to the defendants.

He alleged that part of the luggage or baggage consisted of a despatch box containing money, jewellery, scrip, documents, promissory notes, and other securities, for money of the value of 300*l.*, or thereabouts, and that these were lost on the voyage, being as he suggested, and as is probable, stolen by one of the crew, the box having been securely locked, and corded, and placed in a cabin set apart by the defendants for the plaintiff.

He also alleged that there was negligence and want of care on the part of the carriers in looking after the goods before they were lost, and apparently also in not using due diligence in endeavouring to discover the thief and the goods after they were stolen, the allegation of the plaintiff being that the box was stolen upon the voyage between Durban and Port Elizabeth by a person or persons in the employment of the defendants on board the ship. The question was, whether under the circumstances the plaintiff is entitled to recover.

The ticket which the plaintiff received purported to be a receipt to the passenger, an acknowledgment to the passenger that he had secured a passage from Durban, in Natal, to London by a particular ship or by a substituted ship. It stated what the passage money was; it stated the place of embarkment, and there was a stamped receipt for the purchase money.

On the margin and in bold print were the words "Issued subject to the further conditions printed on the back hereof," and on the face of the ticket itself there was printed matter which the plaintiff said, and as the learned judge found truly said, that he saw there but did not read.

On the face of the ticket was this clause:

The owners do not hold themselves responsible for any loss, damage, or detention of luggage under any circumstances.

On the back of the ticket was the indorsement:

Conditions and regulations (tickets are not transferable).

The clause provided:

Each adult passenger allowed to carry luggage to the extent of twenty cubic feet free of charge, and children and servants in proportion to the amount of passage money paid for them as compared with the rate for adults.

Then it proceeded:

For all luggage in excess of this allowance a charge of so much per cubic foot will be made.

And then in italics the clause proceeded:

It is to be understood, and it is hereby agreed to by the person holding this ticket, that the owners will not be liable in any way for the luggage of passengers embarking in their ships unless the passenger choose to pay 5*s.* per cubic foot for all luggage put under the owners' charge (in addition to the charge of 2*s.* per cubic foot for extra baggage), in which case the packages are to be labelled and numbered, and a receipt given for them on shipment, and should a passenger require any of the packages so labelled during the voyage, he is to relieve the owners of their custody and liability for the delivery of the same.

Then there was a further clause as to the limitation in respect to each single package. Clause 6 relates to a prohibition on the passengers bringing on board wines, spirits, and so on; by clause 7 merchandise cannot be carried under the name of luggage; by clause 8 passengers will only be received on the express condition that the owners are not liable for delay or detention of passengers arising from accident or from extraordinary or unavoidable circumstances, or from circumstances arising out of quarantine regulations and the like, or from transhipment, or for any damage, loss, or injury of or to the passengers, or to their luggage or property, from proceeding with or without a pilot, or from the act of God, &c., or from perils of the seas or rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners. Clause 9 provides for the case where a passenger requires exclusive occupation of a cabin which is capable of accommodating more than one person. Clause 10 requires the passengers to comply with regulations established on board the steamer for general comfort and safety.

Stanger for the plaintiff.

Cohen, Q.C., *Scrutton*, and *Phelps* for the defendants.

Lord RUSSELL, C.J. (after stating the facts as above set out, proceeded):—The question is, whether under the circumstances of this case the plaintiff is entitled to recover. In the first place, a part of these goods undoubtedly consisted of gold and silver apparently, of gold at all events, and so far as any such part is concerned the plaintiff has no right to recover by reason of the effect of sect. 502 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), wholly apart from any express agreement on the subject. That section regulates the relative rights and obligations in a relation of this description apart from contract, and provides that, "The owner of a British sea-going ship . . . shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases." Then the first is the case of loss by fire, and next is the case "where any gold, silver, diamonds, watches, jewels, or precious stones are taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared"—he shall not be liable if any of those "are lost or damaged by reason of any robbery." I think it is clear that this is not a case in which it can be said that there was actual fault of the owner or that the loss was with his privity, and next I am clear that the words of sub-sect. 2 of sect. 502 relate to any robbery, whether that robbery is the robbery of a passenger for whose act the company would not be otherwise responsible, or is the robbery of one of the servants. So much as to that part of the claim. The more general question is this, what is the proper construction of the terms of the ticket on the assumption—which I make for the moment—that these terms do constitute the terms of the contract. The ticket purports to be a receipt to the passenger, and an acknowledgment to the passenger that he has secured a passage from Durban to London by a particular ship, and it states: [His Lordship then read all the terms of the ticket as already set out.] I have read the whole of these conditions for two reasons, first of all, to make it clear that these conditions, if they are terms of the contract, show that the defendants are not carrying as common carriers at all, but that they are carrying only under special conditions; and in the second place, to make it apparent that any reasonable

person would suppose, and must have supposed, that in a contract of passage of this kind accompanied by baggage and by luggage it is absolutely necessary that there must have been conditions regulating the conduct of the passenger, and giving to those representing the shipowner certain powers of control without which it would be impossible to preserve discipline and order and ensure the safety of passengers and of their property on board ships; and therefore that it cannot reasonably be supposed that any person taking a ticket for a passage of this kind could be under the notion that the whole contract between them was embraced in his paying passage money, and merely getting a receipt for the same. A person taking a ticket under such circumstances must have understood, and must be taken to have understood, that there would be necessarily incident to such a relation, as he was contemplating entering upon, certain conditions regulating the nature and character and obligations relatively of that agreement. The first point therefore to consider is—assuming that these conditions do express the terms of the actual contract, then do they relieve the shipowner from responsibility? I am clearly of opinion that they do. There is nothing that I am aware of to prevent parties in the relation of shipowner and passenger from entering into any contract that they please, unless the Legislature has intervened and said that they shall not enter into such contract. I am not aware, nor has it been suggested, that there is anything to prevent the parties in this case from entering into such a contract as would be evidenced by these terms and conditions if they chose to do so. The next question therefore is, are these the terms and conditions of the contract of passage of the plaintiff? I think they are; and so far as it is a matter of fact, I hold that in the circumstances of this case, although the plaintiff did not read the conditions, but merely saw that the document that he received did contain printed and written matter, the communication of that document to him was (in the circumstances of this case) reasonable notice to him of the terms and conditions upon which his passage-money was received from him, and upon which the defendants were willing to enter into a contract to carry him. I justify that conclusion on these grounds. The plaintiff is an intelligent man, and although he may not have frequently travelled by steamships, he has gone about the world in railways, and he must have known, and at least ought to have known, that when he was engaging a passage in such circumstances as these, there would necessarily be conditions regulating the circumstances under and upon which he was to be carried. He candidly says that he did see that there was written and printed matter upon the face of the document, but that he did not read it; that there was a printed notice of a cautionary kind in the same sense put up in his cabin, but that he did not read it until after the loss. That he did not read it was his own fault. I think therefore that the case in question comes entirely within the principle of the case of *Parker* v. *The South-Eastern Railway Company* (36 L. T. Rep. 540; 2 C. P. Div. 416), and I refer particularly to the judgment of Mellish, L.J. in that case, where he says (36 L. T. Rep. at p. 542), "The parties may however reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement, and did not know its contents." Again, referring to the cases of *Henderson* v. *Stevenson* (32 L. T. Rep. 709; L. Rep. 2 H. of L. Sc. 470), and *Harris* v. *The Great Western Railway Company* (34 L. T. Rep. 647: 1 Q. B. Div. 515), he says: "The facts in the cases before us differ from those in both *Henderson* v. *Stevenson* (*ubi sup.*), and *Harris* v. *The Great Western Railway Company* (*ubi sup.*), because in both the cases which have been argued before us, though the plaintiffs admitted that they knew there was writing on the back of the ticket, they swore not only that they did not read it, but that they did not know or believe that the writing contained conditions, and we are to consider whether under those circumstances, we can lay down as a matter of law either that the plaintiff is bound, or that he is not bound, by the conditions contained in the ticket, or whether his being bound depends upon some question of fact to be determined by the jury, and if so, whether in the present case the right question was left to the jury. I am of opinion that we cannot lay down as a matter of law either that the plaintiff was bound, or that he was not bound by the conditions printed on the ticket from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread." Then he gives the illustration of a man taking a receipt for a toll-gate fare, which he might well suppose was simply a document handed to him in order to clear him at some other toll-gate. Then he says: "On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exception contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading is entitled to assume that the person shipping goods has that knowledge." I think that reasoning applies to this case, and that this is a case also in which it may be said that not only in the great majority of cases, but in all cases of contracts of passage of this nature documents are delivered which are not mere documents of receipt, but are documents which do contain conditions, and I have already pointed out the detailed conditions in order to show that they are conditions which apply not only to the question

of liability in respect of goods, but are conditions also which apply in a greater or less degree to the internal arrangements, government and discipline of the ship. I therefore come to the conclusion that the plaintiff, candidly admitting that he saw that there was not merely writing but printing upon the face of the document, ought to have assumed, and I think he must have known that it probably did contain conditions upon which he was about to be carried; that he ought to have so known as a reasonable person, that he ought to have assumed and to have so informed himself as to object, if he thought fit, to those terms of carriage, and have declined to accept such terms. Not having done so he is bound by those terms, and as I have already come to the conclusion that those terms, if they form part of the contract, exclude the liability the plaintiff has sought to impose, I must give judgment for the defendants, and the plaintiff, if he has not insured, must bear the loss. I may merely add that I do not think that in either of the alternative modes in which the matter was put as to the negligence of the defendants in not looking after the goods, and endeavouring to discover the thief, there was any evidence on which the plaintiff would be entitled to recover. I therefore give judgment for the defendants with costs.

Judgment for defendants.

Solicitors for the plaintiff, *Peacock* and *Goddard*, for *Acton* and *Marriott*, Nottingham.

Solicitors for the defendants, *Parker, Garrett*, and *Parker*.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, April 4.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

FLOOD AND ANOTHER *v.* JACKSON AND OTHERS. (*a*)

APPLICATION FOR A NEW TRIAL.

Action—Cause of action—Maliciously procuring discharge of a servant without breach of contract—Maliciously inducing not to employ—Evidence of malice—Intent to injure.

Maliciously inducing an employer to discharge a servant, though he does not thereby break any contract, or maliciously inducing a person not to employ a servant, is an actionable wrong if the servant is thereby injured.

THIS was an appeal by the defendant Allen from the judgment of Kennedy, J., after the trial, and also an application for a new trial on the ground of misdirection. The plaintiffs gave notice of a cross-appeal against so much of the judgment as directed judgment to be entered for the defendants Knight and Jackson.

The plaintiffs brought this action to recover damages from the defendants for maliciously and wrongfully and with intent to injure the plaintiffs procuring and inducing the Glengall Iron Company to discharge them from their employment and not to engage or employ them again.

The plaintiffs were shipwrights who were employed by the Glengall Iron Company, in London, on the work of repairing a ship, they being employed on the woodwork. They were employed by the day, and could be discharged at the end of any day without notice.

The defendants Allen, Jackson, and Knight were members of a trades union, the United Society of Boilermakers and Iron Shipbuilders, and were respectively the district delegate for London, the chairman, and the general secretary of the union. Members of this union were employed by the Glengall Iron Company upon the repair of the ship, upon the ironwork.

These ironworkers held a meeting and resolved not to work in the same yard as the plaintiffs, on account of something which the plaintiffs had done when working for other employers, and that they would leave the work unless the plaintiffs were removed. The ironworkers then communicated with Allen, who told them not to leave their work without the sanction of the executive committee of the union, and that he would try to settle the matter.

Allen then saw the manager of the company, and told him that the ironworkers had determined not to work in the same yard as the plaintiffs on account of the previous conduct of the plaintiffs, and that unless the plaintiffs were discharged that day all the society ironworkers would leave work there. He also said they would leave work at any other yard where the plaintiffs were employed, and that they were doing their best to stop shipwrights being employed on ironwork, which was the previous conduct of the plaintiffs to which they objected. There was evidence that Allen said that he was acting in this way in order to punish the plaintiffs.

The company thereupon discharged the plaintiffs at the end of the day, and refused to employ them again.

The defendants Jackson and Knight did not know of this dispute, and Allen did not consult them or any of the officers of the union.

The rules of the society regulated the position and functions of the officers, and of the executive council.

The Court held that the district delegate was not the servant or agent of the members of the society, or any of them.

The action was tried before Kennedy, J. and a jury. The jury found (1) that the defendant Allen maliciously induced the Glengall Iron Company to discharge the plaintiffs; (2) that the defendant Allen maliciously induced the Glengall Iron Company not to engage the plaintiffs; (3) that the defendants Jackson and Knight did not authorise the defendant Allen in acting as he did; (4) that the settlement of this dispute was a matter within the discretion of Allen. The jury assessed the damages at 20*l.* in the case of each plaintiff.

Upon further consideration the learned judge gave judgment for the plaintiffs against the defendant Allen; but gave judgment for the other two defendants.

Allen appealed, and also applied for a new trial on the ground of misdirection. The plaintiffs appealed against the judgment in favour of Jackson and Knight.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Robson, Q.C. and *Morten* for the defendant Allen.—It cannot be denied that the boilermakers had a perfect right to leave the service of the company if they wished. They were at liberty to decide not to work in the same yard with the plaintiffs. They had an equal right to tell their master of their decision and of their reason for it. It would be only proper for them to do so, in order that he might have an opportunity of exercising his option by keeping either the two plaintiffs or the hundred boilermakers. There is no evidence of any contract of the company having been broken, or having been likely to have been broken, by the action of the boilermakers. But even if there was such evidence, the acts of the boilermakers were done simply with the object of extending their trade and increasing their profits, and were therefore lawful:

The Mogul Steamship Company v. *McGregor, Gow, and Co.*, 66 L. T. Rep. 1; (1892) A. C. 25.

Allen was nothing more than the mouthpiece or messenger of the boilermakers. He had a perfect right to tell the company what would be the result if it was decided to keep the plaintiffs in their employ. The state of his mind is immaterial. There is nothing wrong in a malicious exercise of a legal right:

The Corporation of Bradford v. *Pickles*, 71 L. T Rep. 793; (1895) 1 Ch. 145.

Here there is no evidence of any conspiracy, nor any malicious procuring of a breach of contract, and the cases of *Bowen* v. *Hall* (44 L. T. Rep. 75; 6 Q. B. Div. 333) and *Temperton* v. *Russell* (69 L. T. Rep. 78; (1893) 1 Q. B. 715) are therefore distinguishable.

Lawson Walton, Q.C. and *Rufus Isaacs*, for the plaintiffs, were called to argue their cross-appeal only.—The defendants Jackson and Knight were responsible for the acts of Allen. He was their servant or agent, and acted with their authority; he was the servant or agent of each member of the union, and acted within the scope of his authority, as the jury have found:

Temperton v. *Russell*, 69 L. T. Rep. 78; (1893) 1 Q. B. 715.

If not the agent or servant of each member of the union, Allen was the agent or servant of the executive counsel of which Jackson was a member. They cited also

Limpus v. *London General Omnibus Company*, 7 L. T. Rep. 641; 1 H. & C. 526.

Murphy, Q.C., *Chester Jones*, and *L. G. Pike*, for the defendants Jackson and Knight, were not called upon to argue.

Lord Esher, M.R.—This is an action by two workmen against the defendants for having, maliciously and with intent to injure the plaintiffs, procured their employers to discharge them from their employment, and to undertake not to employ them again. That is, in effect, the cause of action. The defendant Allen was the district delegate for London of the union, the head office of which is at Newcastle-on-Tyne. A district delegate is not appointed by the executive council of the union, but by the votes of the members, and Allen was appointed in that way. Certain members of the union, who were offended with the plaintiffs, called in Allen. They were offended with the plaintiffs for what they had done when in the employment of another master at another place. A meeting of the members of the union was held, and they resolved not to work in the same yard as the plaintiffs, and that, if the masters would not discharge them, they would insist on the executive council ordering them out on strike. The men might have gone out if they wished to do so, but in truth they did not wish to do so. They wished to remain in their employment, and to insist that the plaintiffs should leave. Allen was called in to consult with the men, and he took upon himself to forward their wishes. He was not ordered by the men to do that, for they could not give him orders. If he undertook to do that which was wrong, he is personally liable. He accepted the views of the men with whom he had conferred for the good of the union, as he thought. He went to the employers, and, for the purpose of punishing the plaintiffs for what they had formerly done, he told the employers that, if they did not discharge the plaintiffs and promise not to employ them again, all their men would go out on strike. It is idle to ask us to assume that the defendant Allen did not intend thereby to put pressure upon the employers by intimating that they would be injured if they did not yield. The threat would have been an idle one if the masters would not have been injured by the men going out on strike. He knew that the masters could not afford to let the men go out, and for that reason told them that the men would go out unless they discharged the plaintiffs. The employers gave way to that threat, and discharged the plaintiffs. If the defendant so acted, he is, I think, personally liable, whether he was an agent or not. It has been contended that he did not induce anyone to break a contract. There is no cause of action for persuading a person who has made a contract to break his contract; but, if that is done maliciously for the purpose of injuring the person persuaded, or someone else, then the person against whom the malice is aimed and carried out has a cause of action on the ground of the malice directed against him. In my opinion the rule is the same whether the persuasion is to break a contract or not to make a contract. Anyone has a right to advise another not to make a contract, and that other is free to follow that advice or not. If, however, a person uses that persuasion with intent to injure the person persuaded, or the person with whom he was going to make a contract, the act is malicious, and the malice makes that unlawful which otherwise would be lawful. The law has been so laid down in this court in *Bowen* v. *Hall* (*ubi sup.*), where it was said that "if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefitting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." The same question arose again in this court in *Temperton* v. *Russell* (*ubi sup.*), where that passage was quoted, and the same view clearly expressed. Those cases, therefore, are binding authorities that an act, which may be done lawfully to the injury of another, if done without malice, is unlawful if done with malice, and gives a cause of action if injury ensues from it. I will not attempt to define malice; everyone knows what is meant by acting maliciously; it is a question to be decided by the jury. There

was evidence upon which the jury might find that that which was done by the defendant Allen amounted to a threat to the employers of the plaintiffs that if they continued to employ the plaintiffs, and would not promise not to employ them again, they would be injured in their business; and that his motive was to punish the plaintiffs for their previous conduct, and to interfere with their liberty of earning their living in the future. The jury, therefore, had a right to find, as they have done, that the defendant Allen acted maliciously, and that entitles the plaintiffs to succeed in this action in recovering damages from Allen. With regard to the claim against the other two defendants, I will not inquire into the precise position of the officers of the union; but it is clear that the mere fact of Allen being a district delegate does not make him the servant of anyone, and it is not intended that he should be a servant. It is said that he is the agent of the members of the union, but it is absurd to suppose that any member of the union thought that Allen was his agent or intended to be his agent. There was no such agency. Allen, then, is liable in consequence of the answers given by the jury to the first two questions; there was no evidence to support the third question, and it ought not to have been left to the jury; the fourth question, which the learned judge was asked to put, ought not to have been put. The defendant Allen, therefore, is liable, but the other two defendants are not, and both appeals must be dismissed.

Lopes, L.J.—I am of the same opinion. This is an action by two workmen against the district delegate, the chairman, and the general secretary, of a trades union, for maliciously and wrongfully and with intent to injure the plaintiffs, inducing the employers of the plaintiffs to discharge the plaintiffs from their employment. The jury have found that the defendant Allen did so induce the plaintiffs' employers. It is contended that the jury could not so find, because there was no evidence of malice, and therefore no wrongful act, on the part of the defendant Allen. It is quite clear, as has been pointed out by the Master of the Rolls, that any person may advise another to discharge a servant, or to break a contract, without being answerable in damages for so doing. But may any person advise another to discharge a servant, or break a contract, with intent to injure the servant or the other party to the contract? In my opinion that is a question which has been answered in *Bowen* v. *Hall* (*ubi sup.*) and *Temperton* v. *Russell* (*ubi sup.*). The latter case, as I understand it, lays down the general principle that a person who induces another to break a contract, intending thereby to injure another person, commits an actionable wrong. I can see no distinction between inducing a person to break a contract and inducing a person to discharge a servant. It is said that there is no evidence of malice. and therefore no evidence of a wrongful act. I will not attempt to define malice, but I will say that when one person wilfully does an act to the injury of another, without lawful cause, that is evidence of malice. In this case, I think there can be no doubt that the defendant Allen went to the employers of the plaintiffs with the intent to injure the plaintiffs. The evidence was that Allen said that he did it in order to punish the plaintiffs for their previous conduct. I think, therefore, that it is clear that the defendant Allen intended to injure the plaintiffs, and that he did injure them by getting them discharged. Had he any lawful cause for so acting? None, I think. He might have made the iron-workers come out on strike, or they might have done so of their own accord; but he had no right to go to the plaintiffs' employers and induce them to discharge the plaintiffs. In my opinion this case is within the proposition which I have stated, and there was ample evidence to justify the finding of the jury. The appeal of the defendant Allen must, therefore, be dismissed. As to the appeal of the other two defendants, the jury found, correctly, I think, that they did not authorise Allen to act in the way in which he did act. They did not, therefore, maliciously induce the employers to discharge the plaintiffs. I think that the learned judge might have held that there was no evidence against them. It is said that Allen was the agent of these two defendants; but there was no evidence of that, and I do not think that he was. The cross-appeal must be dismissed.

Rigby, L.J.—I am of the same opinion. Upon the question whether, in this class of case, that which would otherwise be lawful may be made unlawful by an intention to injure another person, who is in fact injured, I will ouly say that I think we are bound by the case of *Temperton* v. *Russell* (*ubi sup.*). In other parts of the law, as regards property, there are some well-known cases in which a person, who exercises a right of property, is not made liable upon the ground that he acted with an intention to injure another person. That is contrary to the civil law, and appears to me to be contrary to the law of Scotland. In our law, however, the rule is well established, and, if the matter were *res integra*, there might be good reason for extending that rule to cases like this. In my opinion, however, the case of *Temperton* v. *Russell* (*ubi sup.*) has settled the question, and we cannot go behind that decision. Then, as to the cross-appeal, I cannot see any foundation for saying that Allen was the servant or agent of each member of the union. The effect and meaning of the rules is that the members shall choose persons who are to direct the opinion of the whole body, but such persons are not servants or agents. I think, therefore, that both appeals must be dismissed.

Appeals dismissed.

Solicitors for the plaintiffs, *Smith* and *Gofton*.
Solicitors for the defendants, *Shaen*, *Roscoe*, *Massey*, and *Co.*

Saturday, June 15.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Petersen *v.* Freebody. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—Charter-party— Demurrage — Discharge — Duty of consignee in taking delivery.

By a charter-party for the carriage of a cargo of poles and spars it was agreed that the ship should "discharge overside in the river or dock into lighters or otherwise if required by the consignees." The ship was discharged into lighters, and the lay days were exceeded because the con-

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

signees did not put enough men on the lighters to receive the poles and spars when they were brought over the ship's side by the crew and placed within reach of the men in the lighters.

Held (affirming the judgment of Kennedy, J.), that it was not the duty of the shipowner to put the poles and spars into the bottom of the lighters, and that the consignees were liable to pay demurrage.

THIS was an appeal by the defendants from the judgment of Kennedy, J., at the trial without a jury in Middlesex.

The plaintiff, the owner of the ship *Magdalene*, brought this action against the defendants for demurrage. The ship was chartered by a Christiania merchant to proceed to a port in Sweden, and there load "a part cargo of spars and poles leaving room for about a hundred cubic feet of firewood." The defendants were the consignees of the cargo. The bill of lading contained the following clause: "all other conditions as per charter-party."

The charter-party contained the following clauses:

The discharging to take place in eight days, or quicker if possible. Receiver of cargo to have the option of keeping the vessel five running days on demurrage at the rate of fourpence per register ton per day, and *pro ratâ* for any part of the last of such days, payable day by day.

Lay days to commence on ship being ready for loading or discharging, provided that the captain has given notice twenty-four hours in advance and vessel being reported at customs.

The cargo to be brought to and taken from alongside the ship at merchant's risk and expense. Ship to receive and deliver the cargo with such despatch that unnecessary delay can be avoided.

If fixed for London, and discharged in one of the docks, the cargo to pay two-thirds of the ship's dock dues. To discharge overside in the river or dock into lighters or otherwise if required by consignees.

The usual custom of the wood trade of each port to be observed by each party in cases where not specially expressed.

The ship arrived at the Surrey Commercial Docks, and there commenced to discharge her cargo. The thicker spars were discharged into the water, and were rafted and taken away; the poles and thinner spars, which were in length from twenty to forty feet, were discharged into lighters provided by the consignees. These poles and spars were hoisted from the hold by a crane by the ship's crew, and were pushed by them through a port. Outside the port there was a small stage against the ship's side; the lighter was placed end-on to the stage; one of the ship's crew stood on this stage, and guided the poles and spars, as they came through the port, to the men on the lighter, who took them down into the lighter. The consignees sent two men only with the lighter; the master of the ship frequently complained that there were insufficient men on the lighter; he put two, and sometimes three, of the ship's crew on the lighter to help the consignees' men.

The discharge of the cargo was not completed until the lay days had been exceeded by about eight days.

The plaintiff alleged that the delay was caused by there being an insufficient number of men on the lighter, and that the defendants were liable for that delay.

At the trial before Kennedy, J., without a jury, the learned judge gave judgment for the plaintiff for 93*l*.

The defendants appealed.

Joseph Walton, Q.C. and *Scrutton* for the appellants.—The shipowner was bound "to discharge overside into lighters," that is, to put the poles and spars into the bottom of the lighter. The master, therefore, was bound to provide men for that purpose, and the delay was caused because he did not provide sufficient men for that purpose. The consignees were bound only to stow the spars and poles when delivered into the lighter by the ship.

Robson, Q.C. and *Carver* for the respondent.—The master was not bound to provide any men to work off the ship; his duty was to bring the poles and spars over the ship's side, so as to be within reach of the men employed by the consignees, whose duty it then was to take the spars and poles into the lighters. The delay was caused by the consignees not providing sufficient men to receive the cargo into the lighters when brought over the ship's side by the crew, and the consignees are liable to pay demurrage.

Joseph Walton, Q.C. replied.

Lord ESHER, M.R.—In this case the plaintiff, a shipowner, has sued the consignees of the cargo shipped under a charter-party for demurrage. He alleges the delay was caused by the defendants while discharging the cargo. By the terms of the charter-party the cargo was to be discharged within eight days. The discharging of the cargo took more than that time; the question now is, whose fault was it. If it was the fault of the shipowner, of course he cannot claim demurrage; if it was not his fault, then the consignees are liable to pay demurrage. By the terms of the charter-party, "the discharging is to take place in eight days," "the cargo is to be brought to and taken from alongside the ship at merchant's risk and expense; ship to receive and deliver the cargo with such despatch that unnecessary delay can be avoided," and "to discharge overside in the river or dock into lighters or otherwise if required by consignees." The operation, then, which is to be done in eight days, is to be done as between the shipowner and the consignees. The one party has to give delivery, and the other party has to take delivery, at the same time and by the same operation. Both parties must be present to perform their respective parts in that operation. The ship has to deliver the cargo, and the consignee has to take delivery. Where has that to be done? Each party must act within his own department. The shipowner acts from the deck or some other part of his ship; he always acts on board his ship. The place of the consignee is alongside the ship where the cargo is to be delivered to him. If delivery is to be made on to another ship, the consignee must be on that ship to take delivery; if it is to be into a barge or lighter, he must be on the barge or lighter to take delivery; if it is to be on to the quay, he must be on the quay to take delivery. Wherever the delivery is to be, the shipowner must give delivery; if he merely puts the goods on the ship's rail, that is not sufficient. If, on the other hand, the consignee merely stands on the other ship, or

on the lighter, or on the quay, and does nothing, he does not take delivery. It is true that, when he has put the goods on the rail of the ship, the shipowner has performed the principal part of his duty; but he must do more, and must put the goods in such a position that the consignee can take delivery; he must put the goods so far over the ship's rail that the consignee can deal with them. The moment the goods are put within reach of the consignee he must take his part in the operation of discharging. At one moment the shipowner and the consignee are both acting, the one giving and the other taking delivery; and at another the joint operation is finished. When cargo is lowered over the side of the ship into a lighter it cannot all be deposited in the same place in the lighter; those on board the lighter must therefore help in the operation of taking delivery by guiding the cargo as it is lowered into the lighter. In this case there was a joint operation in which each party had to take part. The shipowner had to put the poles and spars so that they could be taken out of the ship; it was not sufficient for him merely to get them on to the stage; but when one end was placed within reach of the men on the lighter they had to take their part in the ordinary operation in the ordinary way and assist in getting the spars and poles into the lighter. The plaintiff says that the consignees could not perform this duty with only two men on the lighter. The consignees ought to provide sufficient men to complete the discharge within the lay days, and the evidence in this case proves that the discharge was delayed beyond the lay days because the consignees did not provide sufficient men on the lighter. The defendants contend that it was the duty of the shipowner to complete the whole operation of getting the cargo out of the ship and delivering it into the lighters. Upon the true construction of the charter-party I am of opinion that that was not his duty. The delivery under the charter-party was to be a delivery in the ordinary way by a joint operation in which each was to take his part. The lay days were exceeded because the consignees did not provide sufficient men on the lighters to perform their part of the operation. The shipowner was not in default, and is therefore entitled to demurrage. The appeal fails, and must be dismissed.

KAY, L.J.—I am of the same opinion. The consignees rely upon the clause of the charter-party, which provides, "The ship to discharge overside in the river or dock into lighters or otherwise if required by the consignees." They contend that the duty imposed upon the shipowner is not performed until he has discharged the cargo, not merely overside, but by putting the spars and poles into the lighters. I do not think that that clause imposes such a duty upon the shipowner. I think that he has performed his duty when he has delivered the cargo overside and put it under the dominion and control of the men in the lighters. I entirely agree with what the Master of the Rolls has said as to the duty of the shipowner and consignee respectively with respect to the delivery of the cargo, and I do not wish to add anything upon that point. The question is, by whose default the delay was caused. I think that there was quite sufficient evidence to justify the conclusion of fact come to by Kennedy, J., that the delay was caused by there not being a sufficient number of men on the lighters to receive the cargo. The plaintiff, therefore, was entitled to succeed, and this appeal must be dismissed.

SMITH, L.J.—I am of the same opinion. This charter-party is of an ordinary description, and there is nothing peculiar in it. The shipowner complains that the consignees detained his ship beyond the days specified in the contract. *Primâ facie* he is entitled to demurrage, unless the delay can be shown to have been caused by his own default. The consignees contend that it was the plaintiff's fault, because he did not provide enough men to deliver the cargo within the lay days. The plaintiff says that he did provide enough men, but that the defendants did not provide enough men to take delivery, and he had to put some of his own men on the lighters to help their men. The question is, whether it was the duty of the shipowner to place the spars and poles at the bottom of the lighter, and whether the consignees were bound to accept delivery before that was done. It is well known that in the ordinary course of discharging a cargo, the crew of the ship does the work until the goods are over the ship's rail, and that the consignee then takes his part in the operation of discharging the cargo. The giving and taking delivery is a joint operation, as has been pointed out by the Master of the Rolls. The defendants contend that, this being a cargo of poles and spars, they had not to receive the poles and spars until the crew of the ship had put them into the bottom of the lighter. That would be an exception to the general rule. What is there in this case to show that the shipowner was bound to do that which he would not be bound to do with any other cargo, that is, to put some of his men on board the lighter? There is no custom to that effect, and there is nothing to show that any different rule is applicable in this case than applies in the case of any other cargo.

Appeal dismissed.

Solicitors for the appellants, *Trinder* and *Capron*.

Solicitors for the respondent, *Stokes, Saunders,* and *Stokes*.

Monday, June 17.

(Before Lord ESHER, M.R., KAY and SMITH, L JJ.)

Ex parte SPELMAN. (*a*)

Liverpool Court of Passage—Practice—Summary judgment—R. S. C. 1883, *Order XIV.*

The judge of the Liverpool Court of Passage does not possess the powers conferred upon a judge of the High Court by Order XIV. of the Rules of the Supreme Court.

THIS was an application for a rule *nisi* for a *mandamus* to the registrar of the Liverpool Court of Passage.

The applicant, Spelman, brought an action in the Liverpool Court of Passage to recover a liquidated amount, and applied to the registrar for leave to sign judgment under Order XIV. of the Rules of the Supreme Court.

The registrar of the court refused to hear the application upon the ground that he had no jurisdiction to exercise the powers given to a judge of

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

the High Court by Order XIV. of the Rules of the Supreme Court, which he held did not apply to the Liverpool Court of Passage.

The Passage Court Orders and Rules of Dec. 1876 provide:

Rule 1. The provisions of the Supreme Court of Judicature Acts 1873 and 1875, and such orders and rules made in pursuance thereof as are now in force, as well as any orders or rules which may hereafter be made and be in force for the time being, by virtue of the said Acts, shall (except as hereinafter is excepted or otherwise provided for) extend and be applied to, and the forms therein mentioned shall be adopted and used in all actions, causes, and matters which at or after the time of the coming into operation of these rules shall be within the cognisance of the Court of Passage of the borough of Liverpool, but so far only as such provisions, orders, rules, and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description of the court, the character of the parties, or the circumstances of the case may render necessary, but any variance therefrom not being in matter of substance shall not affect their validity or regularity.

The Judicature Act 1873 (36 & 37 Vict. c. 66) provides:

Sect. 89. Every inferior court which now has, or which may after the passing of this Act have, jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

Sect. 91. The several rules of law enacted and declared by this Act shall be in force and receive effect in all courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognisable in such courts.

The Liverpool Court of Passage Act 1893 (56 & 57 Vict. c. 37) provides:

Sect. 6. The assistant barrister or assessor of the Court of Passage shall henceforth be and be styled the presiding judge of the Court of Passage, and shall have and may exercise all powers, authorities, and jurisdictions belonging or which but for this Act would have belonged to the said court or to the mayor of the city of Liverpool or judge or member of the said court; and he shall have the same power, jurisdiction, and authority in regard to causes in the Court of Passage (subject to rules of court) as is possessed by a judge of the High Court in similar matters sitting in chambers or at Nisi Prius.

Sect. 7. The registrar of the Court of Passage shall, in dealing with actions or with matters and proceedings in an action, have (subject to rules of court) all the powers which a registrar, district registrar, master, taxing officer, or associate of the High Court has or would have in the same matter if the same were proceeding in the High Court.

A rule *nisi* for a *mandamus* to the registrar to hear and determine the application was refused by the Divisional Court (Pollock, B. and Wright, J.).

The applicant then applied, *ex parte*, to the Court of Appeal for a rule *nisi*.

A. Rutherford for the applicant.—The registrar of the Liverpool Court of Passage has all the powers of a judge or master of the High Court under Order XIV. of the Rules of the Supreme Court. The judge of the Court of Passage was empowered to make rules for his court by sect. 1 of 2 & 3 Vict. c. 27 (now repealed, but substantially re-enacted by 45 & 46 Vict. c. 50, ss. 5 and 182). Under that power rule 1 of the Court of Passage Rules was made, and confers on the registrar the powers given by Order XIV. The case of *Speers* v. *Daggers* (1 C. & E. 503) does not affect this question. The Judicature Act 1873, by sect. 89, gives to every inferior court power to grant such relief, redress, or remedy in as full and ample a manner as might or ought to be done in the like case by the High Court; and sect. 91 provides that, "the several rules of law enacted and declared in this Act shall be in force and receive effect in all courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognisable by such courts." In *King* v. *Hawkesworth* (4 Q. B. Div. 371) it was held that Order LV. of the Rules of the Supreme Court, relating to costs, was applicable in the Court of Passage. By sects. 6 and 7 of the Liverpool Court of Passage Act 1893 (56 & 57 Vict. c. 37) the powers of the judge and registrar of the Passage Court have been enlarged since the decision in

Fellows v. *The Owners of the Lord Stanley*, 67 L. T. Rep. 857; (1893) 1 Q. B. 98.

Lord ESHER, M.R.—This question depends upon the construction of rule 1 of the Passage Court Rules 1876; if that rule does not give the Passage Court the powers of Order XIV. of the Rules of the Supreme Court, the Passage Court has not those powers. When Order XIV. was established the Passage Court was a peculiar court; the assessor was not the judge; originally the mayor and certain officials of the corporation were the judges; afterwards a lawyer was appointed as assessor for the purpose of trying causes, but he had nothing to do with regard to pleadings and other preliminary matters. He has indeed been given the powers of a judge who tries causes. In the case of *King* v. *Hawkesworth* (*ubi sup.*), which has been cited, a question arose as to the costs of the trial, and the Queen's Bench Division thought that the orders and rules under the Judicature Acts were applicable. That case, however, does not touch the present question. The assessor of the Passage Court never had chambers, for he had no jurisdiction which he could exercise at chambers with regard to preliminary proceedings in an action. The provisions of Order XIV. do not relate to the trial of an action, but are intended to prevent the necessity of a trial. The jurisdiction of a judge under Order XIV. is exercised by him as a judge at chambers; it is, indeed, in the first instance exercised by a master at chambers, but the jurisdiction is that of a judge at chambers. It was therefore impossible when the Passage Court Rules of 1876 were made for the jurisdiction under Order XIV. to be exercised in that court; that court had no machinery for the purpose. Then came the Passage Court Rules of 1876, which did not alter the constitution of the court, and did not give the assessor jurisdiction in chambers. The Liverpool Court of Passage Act 1893 (56 & 57 Vict. c. 37) does extend the powers of the assessor in certain respects; but his power to make rules under that

Act is restricted so as to prevent him from giving himself any jurisdiction which he did not before possess, because he cannot make rules without the concurrence of the Rule Committee. Now, rule 1 of the Passage Court Rules of 1876 provides that the provisions of the Judicature Acts, and of the orders and rules made under them, shall apply to actions in the Court of Passage, "but so far only as such provisions, orders, rules, and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description of the court, the character of the parties, or the circumstances of the case may render necessary." The difficulty which existed before that rule continued to exist after. The powers of Order XIV. could not be exercised in the Court of Passage without altering the constitution of the court, and that the assessor had no power to do. If such powers could be conferred upon the Passage Court without an Act of Parliament, they certainly have not yet been conferred. I think, therefore, that this application must be refused.

KAY, L.J.—I am of the same opinion. By the statute 2 & 3 Vict. c. 27, s. 1, power to make rules was given to the assessor of the Passage Court. Under that Act the Passage Court Rules of 1876 were made.. It is contended that rule 1 has given to the Passage Court the powers of Order XIV. of the Rules of the Supreme Court. The Judicature Act of 1873, by sect. 39, confers jurisdiction upon a judge sitting at chambers; and, in the rules under that Act, when the expression "the court or a judge" is used, the expression "a judge" clearly means a judge sitting in chambers. The jurisdiction given by Order XIV. was given to "the court or a judge." When the Passage Court Rules of 1876 were made, the judge was an assessor appointed to try causes, who had no chambers; the registrar of that court was not in the same position as a master of the High Court, who acts in chambers as though he were a judge, his orders having the same effect as orders made by a judge in chambers. There is an appeal in the High Court from the master to the judge in chambers. Here there was no appeal to the assessor of the Passage Court, for he has no chambers. Looking at the provisions of rule 1 of the Passage Court Rules, it is clear, from the terms of the rules, that this application must fail. It provides that the orders and rules under the Judicature Acts shall apply to the Court of Passage only so far as they are applicable thereto. The powers of Order XIV., which were to be exercised by a judge in chambers, could not apply to the Passage Court; the registrar of that court could not then act as a judge sitting in chambers. The provisions of the Liverpool Court of Passage Act 1893 no doubt make the position of the assessor of that court more nearly analogous to that of a judge, and somewhat alter the position of the registrar; but rules made under sect. 8 of that Act can be made only with the concurrence of the Rule Committee of the Supreme Court. I agree that this application must fail.

SMITH, L.J.—This appears to me to be a very plain case. I do not say whether sect. 1 of 2 & 3 Vict. c. 27 gave the assessor power to make a rule applying the provisions of Order XIV. to the Passage Court. Assuming that it did, the rule which was made in 1876 is limited by the words "so far only as they are or may be applicable thereto." The reasons why the provisions of Order XIV. could not apply to the Passage Court have been stated by the Master of the Rolls and Kay, L.J. The assessor only tried causes, and had no chambers, and could not, therefore, administer the provisions of Order XIV. It is said that the position of the assessor has been changed by the Liverpool Court of Passage Act 1893 to that of a judge; but that depends upon rules to be made under sect. 8, and no such rules have yet been made and confirmed. The application must be dismissed.

Application refused.

Solicitors for the applicant, *Norris, Allens,* and *Chapman,* for *J. M. Quiggin* and *Brothers,* Liverpool.

Monday, June 24.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

LOFTUS v. HERIOT. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Husband and wife — Judgment against married woman — Separate property — Restraint on anticipation—Equitable execution—Arrears of income due and payable at date of judgment—Married Women's Property Act 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-sects.* 2 *and* 4, *s.* 19.

A restraint on anticipation continues until the income of the separate estate has come into the hands of a married woman, and therefore such income which has become due and payable to, but has not been received by, a married woman at the date of a judgment against her, cannot be taken by any process of execution to satisfy such judgment.

Hood-Barrs *v.* Cathcart (No. 2) (70 *L. T. Rep.* 865; (1894) 2 *Q. B.* 559) *followed.*

APPEAL by the defendant from an order of Day, J. at chambers, appointing a receiver of income of trust funds due to the defendant, by way of equitable execution.

The plaintiff had recovered judgment against the defendant, a married woman, in an action for goods sold and delivered. The judgment, which was dated the 15th Nov. 1892, was in the form prescribed in *Scott* v. *Morley* (57 L. T. Rep. 919; 20 Q. B. Div. 120).

By a settlement, made upon the marriage of the defendant in 1872, it was provided that the trustees should pay the income of the trust funds to the defendant for her life, and during coverture for her separate use, and without power to anticipate the same.

At the date of the judgment there was income of the trust funds in the hands of the trustees of the settlement which was due and payable to the plaintiff.

An order was made by Day, J. at chambers, by way of equitable execution, appointing a receiver of the income of the trust funds due and payable to the defendant at or before the date of the judgment, sufficient to satisfy the judgment debt and costs.

The defendant appealed against that order.

Macaskie for the appellant.—Any alienation of income before it actually reaches the hands of the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

married woman who is restrained from anticipation is prevented by the restraint. No order, therefore, can be made which will prevent the income from being paid to the married woman. The restraint on anticipation continues until the income has actually come into the hands of the married woman. That is the judgment of this court, delivered by Kay, L.J. in *Hood-Barrs* v. *Cathcart* (*No.* 2) (70 L. T. Rep. 865; (1894) 2 Q. B. 559). That judgment was followed in *Pillers* v. *Edwards* (71 L. T. Rep. 788). *Cox* v. *Bennett* (64 L. T. Rep. 380; (1891) 1 Ch. 617), which is relied on by the respondent, did not decide this point.

Oswald, Q.C. and *Bartley Denniss* for the respondent.—*Hood-Barrs* v. *Cathcart* (*No.* 2) (*ubi sup.*) is distinguishable; the income in that case had accrued due after the date of the judgment. The passage in the judgment of Kay, L.J., which seems to decide this question, was a dictum only, and was not necessary to the decision. In *Pillers* v. *Edwards* (*ubi sup.*), the court assumed that this point was decided in *Hood-Barrs* v. *Cathcart* (*No.* 2), which was not the case. In *Hood-Barrs* v. *Cathcart* (*No.* 1) (70 L. T. Rep. 862; (1894) 2 Q. B. 559), in which the judgment was delivered by Davey, L.J., on the same day as the judgment of Kay, L.J., it was expressly stated that the court did not decide this question. Many of the cases show that, when the income becomes due and payable to the married woman, the restraint upon anticipation is at an end:

Moore v. *Moore*, 1 Coll. 54;
Harnett v. *M'Dougall*, 14 L. J. 173, Ch.;
Draycott v. *Harrison*, 17 Q. B. Div. 147;
Re Brettle, 2 De G. J. & S. 79;
Pemberton v. *M'Gill*, 1 Dr. & Sm. 266;
Hyde v. *Hyde*, 59 L. T. Rep. 529; 13 P. Div. 166;
FitzGibbon v. *Blake*, 3 Ir. Ch. Rep. N. S. 328;
Claydon v. *Finch*, 28 L. T. Rep. 101; L. Rep. 15 Eq. 266;
Cox v. *Bennett*, 64 L. T. Rep. 380; (1891) 1 Ch. 617.

[KAY, L.J. referred to *Baggett* v. *Meux* (1 Coll. 138; 1 Ph. 627).]

Macaskie was not heard in reply.

Lord ESHER, M.R.—That there should have been considerable doubt about this matter during the many discussions, in the dispute between Mr. Hood-Barrs and Mrs. Cathcart, does not cause any surprise in my mind. Mrs. Cathcart has appeared in person, so that it was almost impossible to get at what the facts were in any of the cases, and it was certainly impossible to understand what were the points of law which were taken. When, on a particular occasion, there was a long argument by Mr. Hood-Barrs, I cannot say that he made the matter clear. Two cases, really of the same kind, came before this court, and the court thought that they were bound to take the greatest care in trying to find out what, in their opinion, the law was. The cases were considered for a considerable time, and it is absurd to suppose that the judges of the court were not in communication with each other in considering what the law was. On the same day, after careful inquiry, in which almost all the judges took part—certainly those who had to take part in the judgments—two judgments were given. It is said that people and the Profession are puzzled by those two decisions, as they are in conflict; that the judgment read by Davey, L.J. is in conflict with that read by Kay, L.J. But when we come to look at them carefully, they are not the least in conflict; they decide different points altogether. There is nothing in the judgment of Davey, L.J. which is in conflict with the judgment delivered by Kay, L.J. Now, it is said that there are other and older judgments which are in conflict; that there are decisions of the Court of Appeal which are not the same; and the argument on the last point was that the same judges in the same court were in conflict with themselves. Those older cases are now said to be in conflict with the last decision of the Court of Appeal, and we are told that the Lord Chancellor said, what he has not said, that the former case was to overrule the later one; but he has said that, if the Court of Appeal is in conflict with itself, then the court may consider whether it will abide by its last decision, or whether it will not alter its last decision and adopt its former decision. The court is very likely, I think, when it has carefully considered the case, if it finds it differs from the former case, to abide by its last decision. I cannot see that that opinion of the Lord Chancellor helps us much. It seems to me now, as it did at the time the case of *Hood-Barrs* v. *Cathcart* (*No.* 2) was decided, that this question is to be considered at the time when somebody wants to deal with the property of a married woman. That is the moment when the doctrine applies—not the moment when the judgment is given, or the contract is made, or any other point of time than that, but at the moment when somebody comes forward and says, "I admit you, the married woman, have not had that money paid to you. I say it ought not to be paid to you, but to me." That is the time. If the appellant's proposition is true, it seems to me she would be anticipating the time and moment when she is to receive the money which has been settled to her separate use without power of anticipation. So far from thinking that the decision in *Hood-Barrs* v. *Cathcart* (*No.* 2), which was come to after the most careful consideration by this court, is wrong, I was of opinion, and am of opinion still, that it was perfectly right. Certainly, if I had the power to say that one may overrule the last decision of the court and adopt the former decision, or to say that they were in conflict, I should deliberately and clearly abide by the last decision. In my opinion, the decisions are not conflicting. The cases were carefully considered by the court, and almost every one of them is mentioned and dealt with in the last case of *Hood-Barrs* v. *Cathcart*. It may be a proper question to go to the House of Lords for their consideration. I was disposed to say that, if the money is paid to an agent of a married woman, authorised by her to receive it for her, and to be under her control entirely, and if, after it is due, such an agent receives the money—I will not speak absolutely—that that might be a receipt by her. I will not say that that is not so. I have been frightened from saying that by the intimation that, if I do, then the husband may be such an agent. If that could be, then it seems to me that the protection given, or intended to be given, to a married woman by those who invented the doctrine might be entirely destroyed. Even at this advanced period the husband is the stronger of the two, and he has powers of persuasion over his

wife which, if they are exercised without the control of the court, are very powerful indeed. If he can be privately made her agent to receive the money so that it shall never come into her hands, it seems to me that the protection might be entirely destroyed. That question, however, does not arise here, and it is enough to say that I stand by the decision of the Court of Appeal in *Hood-Barrs* v. *Cathcart* (*No.* 2), and say that the restraint against her anticipating is not at an end when the money has become due and payable to her, but has not been paid to her, and which she can only obtain, if it is disputed, by means of an action. That is not a receipt by her. If she does anything with the money at that time, and under those circumstances, she is anticipating it, even although it is due but not paid. It must be paid to her herself; at all events, in the view of the law, it must be paid to her, and the restraint on anticipation lasts until the time when she is in point of law actually in receipt of it. I consider that the judgment in *Hood-Barrs* v. *Cathcart* (*No.* 2) is right, and that, therefore, this appeal must be allowed.

KAY, L.J.—In this case judgment was obtained on the 15th Nov. 1892 for some 40*l.* against a married woman. I suppose it was in the ordinary form of a judgment against a married woman. Her trustees then had certain income in their hands, which we are told was then due to her. They have that income still. On the 1st April 1894 the order, which we have now to consider, was made by Day, J. By a settlement made on the marriage, it was provided that the funds in the hands of the trustees should be dealt with thus: That after the solemnisation of the marriage the trustees should pay the income of the funds to her during her life, and during her intended coverture for her separate use and without power to anticipate the same. Now the question is, whether this comes within the decision of this court in *Hood-Barrs* v. *Cathcart* (*No.* 2) in 1894. If it does, of course this court is powerless to deal with it now otherwise than as it dealt with it then, and the only mode of altering what was done then would be by appeal to the House of Lords. In *Hood-Barrs* v. *Cathcart* (*No.* 2), as appears by the report, this happened: There were two similar applications, made to the Court of Appeal constituted differently. One was the Court of Appeal consisting of Lord Esher, M.R., Smith and Davey, L.JJ.; the other was the Court of Appeal consisting of Lord Esher, M.R., Kay and Smith, L.JJ. Judgment was given in each of those appeals upon the same day, namely, on the 16th June 1894, and they are reported together in 70 L. T. Rep. 862, 865; (1894) 2 Q. B. 559. Now, it is very material to see what appeared on the face of those judgments. In both cases the question was whether income, which had accrued after the date of the judgment, but had not been paid over to the married woman, could, by the appointment of a receiver or by any other mode, be made available to pay the judgment debt. It was decided by both courts that it could not. Davey, L.J., who read the judgment of one of the courts, said: "For the purpose of this judgment we have assumed that the restraint on anticipation was gone as to the rents in arrear, but we must not be taken to decide that point or express an opinion upon it. We have referred to deal with the larger question." The other judgment, however, which was read by myself, does deal with that question, and expresses the opinion distinctly that the restraint on anticipation was not gone until the money was either actually or in effect received by the married woman, and that the mere fact that it was due, like rent in arrear, did not make it free separate property. That was one of the grounds, and the main ground, I think, of the judgment of this court in the second of those two cases. I have said that, because it shows, what anyone might assume, that the court, as constituted, did consider the question, and that every one of the judges who took part in those two appeals was informed in fact as to the judgment delivered in the second one. Then the question is whether this case differs from *Hood-Barrs* v. *Cathcart* (*No.* 2). The only difference that I can make out is that here, at the date of the judgment, there was some income in arrear in the hands of the trustees which had not been paid over to the married woman. I do not see how that can make any difference. The date of the judgment was in Nov. 1892. By the Married Women's Property Act 1882, "every contract entered into by a married woman to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Therefore, by analogy, a judgment would bind not merely separate property that she was entitled to at the date of it, but all separate property which she might thereafter acquire. Therefore, when the question is whether the separate property is bound by the judgment, it does not seem material whether it was separate property acquired before the date of the judgment or separate property acquired after the date of the judgment. It is apparent that the court has so treated the matter, because in the case of *Pillers* v. *Edwards* (*ubi sup.*), to which we have been referred, there was separate property of the married woman, which was restrained from anticipation, in arrear at the date of the judgment. The court, in that case, held distinctly—Lindley, L.J., as appears from his judgment, with reluctance—that it was, nevertheless, bound by the decision in *Hood-Barrs* v. *Cathcart* (*No.* 2), the second of the two judgments to which I have referred, and that the arrears at the date of the judgment were just as much protected by the restraint on anticipation as arrears which accrued afterwards. The judgment in *Hood-Barrs* v. *Cathcart* (*No.* 2) decides the point as to which it may fairly be said there has been some conflict of authority. In some cases it certainly has been considered that a married woman might, after her income had accrued due, and before it was actually paid over to her, make an assignment of it. That looks as if, and indeed in some cases it is put on that ground, the restraint on anticipation is gone directly the income becomes due and payable. Therefore, I agree, it is a matter which it is very fair to take to the House of Lords, and the House of Lords must finally determine the question. But it has been brought very prominently before these courts lately because of the power which the court now assumes to grant a receiver to enforce a judgment, and the court has been appealed to again and again to grant a receiver, in order to enforce a judgment, either of arrears due at the time of the judgment or after. In no case that has been

cited, or that can be found, has a judgment, before this practice arose, been made effectual against the arrears of the income of a married woman due even at the date of it. Those were not the cases cited to us. This court has, in several instances since the discussion in *Hood-Barrs* v. *Cathcart*, again and again decided that, neither as against arrears of income due at the date of the judgment, nor against arrears of income which accrued after the date of the judgment, can the judgment be made effectual by a receiver, sequestrator, or any other kind of process. The ground on which it is put is this, that that would be practically destroying, to a very great extent, the protection which the courts have always given to married women who are restrained from anticipation. I, therefore, think that no valid distinction can be made between the recent decision and this case; and, speaking for myself, I feel unable to decide against the decision of *Hood-Barrs* v. *Cathcart* (*No.* 2), and *Pillers* v. *Edwards*, which followed it. I think this case is completely covered by those authorities, and that the appeal must be allowed.

SMITH, L.J.—The question sought to be raised in this case is, whether income which became due and payable to a married woman, and is fettered against anticipation, becomes free money when it becomes due and payable, or only free money when it gets into the hands of the married woman. That has been decided upon many occasions. Speaking for myself, I should have thought that, if the money got into the hands of an agent of the married woman, if the agent was to receive it for her, that would have been sufficient; but, if it got into the hands of the husband to receive it for himself, that would not be sufficient. That is not this case. I wish to point out that, in the numerous cases of *Hood-Barrs* v. *Cathcart*, the first time when the matter was really taken in hand was on the 13th April 1894. There were many applications prior to that date. Mrs. Cathcart came in and made applications, many of which were perfectly unintelligible. On the 13th April 1894 she made an application which was intelligible, namely, as to whether or not a certain receiver ought or ought not to be appointed. We took time to consider, and Davey, L.J. undertook to give the judgment of the court. Before that judgment of Davey, L.J. was given, another application was made by Mr. Cathcart, and Mr. Bartley Denniss explained to us that there was not really any difference between the application which Mrs. Cathcart made then, and that which she made on the 13th April, and we again took time to consider, the court being then formed as it is to-day. The matter was afterwards debated, and two deliberate judgments were prepared, one by Davey, L.J. to decide the point which was taken on the former occasion, and the other to decide the point which was raised when Kay, L.J. was a member of the court. They were perfectly distinct judgments. The judgment of Kay, L.J., which was the judgment of the whole court, decided the point which is now in question, namely, as to when property restrained from anticipation became free from the restraint. In that case we held that the true view was, notwithstanding the conflicting decisions which had been given before, that property clogged against anticipation was not free property until it got to the hands of the married woman. Attempts have been made since that time to get rid of that for the purpose of seeing whether or not what was laid down in the judgment delivered by this court on the 16th June 1894 was the law of the land. That, however, has been settled. In the meantime, an attempt was made in the other branch of the court, when I was sitting with my brother Lindley, to get rid of the decision of *Hood-Barrs* v. *Cathcart* delivered on the 16th June 1894. As I said in *Pillers* v. *Edwards*—I do not intend to go over the ground again, and I stand by every word, except possibly the statement as to whether *Hulbert and Crowe* v. *Cathcart* had been argued or not—I am bound by the deliberate judgment, to which I was a party, which was delivered by Kay, L.J. It is impossible for this court to overrule a written judgment, or indeed the unanimous judgment of the majority of the court. If that judgment be wrong, the only court which can set it right is the House of Lords. It is useless to come here arguing it over and over again. If that was not the rule, every case which has been decided in the Court of Appeal could be re-opened and argued over again. I protest against that. This appeal ought to be allowed.

Appeal allowed.

Solicitors for the appellant, *Crossman* and *Prichard*, for *Dunlop*, Berwick-on-Tweed.

Solicitors for the respondent, *Hood-Barrs* and *Co.*

Friday, July 5.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

Re TUCKER; *Ex parte* TUCKER. (*a*)

APPEAL IN BANKRUPTCY.

Bankruptcy — Petition — Petitioning creditor — Judgment debt due to three persons—Death of one judgment creditor—Petition presented by survivors — Joining representative of deceased judgment creditor — Bankruptcy Act 1883 (46 *& 47 Vict. c.* 52), *s.* 6.

Three co-plaintiffs in an action obtained judgment against the defendant with costs. The costs were taxed. One of the co-plaintiffs having died, the survivors presented a petition in bankruptcy against the defendant, the petitioning creditors' debt being stated to be the amount of the costs due under the judgment.

Held, that the two survivors might present a petition in bankruptcy against the judgment debtor, in respect of the judgment debt, without joining the personal representative of the deceased judgment creditor.

THIS was an appeal by the debtor from an order of the registrar making a receiving order against him.

An action was brought against the debtor, in the Chancery Division, by Mary Tucker, some infants by Mary Tucker as their next friend, and Elizabeth Tucker. In that action judgment was given for the plaintiffs that they were entitled to a declaration and inquiries.

As to the costs of that action, Romer, J., at the trial, made an order that the defendant should pay to the plaintiffs the costs of the action, and that the plaintiffs should pay the costs of the

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

defendant in respect of two issues upon which he succeeded, and that the balance found to be due from either party upon taxation should be paid to the other party.

The taxing master made his certificate that he had "taxed the costs in pursuance of the order," and that he found that the costs payable by the defendant to the plaintiff amounted to 290*l*. It was said that the taxing master had taxed only the costs payable by the defendant, and not the costs payable to the defendant. Before the registrar parol evidence was given by the petitioning creditors that by arrangement the costs payable to the defendant had not been deducted from the costs payable by the defendant, but had been otherwise provided for.

Elizabeth Tucker died before the petition in bankruptcy was presented.

A petition in bankruptcy was presented against the debtor by Mary Tucker, and by the infants by Mary Tucker as their next friend. The petitioning creditors' debt was stated in the petition to be the above judgment debt of 290*l*.

The registrar made a receiving order against the debtor, and the debtor appealed.

E. W. Hansell for the appellants.—There are two grounds upon which the learned registrar ought to have refused to make a receiving order upon this petition. First, the debt upon which the petition is founded is a judgment debt due to three persons jointly, and one of the joint creditors is not a party to the petition. Secondly, there was not a good petitioning creditors' debt. The debt was a joint judgment debt due to three persons, and all must join in the petition. Though one of the joint judgment creditors died before the presentation of the petition, and the debt became in law due to the two survivors, yet there was no survivorship as to the beneficial interest of the deceased creditor, and the person in whom that beneficial interest is vested ought to be a party to the petition:

Brickland v. *Newsome*, 1 Camp. 474; 1 Taunt. 477.

A trustee, though he can sue at law, cannot present a petition in bankruptcy without joining his *cestui que trust*:

Ex parte Culley; *Re Adams*, 38 L. T. Rep. 858; 9 Ch. Div. 307;

Ex parte Dearle; *Re Hastings*, 14 Q. B. Div. 184.

The legal personal representative of the deceased judgment creditor ought, therefore, to have been made a party to the petition. The registrar said that he thought an amendment might be made by adding the personal representative as a party, but no amendment was asked for. There was not a good petitioning creditors' debt. The judgment directed that, with regard to the costs, there should be payment of the balance by the person from whom a balance was found to be due. The taxing master, by his certificate, has simply found the costs payable by the defendant to the plaintiffs, instead of finding the amount payable by each party and the balance due from one party. The certificate is for all the costs payable by the defendant, and is not in accordance with the terms of the judgment. The evidence offered by the petitioners was not admissible.

Carrington, for the respondents, was not heard.

Lord ESHER.—First I will deal with the last point which has been raised by the appellant. There was an order made by Romer, J. in the Chancery Division. That order was that costs should be paid to the plaintiffs in the action. That was a judgment for the plaintiffs for certain costs. The order was that the costs should be taxed by the proper officer and be taxed in a particular way, and that the taxing officer should certify what balance was due. When that taxation has taken place the certificate becomes part of the judgment. The taxing officer has certified that he has "taxed the costs in pursuance of the order," that is, in accordance with the order, and he certifies that the amount due to the plaintiffs for costs is 290*l*. His certificate therefore states that he did tax and certify according to the order. It is said that he acted wrongly, but there is no evidence of that. The only thing is that he has not set out in his certificate each part of his inquiry. The view of the appellant is erroneous, and the certificate is right. There is, therefore, a judgment, or its equivalent, as to these costs in favour of the plaintiffs. Then, as to the other point. There was a judgment in favour of three plaintiffs, that is, a joint judgment for costs. If all of them were alive they must all have joined in an action upon the judgment. One of them has died. Could the two survivors sue at law? It is clear that they could. They would be the proper persons to sue at law. There is then a good petitioning creditors' debt, and admittedly a good act of bankruptcy, as there was in the cases of *Ex parte Culley*; *Re Adams* (*ubi sup.*), and *Ex parte Dearle*; *Re Hastings* (*ubi sup.*). The only question, then, is whether these are the proper petitioning creditors. The petitioners are the persons who would be entitled to sue at law. If they were bare trustees for an absolute owner, then, according to the cases, they could not present a petition in bankruptcy without joining the *cestui que trust*. That is the whole of the rule laid down in those cases, that it is only necessary to join a *cestui que trust* if he is absolutely entitled and capable of giving an absolute release. Here the two survivors are not bare trustees, but are trustees who themselves have an interest in the judgment. This case is, therefore, not within the authority of *Ex parte Culley* (*ubi sup.*) and *Ex parte Dearle* (*ubi sup.*), and these are good petitioning creditors, although as to part of the debt they are trustees for others. There is, then, no defect in the petition, and the appeal against the making of a receiving order must be dismissed.

KAY, L.J.—I am of the same opinion. The second point raises this question. By a judgment in the Chancery Division, costs were ordered to be taxed in a particular way; the plaintiffs were to have the costs of the action, but the defendant was to have the costs of two issues upon which he succeeded; the taxing officer was to certify what balance was due and to whom. The taxing officer has taxed the costs, and made his certificate. He has stated in the certificate that he has "taxed the costs in pursuance of the order," and finds that the sum due to the plaintiffs for costs is 290*l*. Upon the face of the certificate he has done that which he was directed by the judgment to do. It is said that he has not done so, as appears from evidence tendered by the petitioning creditors. If that evidence is admissible, it appears that everything was done by agreement. That objection must, therefore, fail. The other

objection is this: It is said that the petition is not a proper petition, because it has been presented by two persons, and another person ought to have been joined. The order was that the defendant should pay the costs to three persons, and the petition is by two only. Those two persons were, when the petition was presented, the only creditors at law. It is said that the legal personal representative of the third, who had died, ought to have been joined as a petitioner, because he was entitled to a beneficial interest in part of the costs. Ought he to have been joined? There are only two authorities upon the point: *Ex parte Culley*; *Re Adams* (*ubi sup.*), and *Ex parte Dearle*; *Re Hastings* (*ubi sup.*). In *Ex parte Culley*, Cotton, L.J. said: "Now, in former days it was necessary, in order to support a petition for adjudication, that there should be a legal debt, and *primâ facie* a creditor entitled to a good legal debt could support a petition for adjudication. But if it turned out that, although he was entitled to the legal debt—that is, entitled at law—he was not absolutely entitled to it by reason of there being a beneficial ownership in someone else, and the beneficial owner was a person who had it in his power to deal as he thought fit with the debt, either by releasing it or receiving it; then the practice in bankruptcy was that the beneficial owner must join in the petition with the legal creditor, for the purpose of satisfying the court that the debt had not been released or paid. That, I understand, was the old rule." The present Master of the Rolls was one of the Lords Justices who decided that case. The point came again before the Court of Appeal in *Ex parte Dearle*; *Re Hastings* (*ubi sup.*). There the decision was that a mere trustee of a debt for an absolute beneficial owner is not entitled to present a bankruptcy petition without joining the *cestui que trust*, because the *cestui que trust* might absolutely release the debt. In this case that is not so. These two petitioners have an interest in the costs, and are trustees of one-third only. This case is not, therefore, within the authority of *Ex parte Culley* (*ubi sup.*) and *Ex parte Dearle* (*ubi sup.*), or within the rules there laid down, or within the reason of those decisions. The appeal, therefore, fails and must be dismissed.

Smith, L.J.—There was a litigation in the Chancery Division, and an order was made for the payment of costs. The costs were to be taxed in a particular way, and the order of Romer, J., was that the costs payable by the one party were to be set off against the costs payable by the other party, and the balance due from either party was to be paid to the other. The taxing master has made his certificate that 29*l.* is due to the plaintiffs, and the petitioning creditors' debt is founded upon that. It is said that it appears on the face of the certificate that the taxing master has not complied with the order. That is not so. Upon the face of the certificate it appears that everything was done in accordance with the order of Romer, J. If the parol evidence is admitted, it is clear that everything was done by agreement, and on that ground also the objection must fail. There was, therefore, a good petitioning creditors' debt. It is then said that all the proper petitioning creditors were not joined; that the debt was due to three persons, and that two only have joined in the petition. There was, however, but one debt. It is argued that the legal personal representative of the third judgment creditor ought to be joined. There is no ground for that contention. The debt survives to the two survivors. There is a good legal debt due to those two for which they might sue, and it appears from the case of *Brickland* v. *Newsome* (*ubi sup.*), that there is a good petitioning creditors' debt if there is a good legal debt. It is said that, in bankruptcy, it is necessary to bring in the *cestui que trust*, and the cases of *Ex parte Culley*; *Re Adams* (*ubi sup.*) and *Ex parte Dearle*; *Re Hastings* (*ubi sup.*), have been referred to. It was held in those cases that, if a person is a bare trustee of a debt for an absolute beneficial owner, he must join the *cestui que trust* in a bankruptcy petition. In this case the petitioning creditors are not bare trustees for an absolute beneficial owner, and therefore that rule does not apply here. The appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Kennedy*, *Hughes*, and *Kennedy*.

Solicitors for the respondents, *Tocque* and *Rodyk*.

Friday, July 5.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Re Saunders; *Ex parte* Saunders. (*a*)

APPEAL IN BANKRUPTCY.

Bankruptcy—Realisation of property—Pension of bankrupt—Pension of Indian officer—Order for payment of pension to trustee—Jurisdiction—Discretion—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 53, *sub-sect.* 2.

In the case of a pension granted to a retired officer of the Indian army under the Indian Pensions Act 1871, *the court has jurisdiction to make an order, under sect.* 53, *sub-sect.* 2, *of the Bankruptcy Act* 1883, *directing payment of the pension to the trustee in bankruptcy of the officer, and it is a matter of discretion in every case whether such an order should be made or not.*

This was an appeal by the trustee in bankruptcy from an order of the Divisional Court (Williams and Kennedy, JJ.), setting aside an order of the judge of the Wandsworth County Court.

The bankrupt was a retired major-general of the Indian Army, who had a pension of 320*l.* a year granted to him under the Indian Pensions Act 1871 (Indian Act No. xxiii.) in respect of military services in India.

The bankrupt had a wife and two daughters, and had no means except this pension. His wife had only a very small amount of separate estate.

Upon the application of the trustee in bankruptcy, the County Court judge made an order, under sect. 53, sub-sect. 2, of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) that 150*l.* a year of the bankrupt's pension should be paid to the trustee in bankruptcy for the creditors.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides (sect. 53, sub-sect. 2):

Where a bankrupt is in the receipt of a salary other than as aforesaid, or is entitled to any half pay or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or any part thereof, to the trustee, to be applied by him in such manner as the court may direct.

The Insolvent Debtors (India) Act 1848 (11 & 12 Vict. c. 21) provides:

Sect. 27. And be it enacted that if any such insolvent as aforesaid shall, at any time before he shall obtain his discharge in the nature of a certificate as hereinafter mentioned, hold any public office, appointment, or benefice, civil, military, or ecclesiastical, not saleable, or shall be in any situation or employment whatsoever in respect of which he shall receive any salary or emolument, or shall be in the receipt of any pension, then it shall be lawful for the said court to order the said insolvent to pay such proportion of his receipts therefrom to his assignee as the said court shall think right.

The Pensions Act 1871 (Indian Act, No. xxiii.) provides:

Sect. 11. No pension granted or continued by Government . . . on account of past services . . . and no money due or to become due on account of any such pension, shall be liable to seizure, attachment, or sequestration, by process of any court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such court.

Sect. 12. All assignments, agreements, orders, sales, and securities of every kind, made by the person entitled to any pension . . . mentioned in sect. 11, in respect of any money not payable at or before the making thereof, on account of any such pension . . . or for giving or assigning any future interest therein, are null and void.

The Indian Civil Procedure Code 1882 provides:

Sect. 266. Provided that the following particulars shall not be liable to such attachment or sale; (*g*) stipends and gratuities allowed to military and civil pensioners of Government, and political pensions.

Sect. 351 gives power to make orders declaring persons to be insolvent, and appointing receivers of their property.

Sect. 354. Every order under sect. 351 shall operate to vest in the receiver all the insolvent's property, except the particulars specified in the first proviso to sect. 266.

The Army Act 1881 (44 & 45 Vict. c. 58) provides:

Sect. 141. Every assignment of, and every charge on, and every agreement to assign or charge any . . . pension payable to any officer or soldier of Her Majesty's forces, or any pension payable to any such officer . . . or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a Royal Warrant for the benefit of the family of the person entitled thereto, or as may be authorised by an Act for the time being in force, be void.

The bankrupt appealed, and the Divisional Court (Williams and Kennedy, JJ.) set aside the order.

The trustee in bankruptcy appealed, with leave.

Herbert Reed, Q.C. and *Carrington* for the appellant.—The County Court judge had power to make an order, under sect. 53, sub-sect. 2, of the Bankruptcy Act 1883, and properly made the order in this case. The Divisional Court set aside the order of the County Court judge expressly on the ground that an order ought never to be made in the case of an Indian pension. They so held upon a consideration of the provisions of the Pension Act (Indian Act xxiii.) 1871, of the Indian Code of Civil Procedure, and of the Army Act 1881. By those provisions such a pension as this is made inalienable, and cannot be taken by any process of execution. But sect. 27 of the Insolvent Debtors (India) Act 1848 provides that, in the case of an insolvent, the court may make an order similar to the order which can be made under sect. 53 of the Bankruptcy Act 1883. That Act of 1848 still remains in force, and would be applicable to the case of this bankrupt, for sect. 633 of the Indian Civil Procedure Code preserves the operation of sect. 27 of the Act of 1848. That being so, if this debtor were made a bankrupt in India, an order could be made that part of his pension should be set aside for the benefit of his creditors. It cannot, therefore, be improper to make such an order in England under the Bankruptcy Act 1883. A similar order was made in

Crowe v. *Price*, 60 L. T. Rep. 915; 22 Q. B. Div. 429.

In this case the debtor has the whole of this pension to expend upon himself, as appears from the evidence, and the order was a proper order to be made in such a case.

Muir Mackenzie for the respondent. — The Divisional Court did not say that an order ought never to be made in the case of an Indian pension, but only that it ought not to be made in this particular case. In the circumstances of this case, it was not a proper exercise of the discretion to make an order. [He was stopped by the Court.]

Lord ESHER, M.R.—In giving my judgment in this case I do not think that I am going beyond what has been said in the cases and in the Act of Parliament. It is perfectly clear that the Court of Bankruptcy had jurisdiction to make the order, and I think that no rule of law can be laid down to fetter the discretion of the court in exercising that jurisdiction. In all appeals in matters where the court has a discretion it has been admitted that the court has a discretion and that there is no rule of law to fetter that discretion. Whenever the appellate court differs from the judge, who has exercised a discretion, the court does not lay down any rule to fetter that discretion, but it only expresses an opinion that the discretion ought not to have been exercised in the particular way in which it was exercised. No hard and fast rule is laid down. It is true that, in this case, the County Court judge exercised his discretion by making an order; but the Divisional Court differed from him as to the way in which he exercised his discretion, and, in my opinion, the Divisional Court was right. The matter now comes before us. The Divisional Court has exercised its discretion, and we are asked to overrule that. The bankrupt was a retired Indian officer. He has a pension in respect of past services, and also with a view to future services, if required. In India, if he became insolvent, this pension would not go to the creditors. I agree with the view expressed by Lindley, L.J. in *Lucas* v. *Harris* (55 L. T. Rep. 658; 18 Q. B. Div. 127) that, "it is obvious that the whole object of the Indian Legislature, which has authorised the payment of these pensions, was to prevent them being dealt with by, or taken from, the officers to whom they were granted." In this case the Divisional Court came to the conclusion, in the exercise of

its discretion, that this pension ought not to be interfered with. Here is an officer, with no other means but this pension, and with a wife and daughters. Where a pension constitutes the only means of a man who has a family, and there is nothing else to alter the case, I would always, in the exercise of my discretion, say that I would not make an order that any part of the pension should be set aside for the creditors. If there are other circumstances, as, for instance, if the wife has a good income, and the pension is all pocket-money for the bankrupt, I should not think it wrong to say that a part of the pension should be set aside for the creditors. I agree with the way in which the discretion has been exercised by the Divisional Court, and I say that, if, in a similar case, the discretion is exercised by making an order that a part of the pension shall be set aside for the creditors, I would not agree with that exercise of the discretion. The appeal, therefore, must be dismissed, because we cannot disagree with the exercise by the Divisional Court of its discretion. It may be that some expressions in the judgment of Williams, J. in the court below go too far; for instance, where he says: "In my opinion the courts ought not, with regard to an Indian pension, to make any order under sect. 53, although undoubtedly there is jurisdiction to make an order." Also, perhaps, Kennedy, J. goes too far when he says, "We think that the discretion should not be exercised by making an order under that section," if he meant that to be the rule whatever the circumstances might be.

Kay, L.J.—In this case the County Court judge made an order that a part of the pension of the bankrupt should be set aside for his creditors. The Divisional Court reversed that order, and gave leave to appeal. Now all the courts seem to have agreed, and I agree with them, that sect. 53, sub-sect. 2, gives jurisdiction to the County Court judge to make such an order, because it provides that "where a bankrupt is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct." Those words are obviously very large, and designedly give a large discretion to the court. I agree that, where it is a matter of discretion, the appellate court differs reluctantly from the judge who has exercised his discretion. Unfortunately, in the judgments of the Divisional Court, as reported, expressions are used from which I emphatically differ. When a discretion is given, no court should lay down any general rule to bind the exercise of that discretion. The discretion is to be exercised in each case upon the facts of each case. No two cases are exactly alike. If a court endeavours to lay down any general rule, it obviously, to some extent, endeavours to fetter the discretion of other courts. I respectfully object to that being done. I do not think that the Divisional Court intended to do so in this case. I think that all that Williams, J., meant to say was that, generally speaking, his opinion was that an order ought not to be made. Kennedy, J. also uses language which might be read as laying down a general rule. If he intended to do so, I object to the laying down of any general rule. Then, in the present case, there is the question whether this order ought to have been made by the County Court judge in the exercise of his discretion. The discretion is a judicial discretion, and the question in the appellate court is, whether the discretion has been judicially exercised. We must look at the facts of each particular case, and not lay down any general rule; and we must see whether, in this case, the order to set aside a part of the pension ought to have been made. The bankrupt has no other means but this pension; and he has a wife and daughters. Is it right, under those circumstances, to make an order that part of his pension shall be set aside for his creditors? Under the circumstances, it is not, in my opinion, a proper judicial exercise of the discretion to make any order to set aside a part of the pension. No hard-and-fast rule can be gathered from the Indian legislation with reference to these pensions. The case of *Lucas* v. *Harris* (*ubi sup.*) has been referred to. That was not a case of a bankrupt, but of the appointment of a receiver in aid of execution in respect of a judgment. There it was right to consider the legislation in India, and to consider that there was no power in India to do that at all. That decision, however, has no bearing upon this case. The language of the judges in the Divisional Court in this case may go too far in laying down a general rule, yet their exercise of the discretion is better than that of the County Court judge. I agree that the appeal must be dismissed.

Smith, L.J.—It is said that this is a case of great importance because the Divisional Court laid down, as a general rule, that no order ought to be made under sect. 53, sub-sect. 2, in respect of the pension of an Indian officer. There is, I think, some colour for saying that the Divisional Court did lay down such a general rule. I think, however, that the Divisional Court did not intend to lay down such a general rule that the discretion ought never to be exercised in the case of the pension of an Indian officer. The question before us is whether, under the circumstances of this case, the discretion was rightly exercised, without laying down any general rule to fetter the large discretion given by sect. 53, sub-sect. 2. I think that when an Indian officer has no means except his pension, the court ought to be loth to make any order, under sub-sect. 2 of sect. 53, that any part of his pension should be set aside for his creditors. I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Ashurst, Morris, Crisp,* and *Co.*

Solicitor for the respondent, *George Twynam.*

July 8 *and* 9.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Sarson *v.* Roberts. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Landlord and tenant — Furnished lodgings — Implied condition of fitness for occupation — Extent of condition—Duty of landlord.

Upon the letting of furnished lodgings there is no

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

implied condition that the premises shall continue to be fit for occupation during the term; and there is no duty upon the landlord, who lives upon the premises, and provides the tenant with attendance, to inform his tenant of anything which happens during the term to make the premises unfit for occupation.

THIS was an appeal by the defendant from the judgment of Mr. Commissioner Chalmers, after the trial with a jury at the Chester Assizes.

The plaintiff had taken furnished lodgings for himself and his family in the defendant's house for a month. The defendant was to supply the plaintiff with ordinary household attendance during the period of letting, and the nurse of the plaintiff's children was to be permitted to use the kitchen for all necessary purposes.

While the plaintiff was occupying the lodgings with his wife, two children, and the children's nurse, a grandchild of the defendant, who was living in the house with the defendant, was taken ill with scarlet fever; the child continued in the house during the occupation of the lodgings by the plaintiff, but the defendant concealed from him the fact that the child had the fever.

Soon after the plaintiff left the defendant's house and returned home his wife and one of his children were taken ill with scarlet fever.

The plaintiff brought this action to recover damages in respect of the illness of his wife and child.

At the trial before Mr. Commissioner Chalmers and a jury, at the Chester Assizes, the jury found that the premises were healthy at the time of the letting, but that they became unhealthy during the tenancy of the plaintiff; that the defendant concealed from the plaintiff the fact of there being an infectious disease in the house, and that the plaintiff's wife and child contracted scarlet fever from the defendant's lodgings. The jury assessed the damages.

The learned commissioner gave judgment for the plaintiff for the amount of damages assessed by the jury.

The defendant appealed.

F. Marshall, Q.C., and *W. B. Yates* for the appellant.—Upon the letting of a furnished house, the only condition which is implied is a condition that the house shall be fit for occupation at the time at which the tenancy is to commence:

Smith v. *Marrable*, 11 M. & W. 5;
Wilson v. *Finch Hatton*, 36 L. T. Rep. 473; L. Rep. 2 Ex. D. 336.

There is no implied condition or warranty that the premises shall continue fit for occupation during the term. [KAY, L.J. referred to *Hart* v. *Windsor* (12 M. & W. 68).] In *Maclean* v. *Currie* (1 C. & E. 361) Stephen, J. held that, on the letting of a furnished house, there is not any implied condition that it shall continue to be habitable during the term. It is said on behalf of the plaintiff that there was a duty upon the defendant, as soon as he knew that there was an infectious disease in the house, to inform the plaintiff of that fact. There is no such duty, and there is no authority for that proposition. A person who lets lodgings is not bound by any duty to take care of his lodger or of his goods:

Holder v. *Soulby*, 8 C. B. N. S. 254.

The learned commissioner held that there was an implied agreement to do whatever was reasonable, but there is no authority for implying any such condition, and it cannot be implied.

E. H. Lloyd (*Jelf*, Q.C., with him) for the respondent.—Upon the letting of a furnished house, there is an implied condition that the premises shall continue to be in a habitable condition during the term. In *Wilson* v. *Finch Hatton*, as reported in 46 L. J. 489, Q. B., Kelly, C.B., says: "I now, therefore, hold that it is an implied condition in all hirings of a furnished house that the house shall be in good and tenantable condition, reasonably fit for human habitation, and for comfortable habitation, and from the very day on which the tenant is to enter down to the very day on which the tenancy is to cease, otherwise he has not what he has contracted for." The report in 36 L. T. Rep. 473 bears out that report. In a case like this, where furnished lodgings with attendance are taken by persons for a short period during the holiday season, there must be a duty upon the landlord to disclose to his lodgers anything which may have happened to make occupation dangerous to health.

Marshall, Q.C. was not heard in reply.

Lord ESHER, M.R.—We are asked in this case to imply a condition or a duty into a contract where there is none expressed. I entirely differ from the judgment of the learned commissioner that it is possible to imply a duty to do what is reasonable. The only ground upon which a condition can be implied is, that the condition must be necessary to the carrying out of the contract in the view of both parties. Can we say, in this case, that both parties to such a contract as this contemplated that such a duty or condition should be implied? It was at first argued that a condition must be implied that the house should be in a sanitary condition at the time of entry and should so continue throughout the period of letting, so that if it became insanitary during the tenancy the tenant would have a right to rescind the contract and to refuse to pay the agreed rent, being liable for use and occupation only. I see no ground for implying any such condition. Then the duty was stated to arise upon a further ground, not merely from the relationship of landlord and tenant, but from the making of such an agreement as was made in this case. How is it possible to imply from the stipulations of this agreement a condition that the house shall be sanitary during the tenancy? We cannot imply this duty or condition. The judgment of the learned commissioner was wrong, and the appeal must be allowed.

KAY, L.J.—There is no case where such a condition has been implied, and I do not wish to add to the cases in which conditions are implied. The cases have gone as far as this. Where a man hires a furnished house or lodgings, there is an implied condition that, when they are hired, they are reasonably fit for the purpose for which they are hired. That is because the landlord, knowing the purpose for which the premises are hired, must be understood to agree to, and be bound by, a condition that the thing which is let is reasonably fit for the purpose for which it is let. To carry that rule further, and to say that it extends so far as to be a warranty that the premises shall be sanitary and shall remain in that condition during the tenancy, would be most unreasonable.

With respect to the condition which is implied, it is entirely independent of the knowledge of the landlord, and it is no excuse for the landlord to say that he did not know that the premises were insanitary. To say that the condition applies to the case where the premises become insanitary after the tenant has entered, would be unreasonable. The landlord has no power to prevent that happening. If the condition were as wide as that, the tenant could then, though the landlord was not to blame, at once throw up his contract. It would, in my opinion, be exceedingly unreasonable to imply such a condition. The rule which does exist is extremely artificial, because it does not apply in the case of an unfurnished house, in which case the landlord is not bound by any such condition. I am not inclined to extend the condition beyond that which was implied in *Smith* v. *Marrable* (*ubi sup.*). That case is not applicable to one like this. Another point has been argued. It is said that, even supposing such a condition cannot be implied, yet there is a duty on the landlord, when there is sickness in the house, to communicate that fact to the lodger. Was there any such legal duty? From what could such duty arise? It could not arise from the mere relationship of landlord and tenant; that is out of the question. It cannot be implied from the relationship of landlord and tenant that there is such a duty. But it is said that the landlord lived in the house, and provided attendance for the lodger, and so on. We cannot imply the duty from any or all of those facts. It is impossible, therefore, to hold that the tenant can recover damages from the landlord because his family caught scarlet fever, The appeal must be allowed, and judgment be entered for the defendant.

SMITH, L.J.—This action was brought by a gentleman who had hired furnished lodgings from the defendant. During the tenancy a child of the defendant had scarlet fever, and in consequence one of the plaintiff's children caught it. Thereupon this action was brought against the landlord. The first question arises upon the case of *Smith* v. *Marrable* (*ubi sup.*). At the time when the agreement was made and the lodger entered into possession, the jury have found that the house was reasonably fit for habitation. I should have thought that would have ended the case. In *Smith* v. *Marrable* (*ubi sup.*) it was held that it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation, and that, if it is not, the tenant may rescind the contract and throw up his tenancy without any notice. The same was also held in *Wilson* v. *Finch Hatton* (*ubi sup.*). The learned commissioner went wrong in this case through misreading the judgment of Kelly, C.B., in *Wilson* v. *Finch Hatton* (*ubi sup.*). There it was decided that the house must be habitable at the date of entry, not that it must continue to be so during the term. The contention that the house must continue to be habitable during the term is unreasonable. There might be a letting for twelve months; a drain might get out of order in the last month, and it is said that the tenant might then pay no rent. That would be very unreasonable. The mistake made by the learned commissioner was that he mis-read the word "from" in the judgment of Kelly, C.B. In that case the facts were that, at the date upon which the tenant was to enter, the house was not in a habitable condition, and was not put into a habitable condition until some time after that date. I think that the observations of Kelly, C.B., were directed to the point that the premises were put into repair *after* the date at which the tenancy was to have commenced, and that the defendant could not get what she had bargained for. That case did not go any further than *Smith* v. *Marrable* (*ubi sup.*). Then it is said that there was a duty upon the defendant to communicate the fact that scarlet fever was in the house. From what could such duty arise? It cannot be implied from the facts of this case, nor because the landlord knew of the fever, any more than it could be implied in the case of a neighbour who had fever in his house. It has never been held before that there is any such duty, and I decline to so hold now. The appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Rowcliffes, Rawle, and Co.*, for *Griffith* and *Allard*, Llanrwst.

Solicitor for the respondent, *Belfrage* and *Co.*, for *Chamberlain* and *Johnson*, Llandudno.

Tuesday, July 23.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

BOWER *v.* HETT. (*a*)

APPEAL IN BANKRUPTCY.

Bankruptcy—Assets—Money paid under an execution—Money paid to sheriff to prevent seizure—Right of execution creditor—Bankruptcy Act 1890 (53 *& 54 Vict. c.* 71), *s.* 11, *sub-sect.* 2.

The Bankruptcy Act 1890, *by sect.* 11, *sub-sect.* 2, *provides that, "where under an execution in respect of a judgment for a sum exceeding* 20*l. the goods of a debtor are sold or money is paid in order to avoid sale," the sheriff shall retain the balance for fourteen days, and pay it to the official receiver, if he has notice of a bankruptcy petition presented against the debtor within that time and a receiving order is made.*

A warrant of execution having been issued to the high bailiff upon a judgment for 23*l., the debtor's father paid the high bailiff the amount of the judgment in order to prevent possession being taken under the warrant. Notice of a bankruptcy petition against the debtor was given to the high bailiff within fourteen days, and a receiving order was made. The high bailiff paid the money to the official receiver.*

Held (affirming the judgment of the Queen's Bench Division), that the money was not paid "under an execution," or "in order to avoid sale," within sect. 11, *sub-sect.* 2, *of the Bankruptcy Act* 1890, *and that the execution creditor was entitled to recover the amount from the high bailiff.*

Quære, *whether it made any difference that the money was not paid by the debtor himself.*

APPEAL by the defendant from the judgment of the Divisional Court (Lord Russell, C.J. and Charles, J.) reversing the judgment of the judge of the County Court of Hull.

The plaintiff had recovered judgment in the County Court for 23*l.* against one Denton, and a

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

warrant of execution was issued to the defendant as high bailiff.

The defendant seized the goods of Denton, but went out of possession under an agreement with Denton that he might enter and seize again at any time.

Subsequently Denton closed his premises and absconded. The defendant obtained the key of his premises from Denton's servant, but did not again enter and take possession. Two days later Denton's father paid to the defendant the amount of the plaintiff's judgment, and of two other judgments against Denton in respect of which the defendant held warrants of execution, and obtained the key of the premises from the defendant.

The defendant retained the money paid in respect of the plaintiff's judgment, and did not inform him that it had been paid.

Within fourteen days a bankruptcy petition was presented against Denton, and notice thereof was given to the defendant. A receiving order was made against Denton, and he was adjudged bankrupt.

The official receiver demanded and received from the defendant the amount which had been paid to him in respect of the plaintiff's judgment against Denton.

The plaintiff sued the defendant to recover from him the amount of his judgment against Denton.

The Bankruptcy Act 1890 (53 & 54 Vict. c. 71) provides:

Sect. 11, sub-sect. 2. Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor.

The County Court judge gave judgment for the defendant, and the plaintiff appealed.

The Divisional Court (Lord Russell, C.J. and Charles, J.) reversed the judgment of the County Court judge, and allowed the appeal.

The defendant appealed, with leave.

C. Dodd, Q.C. for the appellant.—The Divisional Court was wrong in holding that this money was not paid "under an execution" within the meaning of sect. 11, sub-sect. 2, of the Bankruptcy Act 1890. The money was paid because a warrant of execution was issued, and was paid to the bailiff who held that warrant. It was, therefore, paid under an execution. It is not necessary that the money should be paid when the bailiff is in possession in order to make it money paid "under an execution," for the amount may be paid before possession is taken in order to prevent possession being taken, and it can properly be said that in such case the money is paid under the execution. Money so paid is paid in order "to avoid sale," because it is paid to prevent seizure and consequent sale. In this case the bailiff was in constructive possession, because he had the right to take possession, and the power and means of doing so, the key having been given to him for that purpose. If the money was not paid to the bailiff "under an execution," it was not paid to the use of the plaintiff, and no action will lie. It is not necessary, under the section, that the money paid should be paid by, and be the money of, the debtor himself. The section does not say whose money is to be paid:

Re Pearson, 3 Morrell, 187.

Montague Lush and *Sidney Clarke*, for the respondent, were not called upon to argue.

Lord Esher, M.R.—In this case I think that the appeal must be dismissed. Neither the Divisional Court, nor this court, can determine any fact in the case contrary to the finding of the County Court judge, unless there was no evidence to support his finding. If the County Court has not found any facts, it is left to the Divisional Court, and to this court, to determine those facts. The County Court judge did not find any question of fact except that there was a seizure by the high bailiff on the 1st Oct. That finding we are bound by. That being so, the Divisional Court was bound to see what facts were proved or admitted or were beyond contradiction. On the 1st Oct. there was a seizure by the bailiff. On the 2nd Oct. the bailiff went out of possession under an arrangement with the debtor by which he was to be at liberty to seize again at any time. But for that agreement the bailiff could not have gone in again and seized under the same warrant; having made that agreement, however, he might have gone in again and seized. The bailiff never did in fact go in again and seize. After he had gone out of possession, someone took the key of the premises to him, but he did not go in and take possession of the goods. A bailiff does not take possession of the premises, but of the goods upon the premises. That being the state of things, the bailiff was not in possession of the goods and could not sell. Then the debtor's father came to him, not in consequence of any arrangement with his son but on his own account, and asked him not to go in again to seize, and said he would pay the amount of the levy the next morning. The debtor's father did pay the money. That was a payment made because of the power of the bailiff to go in and seize again, and in order that the bailiff might pay it over to the execution creditor. The money was paid upon those terms. The bailiff, who took the money, took it upon those terms, and the money was received by him for the use of the execution creditor, and he would be bound to pay it to the execution creditor. Then came the bankruptcy, but the bailiff was not released from his obligation to pay the money to the execution creditor, unless the payment to the bailiff was within the provisions of sect. 11, sub-sect. 2, of the Bankruptcy Act 1890. The Divisional Court had to consider that question, and the court held that the money was not paid "under an execution." How could it have been paid "under an execution" when there was no execution upon the goods at the time of payment? The money, therefore, was not paid "under an execution." The Divisional Court further held that, even if it was paid "under an execution," the goods had not been sold and the payment was not made "in order to avoid sale." There was no evidence that it was paid "in order to avoid sale;" it was paid in order to avoid a re-seizure of the

goods, that is, in order to avoid, not a sale, but a seizure. The case, therefore, is not within sect. 11, sub-sect. 2, and the bailiff is not protected by its provisions. The bailiff took this money for the execution creditor, and the execution creditor had a right to sue him for money had and received to his use. The appeal, therefore, fails and must be dismissed.

KAY, L.J.—I am of the same opinion. The conditions of sect. 11, sub-sect. 2, of the Bankruptcy Act 1890 have not been fulfilled. Those conditions are that the money must be paid "under an execution," and "in order to avoid sale." This money was not paid "under an execution," because there was no execution existing at the time of payment. The bailiff had only the key of the house, and an agreement that he might retake possession. How is it possible to say that, under those circumstances, the bailiff was in possession under an execution? The first condition, therefore, was not complied with. It almost follows as a matter of course that, if there was no execution, the money could not be paid "in order to avoid sale." Neither condition, therefore, was complied with. I reserve my opinion as to the third point, which it is not necessary to decide, whether the money paid to the bailiff must be the money of the debtor himself. Upon the words of the section it is difficult to say that it must be the money of the debtor. I agree that the appeal must be dismissed.

SMITH, L.J.—I am of the same opinion. Sect. 11 of the Bankruptcy Act 1890 deals with the duty of the sheriff as to goods taken in execution; sub-sect. 1 provides what the sheriff is to do with goods in his possession under an unsatisfied execution; and sub-sect. 2 what he is to do with the proceeds of sale under an execution or money paid in order to avoid sale, when a bankruptcy petition is presented against the debtor and a receiving order made. Under sub-sect. 2 there are two conditions; the money must be paid "under an execution," and it must be paid "in order to avoid sale." In order to justify a payment by the sheriff to the trustee in bankruptcy, the payment to the sheriff must be brought within the terms of sub-sect. 2. Now in this case, on the 4th Oct. the goods were not taken in execution, and the money was not paid in order to avoid sale. The defendant, therefore, was not protected by the provisions of sect. 11, and was not justified in paying the money to the trustee in bankruptcy instead of the execution creditor. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Collyer-Bristow* and *Co.*, for *Laverack* and *Co.*, Hull.

Solicitors for the respondent, *Oldman* and *Clabburn*, for *C. C. Gresham*, Hull.

July 18 *and* 25.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

O'NEIL *v.* ARMSTRONG AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Contract — Seaman — Voyage — Completion of voyage prevented by act of employer—Right to wages for whole voyage.

The captain of a torpedo boat which had been built in England for the Japanese Government, who was in the service of the Japanese Government, engaged the plaintiff to serve as a fireman on the vessel on the voyage from England to Japan at an agreed amount of wages for the whole voyage. While the vessel was on the voyage, the Japanese Government declared war against China, and the plaintiff, having been warned of the consequences of continuing the voyage, left the vessel at Aden.

Held (affirming the judgment of the Queen's Bench Division), that the character of the voyage had been so altered by the act of the Japanese Government in declaring war that the agreed voyage was frustrated and completion of the contract made impossible, and that the plaintiff was therefore entitled to recover his agreed wages for the whole voyage.

THIS was an appeal by the defendants from the judgment of the Divisional Court (Lord Russell, C.J. and Charles, J.) affirming the judgment of the County Court judge.

The defendants built a torpedo boat, called the *Tastuta*, in the Tyne for the Japanese Government. By the contract the *Tatsuta* was to be delivered to the Japanese Government in the Tyne. By a subsequent contract the defendants agreed to have the *Tatsuta* taken to Japan for an agreed sum.

The defendants engaged Captain Strannach to navigate the *Tastuta* to Japan. Captain Strannach engaged a crew, one of whom was the plaintiff, whose wages were to be 30*l.* for the voyage. Of this sum 8*l.* was to be paid five days after sailing, and was so paid.

When the *Tatsuta* sailed from the Tyne, Captain Strannach hoisted the Japanese flag, and a pennant, and continued to fly the Japanese flag until the vessel reached Aden.

Japan was then at peace, but declared war against China before the *Tatsuta* reached Gibraltar. There news of the declaration of war was conveyed to Captain Strannach. When the vessel reached Aden, she was boarded by the captain of a Queen's ship, who read the proclamation of neutrality under the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90), and warned the crew, who were British subjects, of the risks they would run and the penalties they might incur by continuing to serve on the ship.

Captain Strannach told the crew that "the run was at an end," and that he would take them on under a new agreement for a month. He also said that he had a private telegram, and alone knew whither the vessel would proceed.

The plaintiff and other members of the crew refused to continue the voyage, and left the ship. The Governor at Aden provided them with money to pay their passage home to England, it being

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

impossible for them to get employment on another ship at Aden.

The plaintiff sued the defendants to recover 22*l.*, the balance of his agreed wages, 8*l.* having been paid in advance.

Before the trial of the action it had been agreed between the parties that the defendants would be liable if and so far as Captain Strannach would be liable if he were the defendant.

The County Court judge gave judgment for the plaintiff for the sum of 22*l.*, the balance of his agreed wages.

The Divisional Court (Lord Russell, C.J. and Charles, J.), on appeal, affirmed the judgment of the County Court judge.

The defendants appealed, with leave.

Joseph Walton, Q.C., *A. Lyttelton*, and *G. J. Talbot* for the appellants.—The plaintiff was not entitled to recover his wages because the voyage was not completed, and the non-completion of the voyage was not caused by the defendants:

Cutter v. *Powell*, 6 T. R. 320.

It was the act of the Japanese Government in declaring war that prevented the complete performance of the contract. For that neither party was responsible, and neither party has a cause of action:

Appleby v. *Myers*, 16 L. T. Rep. 669; L. Rep. 2 C. P. 651.

There is no authority for saying that there is any implied warranty to the seaman that the voyage shall be a peaceful one and that war shall not break out.

Sir *Walter Phillimore* and *S. T. Evans* for the respondent.—There was ample evidence that this ship was a Japanese warship, and that the captain was in the service of the Japanese Government. By the act of the Japanese Government in declaring war the completion of the voyage which had been agreed upon was rendered impossible. The voyage became dangerous to the seaman by reason of the risks of war and the provisions of the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90):

The Gauntlet, 26 L. T. Rep. 45; L. Rep. 4 P. C. 184.

The completion of the agreed voyage having been made impossible by the act of the masters of the captain, the seaman is entitled to recover the whole of his agreed wages:

Burton v. *Pinkerton*, 17 L. T. Rep. 15; L. Rep. 2 Ex. 340.

There was an implied warranty in the contract by which the seaman was engaged that the voyage should not be illegal or the ship be liable to seizure.

A. Lyttelton replied.

Lord ESHER, M.R.—In this case an action was brought by a seaman who entered into a contract with the captain of a ship to serve on the ship on a voyage from Newcastle to Japan. It has been agreed that this action is to be tried as if the seaman had brought it against the captain. The plaintiff's case, therefore, is that the defendants employed him to be a seaman on the ship on a voyage from Newcastle to Japan, and that during the voyage the defendants' Government, which they were serving, declared war against China, and that he would have thereby had to continue the voyage on a ship of war; that that altered his position, and exposed him to two risks, one at the hands of the Chinese, and the other at home for breach of the Foreign Enlistment Act 1870, by continuing upon a Japanese warship after Japan was at war and he knew of that fact. That is the plaintiff's case. If it is true, it cannot be denied that, by the action of the captain or of his employers, the voyage was altered and the plaintiff had a right to quit the ship without forfeiting any of his agreed wages. The dispute at the trial was, whether the captain was the servant of the Japanese Government or of the defendants. The learned County Court judge found in favour of the seaman, and there has been an appeal to the Divisional Court, and now to this court. The appeal is really upon a question of fact. There is no doubt as to the law. If the ship was a Japanese warship under the command of a captain in the service of the Japanese Government, the plaintiff is right. This ship was built by the defendants for Japan, to be a war vessel of the Japanese Government. She was built, and then an agreement was made that the defendants should have her taken out to Japan. Then, in order to carry out that agreement, the defendants made an agreement with the captain to take the ship to Japan and there deliver her to the Japanese; he was to command the ship and take her out to Japan. If that were all, and if the captain had proceeded to carry out that contract, the ship would not have been a Japanese war vessel at all, but would have been under the sole control of the defendants' captain. If that had been all, the declaration of war would not have enabled the English Government to stop the ship at Aden, and if the plaintiff left the ship before the end of the voyage he could not recover at all. But, in my opinion, agreeing with the County Court judge and the Divisional Court, I think that more has been established as to the relation between the captain and the Japanese Government than is contained in the agreements. Enough was established before the County Court judge to justify his finding. In the Divisional Court the Court said: "But we think enough was established as to his relation to that Government to render further inquiry unnecessary." The captain did enter into the relation of being a captain acting for the Japanese Government. The inference is irresistible that he did so with the knowledge and consent of the defendants and of the Japanese Government. The relation, therefore, was established between the captain and the Japanese Government, as found by the Divisional Court. What enabled them to so find was the fact that the captain immediately adopted the ship as a Japanese man-of-war, and acted as the captain of a Japanese warship flying the Japanese flag and hoisting a pennant. The meaning of that was, that he took command as a captain in the navy of the Japanese Government. The nautical meaning of those acts is well known. He could not say in a plainer manner that he was in the service of the Japanese Government. The defendants knew all this, and all parties agreed that the captain should take command as a captain of the Japanese Government. There was no harm in that so long as the Japanese were not at war. A British seaman might serve on such a ship when his employers were not at war. But the Japanese declared war, and thereby the

captain went to war also. He had made an agreement with the seaman which was lawful when it was made; but, upon the declaration of war, the seaman became liable to penalties because he was an English subject on board a foreign ship of war during war. Therefore, when war was declared by the Government under which the captain was serving, and that was made known to the seaman, he was in danger, and was not bound to go any further. The employers of the captain converted a harmless voyage into a dangerous voyage, and thereby entitled the seaman to say that the ship had been turned into a ship of war at war, and that he would not continue the voyage. That is the ground of the judgment, and I cannot disagree with the decision of the County Court judge, or with the judgment of the Divisional Court, where it was said: "The exact position, however, of the captain was not clearly proved, and, although the judge in his judgment describes him as the agent, representative, and servant of the Japanese Government, we are informed that no admission of the accuracy of this description was made by the defendants at the trial. But we think enough was established as to his relation to that Government to render further inquiry unnecessary." The seaman, therefore, was entitled to leave the ship, and to recover all his wages. The appeal fails, and must be dismissed.

Kay, L.J.—This is a case of some difficulty, not on account of any question of law, but upon the facts of the case. I will refer only to the most important facts. The ship was built as a torpedo boat for the Japanese Government, and became the property of the Japanese Government when she was at Newcastle. The contract for building the ship having been completed, a new contract was made to send the ship to Japan, and the Japanese paid the defendants a lump sum for that service. Thereupon the defendants agreed with a captain to take the ship out to Japan. The captain then engaged a crew, including the plaintiff, to work the ship on the voyage to Japan. In the contract with the plaintiff it was agreed that he was to be paid 30*l.* for the whole voyage to Japan, of which 8*l.* was to be payable five days after sailing, and the remainder on the completion of the voyage. The ship left Newcastle for Japan. It is not denied that she had the Japanese flag flying all the way to Aden. That flag must have been flying with the knowledge of the defendants, and probably by the direction of the agent of the Japanese Government. At Gibraltar the captain had news of the declaration of war. At Aden, the consequences of proceeding with the voyage were made plain, that the crew would be involved in war, and would be liable to the penalties of the Foreign Enlistment Act. The plaintiff in his evidence gave an account of what passed between the captain and the crew at Aden. The captain said he had his private instructions; that the run was finished; and that he would engage them at monthly wages. There is no contest as to that evidence. There was, therefore, a complete alteration of the nature of the voyage, making the remainder of the proposed voyage very risky; there were the risks of war, and of punishment under the Foreign Enlistment Act. The law applicable to the case is quite plain. It is laid down in the words of Blackburn, J. in *Appleby* v. *Myers* (*ubi sup.*), where he says: "The plaintiffs having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract." Upon the evidence of the men, the captain put an end to the contract which he had made, and the case seems to come exactly within the words of Blackburn, J., above quoted. The completion of the voyage was prevented by the captain. Further, the nature of the voyage was so altered, that the seaman had a right to say that he would not go on if the captain was in the service of the Japanese Government, because the Japanese Government by their own act had made the nature of the voyage different. Was the captain the servant of the Japanese Government? It is said that he was engaged by the defendants under a written contract. That, however, was not all. The Japanese flag was hoisted. Therefore, although the captain was, for some purposes, in the employ of the defendants, he was not solely in their employ, but was also in the service of the Japanese Government. By the act of the Japanese Government the seaman became entitled to say that he would not proceed further, and the completion of the voyage was prevented, for the purpose of this case, by the act of the defendants. The plaintiff is, therefore, entitled to recover the whole of his wages. No argument has been pressed here as to the further damages. I think that the decision of the County Court judge and of the Divisional Court was right, and that the appeal must be dismissed.

Smith, L.J. — This case is to be treated as if the action were brought against the captain. The plaintiff had made a contract to serve on the ship from Newcastle to Japan. He sues in this action to recover the whole of his agreed wages for the voyage. He served only as far as Aden, and there left the ship because of the war which had been declared between Japan and China. The real question is whether there was evidence in this case on which the court could hold that the captain of the ship was, when he took her out to Aden, in the service of the Japanese Government. That, in my opinion, is the sole question. The completion of the voyage was prevented by the Japanese Government declaring war, the nature of the voyage being quite changed by that act. I think that the judgment of the County Court judge proceeded upon the assumption that the captain was in the service of Japan; and the Divisional Court said that that was to be inferred from the evidence. If the case depended solely upon the contract with the defendants, I would have said that there was no evidence that the captain was in the service of Japan, but that he was in the service of the defendants only. The case does not, however, rest solely upon the written contract. There is more than that. The captain went on board the ship, which then belonged to Japan, and was a war vessel; he at once flew the Japanese flag, and sailed under that flag as far as Aden on the way to Japan. When the ship reached Aden, war had commenced between Japan and China. There is evidence as to what happened at Aden, and what the captain said to the crew. He said that the run was at an end, and that he had a private telegram, which must have been from the Japanese Government. I think that there was

ample evidence that the captain was a captain of the Japanese Government at the time when the voyage was frustrated by the act of the Japanese Government. The appeal, therefore, must be dismissed.

Appeal dismissed.

Solicitor for the appellants, *P. G. Robinson*, for *Smith*, Newcastle-on-Tyne.

Solicitors for the respondent, *Crossman* and *Pritchard*, for *Dees* and *Thompson*, Newcastle-on-Tyne.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Aug. 2.

(Before NORTH, J.)

CROMPTON AND EVANS UNION BANK *v.* BURTON. (*a*)

Practice — Order for payment into court on admissions—Money not actually in defendant's hands.

B., a solicitor, acting for trustees of a will, put up for sale part of the testator's real estate, which was subject to two mortgages. An objection having been taken that the trustees had no present power of sale, B. procured a transfer of the first mortgage to his son W. J. B., and got him to convey the property to the purchasers in exercise of the power of sale in the first mortgage. B. received the purchase money, paid off the first mortgage, and retained the balance without giving any notice to the second mortgagee. The second mortgagee brought an action against B., W. J. B., and the trustees for the balance of the purchase money after payment of the first mortgagee, and moved for the payment of that balance into court.

B. filed an affidavit and account, in which he claimed to retain out of the balance, in addition to the moneys paid to the first mortgagee: (1) *moneys paid to the trustees of the will or on their account to creditors of the testator's estate;* (2) *the amount for which B. was liable under a guarantee given by him for money borrowed by the trustees for like purposes;* (3) *a lump sum for costs of sale, there being no direct statement that B. had paid them.*

Held, that B. must be ordered to pay into court the balance received by him without any deductions in respect of (2) *and* (3), *though he would be entitled to proper costs when it was proved that he had paid them. But as to* (1), *though the payments were manifestly improper, B. would not be ordered on his admission to pay into court the moneys improperly paid away but not actually in his possession.*

Neville *v.* Matthewman (71 *L. T. Rep.* 282; (1894) 3 *Ch.* 345); Nutter *v.* Holland (71 *L. T. Rep.* 508; (1894) 3 *Ch.* 408) *commented on.*

HENRY GREEN, the testator in this action, died on the 3rd July 1873 seised of certain lands and hereditaments in Hepthorne-lane, North Wingfield, Derbyshire, which were subject to a first mortgage to Messrs. Kenyon and Woodcock for 2500*l.*, and to a second mortgage, dated the 13th May, 1876 to the plaintiffs, the Crompton and Evans Union Bank Limited, to secure their current account.

The testator appointed the defendants, Alice Green (his widow), John Thomas Hardwicke, and William Holding, trustees and executors of his will, and devised his real estate upon trusts under which the trustees had a power of sale after the death of the widow, but not during her life.

Acting on the advice of George Burton, a solicitor, who had acted for the testator in his lifetime, and continued to act for the trustees, the trustees assumed that they could sell at once with the consent of the widow, and put up the Hepthorne-lane property for sale on the 11th Sept. 1894. The whole of the property was sold either at the auction or by private treaty soon afterwards. One of the purchasers objected that the trustees could not make a title, and G. Burton thereupon, without the knowledge of the trustees, as they alleged, took a transfer of the first mortgage to his son Wilfrid James Burton, dated the 1st Dec. 1844, and completed the purchases by making W. J. Burton convey under the power of sale in the first mortgage. G. Burton received the whole of the purchase money, amounting to 5341*l.* 4*s.* 2*d.*, during the months of Dec. 1894 and Jan. 1895.

In July 1895 the plaintiffs commenced this action against G. Burton and his son and the trustees, asking for an account of what was due to them upon the security of their mortgage, and for immediate payment into court of the balance of the said purchase moneys of 5341*l.* after payment of the 2500*l.* secured by the first mortgage. The money due to the plaintiffs was stated to be 3117*l.*

The trustees did not appear.

G. Burton filed an affidavit in which he admitted the receipt of the purchase moneys amounting to 5341*l.* 4*s.* 2*d.*, but claimed to set off against it 2542*l.* 8*s.* 3*d.*, paid for principal, interest, and costs to the first mortgagees; 15*l.* 15*s.* for costs of transfer; sums amounting to 834*l.* 10*s.* 7*d.* paid to the executors to enable them to make payments on account of the estate; and a sum of 600*l.*, for which G. Burton had given a promissory note at the executors' request to secure their overdraft, and 310*l.* for costs of sale. The affidavit did not state that G. Burton had paid these costs.

These claims left a balance of 1035*l.* 10*s.* 4*d.*, which he submitted to dispose of as the court should direct.

The plaintiffs now moved on the admissions in Burton's affidavit for payment into court of 2835*l.* 19*s.*, being, as then stated, the balance of the purchase money received after deducting 2500*l.*, the principal money due on the first mortgage.

Swinfen Eady, Q.C. and *E. S. Ford* for the motion.—The purchase money was received by G. Burton or his son as or on behalf of the first mortgagee. The first mortgagee is a trustee of the proceeds of sale for the second mortgagee, of whose security he had notice. Burton's own affidavit clearly shows that the money is or was quite recently in his hands. The payments to the trustees were improper, and Burton cannot be allowed to deduct them.

Vernon Smith, Q.C. and *Rowden* for the defendants G. Burton and W. J. Burton.—The practice

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

as to ordering payment into court on admissions was reviewed by the Court of Appeal in

Neville v. *Matthewman*, 71 L. T. Rep. 282; (1894) 3 Ch. 345.

The general principle is, that orders are only made for the security of the fund, and they will not be made lightly. It is not proved here that the fund is in danger. In any case an order will only be made as to moneys actually in a defendant's hands. It cannot be extended to what he has paid away, even though the payment was improper:

Nutter v. *Holland*, 71 L. T. Rep. 508; (1894) 3 Ch. 408.

E. S. Ford in reply.—*Nutter* v. *Holland* (*ubi sup.*) turned only on the wording of Order LV., r. 3.

NORTH, J. (after stating the facts of the mortgages and the sale, proceeded):—It is plain that W. J. Burton (the son) did not really exercise the power of sale at all; he exercised no discretion, he did not put up the property for sale in any way, but simply proceeded on his father's nomination to make conveyances to the persons to whom the trustees had ineffectually tried to sell the property at an earlier date. In the conveyances the son conveys the property as the transferee of the first mortgage, and the purchase money is expressed to be paid to him. The money was received by the father on his account, and the application is that the money so received may be paid into court after deducting the sums payable to or retainable by the first mortgagee for principal and interest. In addition he will be entitled to his costs subject to their being properly taxed. As to the rest of the money, the defence is not by the son; he makes no affidavit at all, showing that he is a mere tool in the hands of his father. But the father makes an affidavit, and produces an account, in which he claims to deduct certain sums from the 5341*l.*, which he admits has been received. He claims to have in hand a balance of 1035*l.* only, and to have paid away the rest. That at least is the suggestion at the bar as the fair inference from the account. The affidavit is not so clear; but I think it shows sufficient for me to say that I could not require the sum payable for principal and interest to the first mortgagee to be paid into court. Then there are certain payments to the executors. The first is 10*l.* entered as advanced to them to pay debt to Johnson; and then some ten or twelve payments of considerable amount, entered, under the heading "Paid executors at their request to pay wages at the colliery," which may be grouped as one item. The next item is a promissory note for 600*l.* to the Leicestershire Bank. According to Mr. Burton's affidavit the history of that is, that in June 1894, at the executors' request, he gave this promissory note by way of guarantee for an advance made to them by the bank. He says this is still outstanding, and asks to retain 600*l.* of this money, which belongs to the second mortgagee, on the ground that he is under a liability for the executors to whom the money does not belong, to the bank. That claim seems to me not only ridiculous but impudent. Another claim is to retain for the costs of sale including surveyor, printer, advertisements, auctioneer, and solicitor, a lump sum of 310*l.* As to that it is introduced into the account, but there is no statement whatever that it has been paid. As regards the payments to the executors, they are entered in the account "paid the executors" and so on, and the affidavit says they were paid. As regards these items, they are not stated to have been paid, either in the account or in the affidavit, and the silence of the affidavit with regard to the payment of these sums making up the 310*l.* is very significant when you look at the express statement in the affidavit of the payment of the sums advanced on the wages account. There is no evidence whatever on which I can come to the conclusion that these costs, or any part of them, has been paid. Therefore there can be no deduction made in respect of that sum. When the money has been paid in—I am not going to distribute it now—if there is any sum which ought to be paid to Mr. Burton, or his son, in respect of these costs, it will be provided for at the proper time. At the present time it ought to be made safe, and I think the circumstances are such as to make it very desirable that it should be made safe by having it in court. Then there remain these items of payments to the executors. The defence in Mr. Burton's affidavit as to those is expressed thus: He says, "I have included in the account a series of payments made by me between November and March to Mr. Hardwicke"—he is one of the trustees—"on behalf of the trustees for the purpose of paying wages and other expenses incident to carrying on a colliery forming part of the testator's estate. It was arranged by Mr. Hardwicke with me"—and I should say this is an affidavit filed on the 1st Aug., and Mr. Hardwicke does not corroborate it—"that I should be recouped in respect of these payments out of the proceeds of sale of the Clay Cross property, and that he"—not "had arranged," but—"would arrange with the bank to discharge their debt out of the rest of the estate, which from what I knew of the testator's affairs I considered would be ample for the purpose when realised." That is to say, that ready money belonging to the plaintiffs was to be misapplied to other purposes, and they were to take their chance of being paid in the future out of an estate that might or might not, when realised, be sufficient for the purpose. Coupled with that we have the fact that the bank would not make an advance to the executors on the estate without a guarantee on the part of somebody else, and there is another statement in this affidavit that there were no securities that could be offered to the bank. Under those circumstances the arrangement which Mr. Burton says was made for applying that money in that way was a gross breach of duty on the part of both of them—both the trustee, if he did it, and the solicitor, who said he concurred. Under those circumstances I should have thought that it was a matter of course that the two defendants, the Burtons, one of whom is the mortgagee who has received this balance through his solicitor, and the other the solicitor who has it in hand for him, should be ordered to pay these moneys into court; but I feel embarrassed by the cases that have been referred to, namely, the cases of *Neville* v. *Matthewman* and *Nutter* v. *Holland* (*ubi sup.*). It does seem to me that those cases have modified the practice, and that to a certain extent it may be an answer to a motion to pay money into court to say that the money is not in hand.

I do not think they go quite as far as is said, that a man who has received money which, if he had in hand to-day, he would be ordered to pay into court, can get off by stating that he paid it yesterday to somebody to whom he had no title to pay it, and who had no title to receive it. But I find some difficulty in saying that this money which is sworn to have been paid away should be paid into court, having regard to what has been decided in those two cases. I do not feel at liberty to do what I think I otherwise should have done, namely, order the defendants to pay into court the money said to have been paid to the executors at their request out of the plaintiffs' money. It seems to me as cool an attempt on the part of this gentleman to rob Peter to pay Paul as I ever saw. I order that both the defendants, the Burtons, should pay into court the sums consisting of the 1035*l.*, the 600*l.*, and the 310*l.* The total amount is 1945*l.* 10*s.* 4*d.*

Solicitors: *Johnson, Weatherall*, and *Sturt*, agents for *Eking*, Nottingham; *Peacock* and *Goddard*.

QUEEN'S BENCH DIVISION.

May 23 *and July* 12.

(Before Grantham and Charles, JJ.)

Southwell (Surveyor of Taxes) (app.) *v.* The Governors of the Royal Holloway College, Egham. (resps.). (*a*)

Revenue — Inhabited house duty — Exemptions from—School supported partly by endowments, partly by fees of students—"Charity school"—48 Geo. 3, *c.* 55, *Schedule B. exemptions, case* 4.

The Holloway College was founded "to enable young women to carry on their studies after they have left school with all the advantages of a collegiate life." The buildings were erected by the founder upon land provided by him, and the institution was endowed with a sum of about 300,000l., which the founder directed to be applied in paying off the building debt (if any), in furnishing and equipping the college, in establishing scholarships and exhibitions, and in paying professors and teachers, and for other such purposes. The average income of the endowment fund has up to the present been largely in excess of the income received from the fees of students. Each student pays 90l. a year, together with some extras, and in return receives board and lodging with a bedroom and sitting-room to herself, and instruction in all the higher branches of education, including that necessary for university examinations.

Held, that the institution was not a "charity school" within the meaning of the exemption in 48 Geo. 3, *c.* 55, *schedule B., and was, therefore, not exempt from inhabited house duty.*

A "charity school" within this exemption means a school primarily intended for the supply of gratuitous education; and the mere fact that the students in a school where a considerable fee is charged obtain various advantages from an endowment fund is not sufficient to constitute the school a "charity school."

Case stated under 43 & 44 Vict. c. 19 (the Taxes Management Act 1880), s. 59, by commissioners for general purposes of the Income Tax Acts, for the district of Godley, in the county of Surrey.

At a meeting of the commissioners, held at Chertsey on the 25th May 1894, the Governors of the Royal Holloway College, Egham, appealed against an assessment to inhabited house duty made upon the buildings used for the purposes of the college, for the year ending the 5th April 1894, in the sum of 6300*l.*, at 9*d.* in the pound.

The college was established to enable young women to carry on their studies after they have left school, and provides the instruction necessary for London degrees and for pass and honour examinations at Oxford.

The building, which stands in its own grounds and gardens, includes chapel, dining hall, gymnasium, library, reading room, museum, lecture theatre, lecture rooms, scientific laboratories, common rooms, and a picture gallery containing a valuable collection of modern British paintings.

Each student has a bedroom and sitting-room to herself fitted with all necessary furniture, and there are certain rooms, such as dining hall, music hall, &c., and a gymnasium, tennis and racquet courts, &c., common to the use of the students; and for board, lodging, and instruction each student pays a fee of 90*l.* a year, payable 30*l.* a term in advance, in addition to certain extras.

The governors of the college submitted before the commissioners, in support of their claim for exemption from inhabited house duty, that the college was a "charity school," inasmuch as it is not self-supporting, and could not be carried on under the trust without the aid of a substantial endowment.

They contended that the college came within the exemption in 48 Geo. 3, c. 55, schedule B, case 4 (repealed by 4 & 5 Will. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36) of "any hospital, charity school, or house provided for the reception or relief of poor persons," and in further support of this contention a statement, showing that a substantial proportion of the income of the college is derived from charitable sources was put in.

Such statement was as follows:

1889-90.—Nominal fees from students, 4350*l.*; college scholarships, 1320*l.*; net receipts from students, 3030*l.*; charitable endowments and benefactions, 7088*l.*

1890-91.—Nominal fees from students, 5700*l.*; college scholarships, 1705*l.*; net receipts from students, 3995*l.*; charitable endowments and benefactions, 7585*l.*

1891-92.—Nominal fees from students, 6420*l.*; college scholarships, 1960*l.*; net receipts from students, 4460*l.*; charitable endowments and benefactions, 8908*l.*

1892-93.—Nominal fees from students, 7110*l.*; college scholarships, 2475*l.*; net receipts from students, 4635*l.*; charitable endowments and benefactions, 7693*l.*

Average for the last four years.—Net receipts from students, 4030*l.*; charitable endowments and benefactions, 7818*l.*

The governors of the college also relied on the case of *The Governors of Charterhouse School* v. *Lamarque* (62 L. T. Rep. 907; 25 Q. B. Div. 121) in support of their contention.

It was contended by the surveyor of taxes on the part of the Crown that the school was not a "charity school," inasmuch as a proportion of the

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

students paid large fees, and that the present case was governed by the decision in *The Charterhouse School* v. *Lamarque* (*ubi sup.*).

The commissioners were of opinion that the college was exempt from inhabited house duty, and they accordingly discharged the assessment.

The *Attorney-General* (Sir Robert T. Reid, Q.C.) and *Danckwerts* for the appellant.—It is a question of fact whether, having regard to the whole character of this institution, it can be regarded or treated as a "charity school," and our contention is that it is not a charity school in any sense. Nearly all—if not all—the scholars pay a very substantial sum for what they obtain, and, although it is quite true that they all, in some sense, receive a benefit from the endowment, that is the case in many other institutions which are not charity schools, as in Eton, for instance, and in all the other great public schools, and it is entirely the case in all the colleges at Oxford, where the members have the chapels, buildings, gardens, and so forth. One other thing ought to be referred to, namely, the terms of the declaration of trust which forms part of this case. This declaration of trust speaks about the erection of a college for women, but it does not say anything whatever about the relief of the poor; and the chief purposes of the endowment seem to be the paying what is due for the erection of the existing buildings and for the erection of any new buildings, and the furnishing and otherwise equipping such buildings; then there is a provision for the establishment of scholarships, exhibitions, and so on. These provisions do not indicate that this is a charity school. With regard to the authorities on the question, the case of *The Governors of Charterhouse School* v. *Lamarque* (62 L. T. Rep. 907; 25 Q. B. Div. 121) is in point as showing that this is not a charity school within the exemption. There the appeal was in respect of inhabited house duty upon the schoolhouse and buildings (except the masters' residences). It was admitted that substantial fees were paid by pupils attending the school, but that a large proportion of the income was derived from the charitable endowments of the founder. Upon that state of facts the commissioners held that the entire school buildings (except the masters' houses) were entitled to exemption from inhabited house duty; but the Court held that the school having substantially ceased to be a charity school at the time in question, the exemption of 48 Geo. 3, c. 55, schedule B, did not apply to relieve the governors from liability to inhabited house duty. Hawkins, J., in delivering the considered judgment of the court, there says: "Where, however, a school is in the main self-supporting, we do not think it could properly be called a charity school because a small proportion of the scholars derive benefit from the charitable foundation whence it originally sprang." That exactly applies to this case. Again, it has been decided in *Needham* v. *Bowers* (59 L. T. Rep. 404; 21 Q. B. Div. 436), as regards the word "hospital" that a "hospital" within the exemption does not include the case of a hospital endowed and maintained by charity, but carried on, and carried on at a profit, by funds derived from paying patients. These cases when applied to the circumstances of the present institution show that this college is not entitled to the exemption claimed.

Channell, Q.C. (*Gregson Ellis* with him) for the respondents.—The proposition which the cases establish is this, that where an institution, whether a school, hospital, or other such institution, has an endowment which entirely supports it then it clearly comes within such exemptions as these; but if it is entirely self-supporting and not supported at all by endowment, then it clearly does not come within any of the exemptions. Then there is a third or intermediate class, where there is a hospital or school which has an endowment, but which also collects moneys or fees in other ways, and in these cases it is a question of degree and of fact as to which category the institution comes under:

The Governors of Charterhouse School v. *Lamarque* (*ubi sup.*);
Needham v. *Bowers* (*ubi sup.*);
Blake v. *The Mayor of London*, 18 Q. B. Div. 437; affirmed 19 Q. B. Div. 79.

In the *Charterhouse* case, the court expressly said that it was a question of fact and of degree in each case, and they there put the institution in the category not exempted. *Needham* v. *Bowers* (*ubi sup.*) is an instance where the buildings of the hospital were assessed to inhabited house duty and where the exemption was not allowed; but that was the case of an institution wholly self-supporting, and the court stated there—and we submit rightly stated—that the institution being wholly self-supporting was not exempt as a hospital within the exemption which must be restricted to "hospitals maintained wholly or in part by charity." At first sight the case of *Blake* v. *The Mayor of London* (*ubi sup.*) would seem to be in my favour, but it is not, as the words there were "public schools," and not "charity schools." The same principles appear by the case of *Cawse* v. *The Committee of the Nottingham Lunatic Hospital* (65 L. T. Rep. 155; (1891) 1 Q. B. 585), where it was held that the institution was not wholly self-supporting mainly because the income derived from the payment of patients and sale of farm produce had in a particular year exceeded the expenditure, but that it was a hospital maintained in part by charity, and was exempt within this schedule B. These cases all support the proposition that if wholly endowed the institution is one thing; if wholly unendowed it is another; if partly endowed and partly unendowed, or supported from other sources, then it is a question of degree whether it falls within one category or the other. It is a question of fact and depends upon the character of the institution. As to the meaning of the word "charity" in these Acts, the judgment of Lord Macnaghten, in the case of *The Commissioners of Income Tax* v. *Pemsel* (65 L. T. Rep. at p. 634: (1891) A. C. at p. 574). may usefully be referred to. When we look at the facts of this case, and when we have regard to the large sum, some 300,000*l.*, provided by the founder for buildings and so forth, and when we consider the advantages young women who go to this college receive, it is obvious that they get much more than the worth of 90*l.* a year which they pay, because they get this 7000*l.* a year from endowment thrown in in some way. We submit, therefore, that the case is brought within the exemption.

The *Attorney-General* in reply.

Cur. adv. vult.

July 12.—The following judgments were read:

GRANTHAM, J.—In this case we are asked to say whether the buildings belonging to and used by the Royal Holloway College for the education of women come within the exemption from inhabited house duty allowed to "charity schools" under schedule B. of 48 Geo. 3, c. 55. In other words, we have to determine whether Holloway College is a "charity school" within the meaning of that exemption, and the young women enjoying the benefit with all the luxuries of a collegiate education are "charity scholars." The commissioners have held that they are, that is, that the buildings are exempt as a charity school. The first point, a preliminary one, which we have to determine is whether or not the question is one of fact or of law. If of fact, we have no power to alter the decision of the commissioners, if of law, we have. If it is one of fact it is only necessary to read the prospectus and report of the governors to see that the commissioners have decided wrongly, though we could not correct their decision, for it is impossible to contend as a fact of every day life that a school or college where every scholar or student pays 90*l.* a year, can be a charity school, and it can only be so treated as a fiction of law. As it is admitted that the commissioners arrived at their decision in consequence of their application to this case of certain legal decisions on the interpretation of the word "charity" as applied to trust estates, I have no doubt that this is a question of law, and one on which our decision is properly sought. Before attempting to apply the law as laid down in other cases, let us see clearly what the facts are, because if the facts are different the application of the same law must be wrong. The college was built —I am reading from the prospectus—"to enable young women to carry on their studies after they have left school under specially healthy conditions, and with all the advantages of collegiate life," and provision is accordingly made for instruction in all the higher branches of education. It may be that under modern ideas of the higher education of the masses all these advantages may some day or other be provided for those who are the object of charity, but can it be said in this case that they are provided for those who are the objects of charity when we find that the recipients of these advantages have to pay, and therefore can afford to pay, for them 30*l.* a term, that is, 90*l.* a year, payable in advance, besides extras for doctors, fees for examination, and all the inevitable extras to be found in high-class ladies schools the charges for which come to from 3*l.* 3*s.* to 5*l.* 5*s.* a term, or 9*l.* 9*s.* to 15*l.* 15*s.* a year, making for the combined advantages the large sum of 146*l.* 16*s.* per annum, and that too without laundress charges, which are also another extra. And yet this, it is said, is to be called a "charity school." Surely the bare statement of these facts answers the question, and no law can be so illogical as to say that legally this is "a charity school." I have not forgotten that large sums are given by way of scholarships, which reduce the cost of the education to those who obtain them; but they are not given on account of poverty, but on account of intellectual merit, and those least requiring pecuniary aid may, and often do, obtain them, so that the existence of these scholarships does not really affect the question. Why is it, then, that it is suggested that this is a "charity school?" Because, it is said, so large a part of the expenses of the college are met by the endowment fund provided by a generous donor, and that the existence of that fund brings it within the principle of previous decisions on the question, and that we are bound by those decisions. True it is that at present a large proportion is so provided, but that is only temporarily so, and year by year as the college increases in numbers that proportion will diminish. The endowment fund may be taken to be a fixed fund of 7500*l.* a year, while the funds derived from fees for the year 1893 were also about the same, namely, 7500*l.*, and as the gross annual expenditure was about 15,000*l.* in 1892-93, the fees provided about half. But that was the proportion when the college only had ninety students, whereas with the full complement of 200 students for which the college was erected and endowed, the proportion will be endowment 7500*l.* and fees 18,000*l.*, without any extras; in other words, about one-fourth only will be derived from the endowment fund, while the annual application of the fund makes the endowment proportion still less important, for I find that even now the fees received are far more than sufficient to pay the whole cost of tuition and household expenses, the fees being 7564*l.*, and the tuition and household expenses 5876*l.* Notwithstanding this anomalous state of things it may be, however, that we are bound by precedent or by decisions of judges in other cases. I can find, however, no case which is applicable to such facts as these. The nearest case to them is the case of the *Governors of the Charterhouse* v. *Lamarque* (*ubi sup.*), where it was held that the school was not a charity school. I admit that the proportion the income from endowed funds bore to the amounts paid by the boys was apparently less than in this case, but the principle was the same. Originally that school was founded for the purpose of providing gratuitous education entirely; now its main object is not to provide a gratuitous education, but to provide for those who can pay the necessary fees a high class public school, and it must not be forgotten that the Charterhouse School buildings at Godalming were, as I understand it, originally built out of endowment money, in the same way that the buildings were erected at the Holloway College, so that free buildings do not make a charity school, and as the primary object of this college is not free education, but the highest class education combined with the luxuries of college life it would require a very strong authority to make me conclude that this was a "charity school." I do not forget that I was pressed very fairly during the course of the argument, with my own judgment in the case of *The Commissioners of Income Tax* v. *Pemsel* reported as *Reg.* v. *Commissioners of Income Tax* (59 L. T. Rep. at p. 836), as that judgment was afterwards upheld in the Court of Appeal, and in the House of Lords, a judgment given by me with a good deal of hesitation as I was differing from the unanimous judgment of three Scotch judges of great eminence, and of the then Lord Chief Justice of England—Lord Coleridge. But not only were the circumstances there entirely different, but the section of the Customs Act which we had to interpret and apply was an entirely different section from this. There we had to determine what was "a charitable trust," and the moment you get into trusts you come within

the range of innumerable decisions of the Court of Chancery, and the fact that the Income Tax Acts have specially relieved property applied to charitable trusts from paying income tax is a long way from showing that buildings, in which charitable trust funds are applied in the maintenance of the building, and the partial provision and education of the inmates, are not profitably used when the inmates themselves pay annually so large a sum for the advantages they derive as is paid in this college. I quite agree with the decision of my brother Charles in the case of *Cawse* v. *The Nottingham Lunatic Hospital* (*ubi sup.*), that the word "poor" in the exemption of "houses provided for the reception or relief of poor persons" only applies to the "house" so provided. But we must not forget that the other words in the schedule "hospital or charity school," indicate buildings for the use of which no pecuniary advantage is obtained, and interpreting the word "charity" you cannot, therefore, divorce it from the word "school," so that we have not to determine what is a "charity," or what is a "charitable purpose," which has been the question in so many of the cases cited during the argument, but what is a "charity school." I have not alluded to the other cases cited during the course of the argument, because I can find nothing in the judgments there delivered helping us to a decision in this case; but for the reasons above given in my judgment this college and buildings are not exempt from inhabited house duty, as coming within the exemption of the Act 48 Geo. 3, c. 55, schedule B.

Charles, J.—I agree, but as we are differing from the opinion of the commissioners, and as I have written the reasons for my opinion, I think I had better read them. The question in this case is whether the Royal Holloway College, at Egham, is exempt from inhabited house duty. The commissioners to whom the governors of the college appealed against the assessment which had been made upon them, were of opinion that the college was exempt, on the ground that it was a charity school within the meaning of 48 Geo. 3, c. 55, schedule B. By that statute (which was repealed by 4 & 5 Will. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36), "any hospital, charity school, or house provided for the reception or relief of poor persons," is exempted from inhabited house duty. The cases which have been decided upon this schedule have reference to three classes of institutions; first, institutions wholly self-supporting; secondly, institutions wholly dependent upon endowments; and lastly, institutions partly supported by endowments, or otherwise self-supporting. With regard to the first class of cases there is no doubt that they do not fall within the exemption, which it has been held must be restricted to institutions maintained wholly or in part by charity. Thus in *Needham* v. *Bowers* (*ubi sup.*), an endowed hospital for the reception of insane persons founded by charitable donations, but supported entirely out of payments made by the patients was held not to be exempt. With regard to the second class of cases, there is equally no doubt that they do fall within the exemption, whether they be "hospitals," "charity schools," or "house provided for the reception or relief of poor persons." It is in the third class of cases, the class to which Holloway College admittedly belongs, that we are met with points of difficulty. It has, however, been decided that the exemption does apply to an institution possessed of a substantial charitable endowment, notwithstanding the fact that it also derives income from the payments made by inmates sufficient in some years to cover the whole expenditure: (*Cawse* v. *The Nottingham Lunatic Hospital* (*ubi sup.*) But the applicability of the exemption can hardly depend upon the exact proportion in any particular year between the income from endowments and that from other sources. It must depend, I think (as was pointed out in *Cawse* v. *The Nottingham Lunatic Hospital* (*ubi sup.*), not upon the consideration of any particular year, but upon the character of the institution itself. This, moreover, was the test applied in *The Governors of Charterhouse School* v. *Lamarque* (*ubi sup.*), where the court held that the modern school of Charterhouse was not a "charity school," although considerable benefit was derived from the funds of the original foundation, especially in regard to scholarships and exhibitions. The question is there treated as one of degree to be decided upon the facts of each particular case, and this seems to me to be the only satisfactory way of dealing with the matter. The facts in the case must first be ascertained, and then the question of law arises whether these facts bring the particular hospital or school whose liability is under consideration, within the exemption clause. The question then to be determined is, what is the character of Holloway College. Can it be said to be, taken as a whole, "a charity school?" Now, I do not propose to give any definition of the word "charity," as used in schedule B. But I think there can be no doubt that the language of the schedule contemplates institutions whose primary object is the maintenance or education of those who cannot, in the one case afford to maintain themselves, or in the other case, to pay for their own education: institutions in other words eleemosynary in character. A "hospital" certainly is primarily intended to receive patients who do not pay for their treatment. "A house provided for the reception or relief of poor persons" is a poor-house and nothing else; and the words "charity school" must, in my opinion, be interpreted having regard to the preceding and succeeding words, as a "school primarily intended for the supply of gratuitous education." If that condition is fulfilled, then the exemption will be available, even although the pupils who are educated contribute towards the expense of education; just as a "hospital" remains a hospital entitled to exemption, although in a particular year it may receive fees to a large amount from paying patients. But, in the case of Holloway College, there does not appear to have ever been an intention to supply gratuitous instruction to any pupil, rich or poor. I say "rich or poor," because I respectfully agree with the observations of Lord Herschell and Lord Macnaghten in the case of *The Income Tax Commissioners* v. *Pemsel* (65 L.T. Rep. at pp. 633, 637; (1891) A. C. at pp. 571, 583), to the effect that many "charities" may exist which are not for the relief of mere pecuniary necessity. The object of the founder of the college was to enable young women "to carry on their studies after they have left school under specially healthy conditions, and with all the advantages of a collegiate life." Instruction is provided for the degrees of the London University,

and for the pass and honour examinations at Oxford. The college was opened for work in Oct. 1887, in buildings erected by Thomas Holloway, at Egham, at his own cost, upon land provided by him between the years 1876 and 1883. In the latter year he endowed the college with the sum of 300,000*l.*, and directed that sum to be applied for the benefit of the college in paying off the building debt (if any), in furnishing and equipping the college, in establishing scholarships, exhibitions, and prizes, in paying the salaries of professors and teachers, and otherwise in defraying the domestic and other expenses incurred. The average income from the endowment under the trust and from other benefactions for the last four years has been 7800*l.* per annum, and is at present largely in excess of the income received from the fees of students, who, however, are rapidly increasing in number. The students pay 90*l.* each a year, which cover all expenses except laundress, medical attendance, fees for university examinations and individual lessons in special subjects. For this sum each student no doubt receives, in consequence of the mode in which the endowment fund is used, more educational advantages and greater material comfort than could be supplied to her in return for the fees she pays. Does this circumstance make the college a "charity school?" I think not, and I base this opinion not upon any comparison between the receipts in any particular year from fees and those from endowment, but upon the view which I take of the character of the institution itself. It was not in its origin, and never has been, one of an eleemosynary character, and the mere fact that in a boarding-school in which a considerable fee is charged the inmates obtain various advantages and comforts from an endowment is not in my opinion sufficient to constitute the school a "charity school." For this reason I think my judgment in this case must be for the appellant.

Judgment for the appellant with costs.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Ewart Jukes* and *Gore.*

Monday, July 29.

(Before Pollock, B. and Wright, J.)

Reg. *v.* The Incorporated Law Society. (*a*)

Solicitors—Incorporated Law Society—Statutory Committee—Complaint of misconduct against solicitor—Discretion of committee to refuse to entertain complaint—Mandamus—*Solicitors Act* 1888 (51 *&* 52 *Vict. c.* 65), *ss.* 12, 13, 19.

The committee of the Incorporated Law Society, created under the Solicitors Act 1888 *for the purpose of hearing complaints against solicitors on the ground of misconduct, have, under sect.* 13, *a discretion at any period of the inquiry when the case is before them, to refuse to proceed further with the inquiry, if they are satisfied upon the materials before them that there is no* primâ facie *case of misconduct against the solicitor.*

In such a case, although the committee have refused to proceed on the ground that there is no primâ facie *case, the complainant may, nevertheless, apply directly to the court itself, under the proviso in the* 13*th section, and the court will have power to deal with the application, notwithstanding the refusal of the committee.*

The committee having considered the affidavit of the complainant in a case before them, refused to proceed or require the attendance of the solicitor on the ground that no primâ facie *case was made out. A rule for a* mandamus *having been obtained:*

Held, that the rule ought to be discharged on two grounds, (1) *that the committee had a discretion to act as they had done, and that the court ought not to interfere with their discretion, and* (2) *that there was another more convenient remedy open to the complainant, namely, a direct application to the court itself, and that therefore the remedy by* mandamus *ought not to be granted.*

Rule for a *mandamus* to the statutory committee of the Incorporated Law Society, constituted under the Solicitors Act 1888, ordering them to hear and determine a complaint brought against two solicitors who practised in partnership as a firm, by Mr. Robert Chapman, a solicitor, at whose instance this rule was obtained.

It appeared from the affidavits that the solicitors complained of had acted as solicitors, and, to a certain extent, as financiers, to one A., who was engaged in building operations, and that, after A.'s death, they acted for his widow and administratrix.

Disputes arose between the parties, and an action for an account was commenced against the solicitors in question by the widow, through the complainant, Mr. Chapman, as her solicitor. This action was tried before Romer, J., and lasted several days, and judgment was given in the action in 1892, and a lengthy taxation of a bill of costs took place before a taxing master.

On the 12th Oct. 1892 an application was made by Mr. Chapman, who was not the plaintiff in the action, but who was acting as solicitor for the plaintiff, to the committee of the Incorporated Law Society to require the solicitors in question to answer the matters contained in his affidavit. This application was before the committee, and was considered; and the committee, through their secretary, wrote to Mr. Chapman on the 26th Oct. 1892, "that they were of opinion that the affidavit in support does not disclose a case with which they can deal."

Litigation was then pending, and the taxation was proceeding before the taxing master; and after the taxation was over, Mr. Chapman again, on the 21st May 1895, made another affidavit and another application to the committee to call upon the same solicitors to answer the matters contained in the affidavit.

The affidavit upon which this second application was based was considered by the committee on the 30th May 1895, who passed a resolution:

That applicant be informed that all the matters appear to have come before the judge, and to have been considered in the action brought by Mrs. A. Most of them are questions of taxation or of mistakes in accounts of long-standing between the solicitors and their clients now deceased whom they were financing. The representative of the deceased client does not join in the affidavit. The real complainant must, except under very special circumstances, pledge her belief in, and make herself responsible for, the charges made. But the affidavit read, with that made in Oct. 1892, does not

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

disclose a case in which the committee can properly order an inquiry under the Solicitors Act 1888.

Mr. Chapman was informed of this resolution by a letter on the 31st May, and in reply he wrote stating that the principal classes of charges against the solicitors were that they manufactured improper bills of costs by making fictitious charges; that they made false entries in their ledgers and accounts rendered to their clients to cheat them; that they made false representations to the court to deceive the court; and that some of the work for which charges had been made had not in fact been done, and stating that his petition showed a *primâ facie* case to be answered by the solicitors.

This letter and the two affidavits of Mr. Chapman were again considered by the same committee on the 20th June 1895, and they resolved to adhere to their former decision, and the grounds upon which the committee based their decision were set out in the affidavit made by the chairman of the committee, who stated that since the Act came into operation 764 applications against solicitors had been made to the committee, and in 421 of these cases the committee, after consideration of the affidavits, came to the conclusion that no further investigation was necessary, and in no other case except the present has such decision of the committee been the subject of appeal; and he submitted that in all cases where the committee in their discretion decide that sufficient grounds of professional misconduct are not disclosed by the affidavit it would be a great hardship to and oppression on the solicitors complained of if the committee were to fix a day for hearing in order to hold a further investigation, and so compel the solicitor to attend by counsel and witnesses to meet a complaint which if fully proved did not establish any charge of misconduct.

This rule was then obtained, the question being whether the committee had a discretion to refuse the application when they were of opinion that no *primâ facie* case was made out against the solicitor whose conduct was complained of.

The Solicitors Act 1888 (51 & 52 Vict. c. 65) provides:

Sect. 12. For the purpose of hearing any application to strike a solicitor off the roll of solicitors, or an application to require a solicitor to answer allegations contained in an affidavit, the Master of the Rolls shall appoint a committee of not less than three nor more than seven of the members of the council of the society, in this Act called "the committee." . . . No application shall be heard before less than three members of the committee.

Sect. 13. An application to strike the name of a solicitor off the roll of solicitors (whether at the instance of the solicitor himself or of any other person), or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and shall be heard by the committee, in accordance with rules to be made under the authority of this Act. The committee, after hearing the case, shall embody their finding in the form of a report to the High Court of Justice, except where the application is made at the instance of the solicitor himself, in which case the report shall be made to the Master of the Rolls, who shall make such order thereon as he shall think fit. If the committee are of opinion that there is no *primâ facie* case of misconduct against the solicitor, the society need not take any further proceedings; but if the committee are of opinion that there is a *primâ facie* case it shall be the duty of the society to bring the report of the committee before the court. The report shall have the same effect, and shall be treated by the court in the same manner as a report of a master of the court; and the court may make such order thereon as to the court may seem fit. Provided that any person who, but for this Act, would have been entitled to apply to the court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit shall be entitled so to apply although the committee are of opinion that there is no *primâ facie* case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the court.

Sect. 19. The Master of the Rolls, or any judge of the High Court, may, notwithstanding anything in this Act, exercise any jurisdiction over solicitors which he might have exercised if this Act had not been passed.

Sir *Edward Clarke*, Q.C. and *Hollams*, for the committee, showed cause against the rule.—There are two answers to this application for a *mandamus*. In the first place, we say that the Act in express terms gives the committee a discretion, and a discretion to be exercised at any stage of the proceedings. Sect. 13 says, "If the committee are of opinion that there is no *primâ facie* case against the solicitor then the society need not take any further proceedings." That is as plain as it possibly can be, and clearly gives the committee a discretion in the matter. If it were not so, and if the committee, although they felt that no case was disclosed which the solicitor ought properly to be called upon to answer, were nevertheless compelled to go on and to require the solicitor to appear before them with counsel and witnesses to answer an allegation which, even if proved, would not amount to misconduct, if that were so, it would be a very serious matter and would be most oppressive not only to the solicitor concerned, but also to the committee themselves, whose valuable services are voluntarily given for these purposes, and whose time would thus be occupied in investigating baseless charges, which it would be impossible for them to do having regard to their own business. In the present case the complaints have reference to detailed charges made in the course of a long litigation, and the committee, after fully considering the affidavits, took the view that the matters complained of in reference to the taxation of costs might very well have been mistakes or overcharges made *bonâ fide*, and in the absence of any complaint by the client herself, or of any unfavourable observations by the taxing master or the judges the committee thought that they would not be justified in deciding that a case of professional misconduct had been made out against the solicitors so as to render it necessary that they should be required to attend an inquiry before the committee. There is another answer to this application, namely, that if the applicant is dissatisfied with the decision of the committee he can still, under the proviso in sect. 13, apply to the court.

Finlay, Q.C. (*Levett*, Q.C. and *A. T. Lawrence* with him), for the solicitors complained of.—There is one consideration which disposes of this application for a *mandamus*. In the first place the granting of this writ is discretionary, and secondly, it will not be granted where there is another remedy open to the party applying. [Wright, J.—"No other equally convenient

remedy" is the legal formula]. The 13th section gives a much more convenient remedy than *mandamus*; it gives direct access to the court. The oppression would be intolerable if the view of the applicant were to prevail. Under the old procedure the applicant had first to go to the court, and the court, if it thought there was a *primâ facie* case, directed an inquiry before a taxing master. Now it is said that this committee, constituted of the most eminent men in the profession, are to be bound to spend any amount of time in investigating any complaint, however frivolous or vexatious, and that could not have been the intention of the Act. Here the committee, on reading the affidavits, came to the conclusion that there was no case to be answered.

Willis, Q.C. (*Rose-Innes* with him), in support of the rule.—Upon the true construction of the Act this committee has no jurisdiction to determine whether there is a *primâ facie* case until after they have heard the affidavits. By the Act it is absolutely clear that the committee can only come to a conclusion whether there was a *primâ facie* case after they have heard the case; they cannot form an opinion upon the mere affidavit sent in to them. It is suggested that this application is an abuse of the process of the court, but it is obvious here that the matters complained of require careful examination as to the conduct of these solicitors. (He gave several instances of alleged overcharges as taken from the affidavit, which he contended constituted a *primâ facie* case for inquiry against the solicitors, but they are not material for the purpose of this report.) It was not intended by the Act to transfer to the committee any portion of the jurisdiction which the court previously exercised. Under the former practice the court heard these applications; they examined into long affidavits and took pains to see and understand and then decide whether there was a *primâ facie* case, but they did not complain of the length of time taken up, and often they decided that there was no case to go to a master. The Act has provided the course to be taken now, and has done so with a view to preserve the entire jurisdiction of the court, and under the Act the committee must in every case hear and have the parties before them and make a report to the court. The 13th section says, that the application shall be made to, and "shall be heard by the committee." If "hearing" means without allowing any person to appear in support of the application, then they have heard the application, otherwise not. There is no discretion left to them, for they are to hear "in accordance with rules to be made under the authority of this Act;" so that the course is exactly defined for them. The committee, "after hearing the case"—that shows that they must hear the case—"shall embody their finding in the form of a report to the High Court." "If the committee are of opinion"—that is, after hearing —"that there is no *primâ facie* case," then they need not proceed further. The Act requires them to hear the case, and they are bound to hear every *bonâ fide* application whether in their opinion it constitutes a *primâ facie* case or not, and they must send for and hear both sides, and the bringing of the report before the court is a condition precedent in all the cases to the court hearing the case.

Pollock, B.—This case is one in which, to my mind, the rule *nisi* was very properly granted in order that a very important question might be discussed, affecting the jurisdiction which, so far as the Law Society is concerned, is new, having been created by the Act of 1888. It seems to me that the chief and cardinal point that the court has to consider, before we put a construction on that Act and the rules made under it, is that the committee of the Law Society are placed, not in any sense in the position of the court itself, but in substitution of the master, whose duty, before the passing of the Act, it would be to make the report of facts in order to assist the court in coming to a conclusion. It is quite clear that before this Act the master would have no duty except of a subsidiary character to perform, and that any question as to whether an inquiry was necessary, or whether the facts made it proper that the court should direct an inquiry, was a question for the court itself. It is true that when this Act was passed in 1888 it assumed that the application should be made in the first place to the committee of the Law Society, and not to the court, as of old. But that, to my mind, has an important bearing which is against the present application, because I think it never could have been the intention of the Legislature to say, that, whereas in times past inquiry as to the conduct of a solicitor could only be made where the court had first considered whether there was a *primâ facie* case against him, now in future under all possible circumstances, except in applications that are not *bonâ fide*, the committee of the Law Society shall and must in all cases inquire and make a report to the court, although they may be of opinion that there is no *primâ facie* case. That is a very strong ground for looking to see whether the Act has not provided for a much more rational course, whereby a discretion is given to the committee of the Law Society at any period of the inquiry, to say whether they think that there is any *primâ facie* case which ought to be, not only dealt with or not dealt with by the court, but which ought to be or ought not to be further prosecuted by themselves. In my opinion the Act is so framed as to give them that discretion. Notwithstanding the words used in sect. 13, that where an application shall be made it shall be heard by the committee, we find afterwards these words: "If the committee are of opinion that there is no *primâ facie* case of misconduct against the solicitor, the society need not take any further proceedings." I think that includes any further proceedings at any period when the case is before them. "But if the committee are of opinion that there is a *primâ facie* case, it shall be the duty of the society to bring the report of the committee before the court"; and then "the report shall have the same effect, and be treated by the court in the same manner as the report of a master of the court," clearly preserving the distinction I have already pointed out under the old practice. Then there is the further provision in the Act entitling a person to apply to the court, although the committee are of opinion that there is no *primâ facie* case of misconduct against the solicitor, and he "shall be entitled to be heard if the society brings the report before the court." Mr. Willis argued from these last words that the bringing of the report before the court was to be

a condition precedent in all cases. It is clear to me that this portion of the section is dealing with two sets of things; first, that the party aggrieved is entitled to apply, although the committee have exercised their discretion, and have said there is no *primâ facie* case, and therefore have made no report; and secondly, that, if the report is made, he is entitled to be heard when the society brings the report before the court. That construction of the Act is not only, to my mind, a reasonable one, but it brings the Act into harmony with the procedure of this court before. That would be sufficient to dispose of this case, but I think it right also to say that I am clearly of opinion that this is a case in which the court, in the exercise of its discretion, ought not to grant a *mandamus*. The well-known rule that this court will not grant a *mandamus* where there is a remedy which is equally convenient, has been thoroughly established. It was stated by Lord Campbell as long ago as the case of *Reg.* v. *The Lords Commissioners of the Treasury* (16 Q. B. 357), that the right, if it exists, must be a legal right, and there must be no efficient remedy without the aid of this prerogative writ; and Hill, J., who was specially conversant with these matters, in the case of *Re Barlow* (5 L. T. Rep., at p. 290), said it was well settled that, where there was a remedy equally convenient, beneficial, and effectual, a *mandamus* will not be granted. Those cases came before Field, J. in the case of *Reg.* v. *The Registrar of Joint Stock Companies* (59 L. T. Rep. 67; 21 Q. B. Div. 131), and before myself in the case of *Reg.* v. *The Shropshire Union Company* (unreported upon that point), and before Bowen, L.J. in the case *Re Nathan* (51 L. T. Rep., at p. 54; 12 Q. B. Div., at p. 478), in which he entered into the matter very fully, and approved of those decisions. That being the result of the decisions, let us see how they apply to this case. Here is a case in which the old jurisdiction of the court was of a *quasi* domestic character; a jurisdiction whereby this court maintained its rights over the duties and deficiences of its own officers; and it was a mere matter of convenience whereby, in 1888, the committee of the Law Society was substituted for the master. The same Act which makes the substitution provides that any person, notwithstanding anything that is done by the committee, may still come to this court. That is also further dealt with by sect. 19. That being so, there is in this case not only another mode of proceeding but a mode of proceeding which is not only equally convenient, beneficial, and effectual, but more convenient, more beneficial and more effectual, and more apt in every way than a writ of *mandamus*, which is open to many very serious objections. It seems that on both grounds this application must fail, and the rule ought to be discharged with costs.

WRIGHT, J.—I am of the same opinion. I think for three reasons the application fails. It appears to me that on the true construction of the Act the effect of it is that applications, instead of being made, as they used to be made, to the court, shall now be made to the committee. The court used to refuse in its discretion to grant a rule at all in a case which did not demand inquiry. I think it follows that the committee have to some extent at any rate the same jurisdiction, namely, to refuse to entertain the matter unless some reasonable ground is brought before them. Where the matters alleged, if they were proved, would not amount to professional misconduct, it seems to me clear not only that the committee may, but that they ought, to refuse to put the parties to the inconvenience and trouble of an inquiry into the matter, if their duty is not absolute, as I think it is not absolute, under the Act. Then this court, in the exercise of its discretion, would be very slow to interfere with the discretion of a body of this kind, specially selected by Parliament for dealing with this particular subject. The next reason is, that, even if that is not so, I think they are very much in the position of a magistrate to whom an application is made to grant a warrant. The late Lord Chief Justice said they were in the position of a grand jury, and might throw out bills if there was not a *primâ facie* case made out. I prefer to take the analogy of a magistrate. This court will not issue an order to a magistrate to grant a summons against a person alleged to have committed an offence, unless the magistrate has declined jurisdiction on grounds he ought not to have taken into consideration. So I think here we ought not to order the committee to proceed unless they clearly appear to have acted on some ground on which they could not refuse judicially to entertain the application. Thirdly, I agree that we ought to be influenced by the consideration that according to the decision of the Court of Appeal in *Re Weare* (69 L. T. Rep. 522; (1893) 2 Q. B. 439), the Court of Appeal took the view that sect. 19 of the Act preserved the jurisdiction of the High Court to act on its own motion, if it thinks fit; and that is a more convenient course, to my mind, than issuing a *mandamus* and having the matter twice argued here, and before the committee afterwards. I specially wish to say that in my judgment there might be cases in which this court would have power to order, and ought to order, the committee to proceed to hear a case, because they are in a better position in many respects for dealing with some of these cases than a master or any other body or person could be.

Rule discharged with costs.

Solicitor for the applicant, *Robert Chapman.*

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Solicitors for the respondent solicitors, *Trower, Freeling,* and *Parkin.*

May 21 *and July* 31.

(Before Lord RUSSELL, C.J. and CHARLES, J.)

THE ATTORNEY-GENERAL *v.* ELLIS AND OTHERS. (*a*)

Revenue — Account duty — Personal property "voluntarily" transferred to owner and other person jointly to accrue by survivorship on death —Purchase effected "in concert or by arrangement"—Liability to duty—Customs and Inland Revenue Act 1881 (44 *Vict. c.* 12), *s.* 38, *sub-sect.* 2 (*b*), *and* 1889 (52 *Vict. c.* 7), *s.* 11.

Sect. 38 *of the Customs and Inland Revenue Act* 1881 *renders liable to account stamp duty all personal property which the owner has "voluntarily" caused to be transferred to or vested in himself and any other person jointly, so that the*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

beneficial ownership therein passes by survivorship on his death to such other person.

Held, that the word "voluntarily," in this case, is not used in the sense of "without consideration," but in its ordinary meaning of "freely," "without compulsion," and "not under any obligation."

A verbal arrangement was made between a husband and wife that they should each contribute in equal shares sums of money for the purchase of railway stocks and shares upon the understanding that whatever sums either of them might so purchase in their joint names should on the decease of one of them belong to the survivor absolutely, and in pursuance of this arrangement investments were from time to time made and registered in their joint names, and "such investments were made on the express agreement that the survivor of them should be entitled by right of survivorship to the stocks and shares so bought." The husband died first, having bequeathed his residuary estate to his widow and his children.

Held, that, upon the death of the husband, account stamp duty was payable in respect of so much of the stocks and shares as was purchased with money belonging to the husband, as such property was property "voluntarily" transferred by the husband to himself and his wife jointly within sect. 38 *of the Customs and Inland Revenue Act* 1881, *and was also property purchased "in concert or by arrangement" with his wife, within sect.* 11 *of the Customs and Inland Revenue Act* 1889.

INFORMATION filed by the Attorney-General on behalf of the Crown against the executors of Arthur Ellis, to recover account stamp duty payable under the Customs and Inland Revenue Act 1881 (44 Vict. c. 12), s. 38, and the Customs and Inland Revenue Act 1889 (52 Vict. c. 7), s. 11, in respect of certain railway stocks standing at the time of his death in the joint names of his wife (one of the defendants) and himself, and the duty was claimed in respect of so much of the said stocks as was purchased with money belonging to the said Arthur Ellis.

No part of these stocks had been bought solely with money belonging to Arthur Ellis. All of them had in fact been bought with money contributed in equal shares by Arthur Ellis and his wife out of her separate estate.

These investments were made from time to time in pursuance of a verbal arrangement that whatever sums either of them might so purchase in their joint names should, on the decease of such one of them as should first die, belong to the survivor absolutely.

Arthur Ellis died on the 11th Feb. 1891. By his will he devised and bequeathed his residuary estate for the benefit of his wife during widowhood, and afterwards for his children. The will then declared that his wife and himself had from time to time invested moneys partly belonging to him and partly belonging to her in various railway shares and stocks which were registered in their joint names, "such investments having been made on the express agreement that the survivor of them should be entitled by right of survivorship to the stocks and shares so bought," and proceeded to direct that the income of the residuary estate should be enjoyed by her on condition of her transferring all such stocks and shares to his executors and trustees, to be held by them on the same trusts as the rest of his residuary estate.

In fulfilment of this condition the various stocks and shares were duly transferred into the names of the defendants, the executors and trustees of Arthur Ellis.

It was now sought to charge account stamp duty on so much of the stocks and shares as had been bought by Arthur Ellis out of his own moneys. The defendants refused to pay the duty claimed, on the ground that the investment of the moneys by Arthur Ellis was made in pursuance of a contract for value and not "voluntarily" within the meaning of the Customs and Inland Revenue Acts 1881 and 1889, and this is the question now to be determined.

By the Customs and Inland Revenue Act 1881 it is provided:

Sect. 38.—(1.) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof. (2). The personal or moveable property to be included in an account shall be the property of the following descriptions, namely: (*b*) Any property which a person dying on or after such day having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself, and any other person jointly whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

By the Customs and Inland Revenue Act 1889, it is enacted:

Sect. 11. Sub-sect. 2 of sect. 38 of the Customs and Inland Revenue Act 1881 is hereby amended, as follows:

The description of property marked (*b*) shall be construed as if the expression "to be transferred to or vested in himself and any other person" included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert or by arrangement with any other person.

The arguments and cases referred to appear sufficiently in the judgment.

The *Attorney-General* (Sir Robert T. Reid, Q.C.) and *Vaughan Hawkins* for the Crown.

Farwell, Q.C. and *L. Jenkins* for the respondents.

Cur. adv. vult.

July 31.—The judgment of the Court (Lord Russell, C.J. and Charles, J.) was read by

Lord RUSSELL, C.J.—[His Lordship having stated the facts already set out proceeded:]—It was contended on behalf of the Crown that the act of Arthur Ellis was "voluntarily" done, inasmuch as it had not been done in pursuance of any obligation previously incurred either by common law, statute, or contract. Had Arthur Ellis acted alone—it was pointed out—there could not have been any doubt that that transfer would have been voluntarily effected, and it was urged that even under the words of the earlier statute, the circumstance that the wife brought in equivalent sums could make no difference. She, too, was not acting under any precedent obligation. Further, it was said that the amending statute made the matter perfectly clear. Arthur Ellis.

had done the very thing contemplated: he had effected a purchase "in concert or by arrangement" with his wife of securities the beneficial interest in which accrued by survivorship to her on his death, and that it by no means followed that because there might have been consideration between the parties the acts could not properly be considered to have been "voluntarily" done within the meaning of the Acts: (see *Crossman and another* v. *The Queen*, 55 L. T. Rep. 848; 18 Q. B. Div. 256.) The respondents on the other hand contended that "voluntarily" meant "gratuitously" or "without consideration," and that here the transfer was not gratuitous, but for valuable consideration. The funds were contributed in consideration of mutual promises. The husband and wife had contracted with each other for value, and, except in so far as every contract is in one sense voluntary, as being the result of an act of will, the act of neither was "voluntarily" done: (see *Re The Duty on the Estate of the New University Club*, 56 L. T. Rep. 909; 18 Q. B. Div. 720.) We are however, of opinion that in the section under consideration, the word "voluntarily" is not used in the sense of "without consideration," but in its ordinary meaning of "freely," without compulsion," and "not under any obligation:" (see *The Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868; *The Art Union of London* v. *The Overseers of the Savoy*, (1894) 2 Q. B. 609, 71 L. T. Rep. 40.) We think that this is not only the true construction, but is that best calculated to carry out the object of the Act, which was to fix with liability to duty all "dispositions which, while preserving to a man the enjoyment of personal property to the day of his death, make the same property pass on his death to some one else, and so become substitutes for wills:" (per Wills, J. in *Attorney-General* v. *Gosling*, 66 L. T. Rep. at p. 287; (1892) 1 Q. B. at p. 550.) It is moreover a construction which makes it possible to put a reasonable interpretation on the amending Act, sect. 11, relating to property marked "(*b*)"; whereas, if "voluntarily" means "without consideration," it is difficult to give effect to the words in the last-mentioned section, "in concert or by arrangement with"—words which would appear to point to the existence of some contractual obligation. Our judgment must therefore be for the Crown, and with costs.

Judgment for the Crown.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Walker, Son,* and *Field.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Monday, May 27.

(Before the PRESIDENT (Sir F. H. Jeune.)

In the Goods of CATHERINE OCTAVIA SHAW (deceased). (*a*)

Probate—Cessate grant—Special provision in will for chain of representation.

The testatrix, by her will, appointed two persons to be her executors and trustees, conferred upon the surviving trustee or trustees power to appoint new trustees, and directed that every trustee appointed under her will should, by force of his or her appointment to be such trustee, become and be an executor under her will. The persons named in the will renounced, and letters of administration with the will annexed were granted in 1852 *to two persons, who died respectively in* 1855 *and* 1870, *without having administered the estate. In* 1856 *the Court of Chancery appointed as trustees of the will two other persons, one of whom died in* 1869. *The survivor of these two trustees died in* 1884, *leaving a will by which he appointed his wife his sole executrix, and she, in Feb.* 1895, *under the Conveyancing and Law of Property Act* 1881, *appointed two persons to be trustees of the will of the testatrix.*

The Court held that these trustees became executors by force of the special clause in the said will, and granted probate thereof to them.

THE testatrix, Catherine Octavia Shaw, spinster, by her will appointed William Brown and Charles Ferguson to be her executors and trustees, and further directed that every trustee appointed under her will should, by force of his or her appointment to be such trustee, become and be an executor of her will. The will also conferred power upon the surviving trustee or trustees to appoint new trustees in future. The trustees and executors named in the will renounced, and on the 14th Oct. 1852 letters of administration with the will annexed were granted to James Edward Shaw and Elizabeth Alderson, and, on the 9th May 1856, Kindersley, V.C. appointed Charles Ransome Drury and James Dowell to be trustees of the will. The administrator, James Edward Shaw, died in 1855, and the administratrix, Elizabeth Alderson, died in 1870, in Australia, without having administered the estate. James Dowell, one of the trustees, died in 1869, leaving his co-trustee Drury him surviving. Drury died in 1884, having by his will appointed his wife, Mary Emma Drury, as his sole executrix. On the 11th Feb. 1895 Mary Emma Drury, under the provisions of the Conveyancing and Law of Property Act 1881, as sole executrix of Charles Ransome Drury, the surviving trustee of the will of the testatrix Catherine Octavia Shaw, appointed Elizabeth Lucretia Ransome and Edmund John Jasper Browell to be trustees of the will of the said testatrix, and these two persons now applied for a grant probate of the said will.

Bargrave Deane for the applicants.—There is no authority for the present application. The meaning of the will seems to be that the testatrix desired that the same persons who might become trustees of her will should also be executors. [The PRESIDENT.—The meaning of the will is pretty clear, namely, that any person who becomes trustee is entitled to become an executor. The only point is: Can that be done? Can there be a shifting executor?] The Conveyancing and Law of Property Act 1881 points to such a case as this. It undoubtedly makes these people trustees; and, it is submitted, their appointment as trustees also makes them executors under the terms of the will.

The PRESIDENT.—The question is, can a person, by will, appoint such and such a person executor, not in the ordinary mode of succession, but by new persons coming in from time to time as trustees. The difference in the chain of repre-

(*a*) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law.

sentation is that, in the absence of a provision of this kind, the representative of the executor would be the person to administer the estate, and so on and on. Here, it passes from the executor to the new trustees. Although there appears to be no authority for it, I think the succession will do. Though certainly novel, it is, I think, legitimate. The applicants may take probate. It will be a cessate grant.

Solicitors: *Hickin, Smith,* and *Capel-Cure.*

June 17 *and July* 1.

(Before the PRESIDENT (Sir F. H. Jeune.)

In the Goods of McAULIFFE (deceased). (*a*)

Administration with will annexed—Residuary legatee a member of a religious community—Grant to the mother superior as residuary legatee.

In a case where property was left under a will to a residuary legatee in trust, for the benefit of the members of a specific religious and charitable institution, the property of which was vested in a governing body possessing absolute control of its funds, and the trustee having died in the lifetime of the testatrix:

The Court granted administration with the will annexed to the mother superior, who was a member of the governing body, as residuary legatee.

HANNAH McAULIFFE, a British subject, domiciled in Ireland, formerly of St. Edward's Convent, Blandford-square, in the parish of Marylebone, in the county of London, and lately of Migliarino Pisano, in the kingdom of Italy, spinster, died at Migliarino aforesaid, on the 6th Dec. 1894, leaving a will bearing date the 17th Dec. 1885, whereby she appointed the Rev. Philip Cavanagh, of 13, Grove-road, St. John's Wood, in the county of Middlesex, clerk in holy orders, to be executor thereof, directed all her debts and funeral and testamentary expenses to be paid; gave to Catherine Headon, known as Sister Mary Gabriel, the sum of 11*l.* 5*s.*; and bequeathed the residue of her property of every description to the said Catherine Headon to be disposed of as she should think fit, at her discretion, for the benefit of the said Convent of St. Edward, Blandford-square.

The said Philip Cavanagh, the executor named in the said will, died on the 19th July 1889, in the lifetime of the testatrix.

The said Catherine Headon, the specific and residuary legatee named in the said will, died on the 20th April 1894, also in the lifetime of the testatrix, who, at the time of her death was a domestic servant in the service of the Duc and Duchesse de Salviati, at Migliarino aforesaid. After her death, all her debts and funeral expenses were paid by her master and mistress, and her personal effects in Italy were handed over by them to the British Consul at Leghorn, by whom they were sent to the Birkbeck Bank in London, where the testatrix kept a deposit account, and where her effects now remained.

The Convent of St. Edward, Blandford-square, was a community of Roman Catholic sisters (at present forty-seven in number), thirty-two of whom were professed nuns and novices, and fifteen lay sisters, who lived together at the said convent, and devoted their lives to charity and the care and instruction of the sick and poor. The sisters of the said community undertook, in particular, the following specific charitable works: (1) The teaching of the children of the poor at Roman Catholic schools under Government control, their pupils being some 600 in number; (2) the visiting of the poor in their own homes; (3) the visiting of the sick and infirm at hospitals and workhouses in the neighbourhood of the convent; and (4) the sheltering and training for domestic service of young women and girls of good character.

All the property of the community (in which was included the personal property of each of its members) was vested in the reverend mother and three sisters, who were known as the council of discreets, consisting of the mother assistant, the mother bursar, and the mistress of the novices, and was subject to their absolute discretion in the management and disposal thereof for the purposes of the community, whose banking account stood in the names of three of the above-mentioned persons, namely, the reverend mother, the mother-assistant, and the mother bursar, the latter, by arrangement and agreement of the said council of discreets, alone signing all cheques.

The members of the said council now applied that letters of administration, with the will annexed, of Hannah McAuliffe deceased, should be granted to Maria Blount, the reverend mother for the time being of the said convent, as being beneficially entitled to the residue of the testatrix's estate.

Robert Younger in support of the motion.—There is no reported case absolutely in point for the purposes of a bequest like this. In this particular convent, no separate accounts are kept for the different branches of the work of the institution, but there is a common fund, which is administered by the governing body. Where the court comes to the conclusion, on the consideration of a will, that there is personal confidence reposed by the testator or testatrix in the trustee, the Courts of Chancery will not appoint a new trustee, but will themselves administer the fund, subject to this, that the court must come to the conclusion, on the face of the will, that there is a power in the trustee to distinguish the different purposes to which the property is to be applied, and that there is a trust to do so. The court exercises the discretion on the principle of equality, and on no other principle:

Cole v. *Wade*, 16 Ves. 27.

That case has been followed in a number of other cases, but the principle of equality was, in that case, carried further than in any other:

Barrow v. *Philcox*, 5 My. & Cr. 72.

If this court can find, amongst the persons who could conceivably have been the object of the discretion of the deceased trustee, a particular person or body of persons who can give a receipt for the whole fund, the court would be justified in paying it to that person or body. [The PRESIDENT.—I am afraid that this fund cannot be distributed without some scheme.] This is not a case in which a scheme could properly be framed. This is a gift to the particular institution. *Walsh* v. *Gladstone* (1 Phill. 290) is very much in point.

Cur. adv. vult.

(*a*) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law.

July 1.—The PRESIDENT delivered the following written judgment:—The question in this case relates to the form of the grant of administration which it is proper to make. By the will, dated the 17th Dec. 1885, the deceased, Hannah M'Auliffe, appointed the Rev. Philip Cavanagh executor, and, after giving a legacy of 11*l.* 5*s.* to Catharine Headon, bequeathed the residue of her property to the said Catharine Headon, to be disposed of as she should think fit at her discretion for the benefit of the convent of St. Edward, Blandford-square. The Rev. Philip Cavanagh and Catharine Headon died in the lifetime of the testatrix. A grant of administration is asked for in favour of Maria Blount, who holds the office of reverend mother of the convent of St. Edward. The convent in question is a community of Roman Catholic sisters. There is no instrument presenting the objects of the society, and no formal allocation of funds to specific purposes. But, in fact, the society devotes itself to four charitable works—the teaching of the children of the poor, the visiting of the poor in their homes, the visiting of the sick and infirm at hospitals and workhouses, and the sheltering and training of young women for domestic service. The property of the community is vested in a council consisting of the reverend mother and three sisters, and is subject to their absolute discretion in the disposal thereof for the purposes of the community. The trust account stands in the name of the reverend mother and two of the said three sisters. The members of the council concur in the application for a grant of administration to Maria Blount. There can, I think, be no doubt that this would be a proper case for a grant under sect. 73 of the Act of 1857. But what is asked is a grant to Maria Blount as residuary legatee, the object being that Maria Blount should not take the grant in a capacity which would imply the necessity of an application to the Chancery Division. I had considerable doubt whether this could be done. As confidence was obviously placed in the personal discretion of Catharine Headon, no doubt a trustee would not be appointed in her place, and, as the several objects of the convent are not so well defined as to admit of equal distribution amongst them, it would seem to be doubtful whether a scheme is not necessary. But I have been referred to a case (*Walsh* v. *Gladstone*, 1 Phil. 290), where the circumstances closely resemble those in the present, which appear to me to show that no scheme is required. There a legacy was given to a certain person to be applied to the use of a Catholic college, and, the legatee having died in the lifetime of the testator, it was urged on behalf of the Attorney-General that a scheme was necessary. But the Lord Chancellor, affirming the decision of the Vice-Chancellor, held that, though the legatee might have had a discretion, if he had been living, as to the application of this fund, yet that it would have been a fair exercise of that discretion to have paid it over to the president of the college, or that, if the court was of opinion that it would be safe in his hands, it would be justified in doing the same. I am satisfied, in this case, as to the permanence of the institution and the fitness of the reverend mother, having regard to her powers, to receive and apply the legacy in question. I think, therefore, that a grant may be made to her as residuary legatee.

Solicitor, *Philip Thornton.*

Friday, July 12.

(Before LAWRANCE, J. and a SPECIAL JURY.)

SAQUI AND ANOTHER *v.* LAZARUS. (*a*)

Probate action—Due execution of will not denied on the pleadings—Will destroyed—Intention—Revocation—Onus of proof—Right to begin.

Where the plaintiffs claimed a decree of intestacy, and the due execution of a will propounded by the defendant was admitted by the plaintiffs in their reply, the only plea against the will being that it was duly revoked by the testatrix:

Held, that the onus of proof lay on the plaintiffs, and that they must begin by opening their case.

THIS was an action for probate in solemn form.

The plaintiffs, Horatio Saqui and Eva Marks, two of the lawful children and next of kin of Sarah Saqui, late of 144, Duke-street, Southport, in the county of Lancaster, widow, deceased, who died on the 14th July 1894, claimed a grant of letters of administration in respect of the personal estate and effects of the said deceased upon the ground that she died intestate. The defendant, Moses Lazarus, as the father and guardian of two grandchildren of the said Sarah Saqui, denied that the said deceased died intestate, and propounded a will of the 8th Feb. 1890, under which the said grandchildren were interested.

The plaintiffs, in their reply and defence to counter-claim, joined issue upon the question of intestacy, admitted the due execution of the will of 1890 propounded by the defendant, but pleaded that the said will was destroyed by the deceased when of sound mind, with the intention of revoking it.

The defendant rejoined by taking issue upon the plaintiffs' defence to the counter-claim, and denied that the will was destroyed by the deceased or upon her instructions; or, if so, he alleged that the destruction took place while the deceased was of unsound mind, and without any intention of revoking the same.

The defendant applied for particulars, in which, when delivered, the plaintiffs stated that they would seek to prove that the will dated the 8th Feb. 1890 was destroyed by the deceased with the intention of revoking it, "on the ground that after the will was executed it was left in the custody of the deceased, and was found in its present condition (all the signatures torn off) after her death." "The date when the deceased revoked the said will is unknown to the plaintiffs, nor is it known whether any person was present at the time of such revocation." "The said will was revoked between the 8th Feb. 1890 and the 1st Sept. 1892."

A. J. Wallach, for the defendant, submitted that, although the defendant was setting up the will, its due execution being expressly admitted by the plaintiffs on the pleadings, the onus lay upon them of showing that the will was duly revoked, and it was their duty to begin.

Kemp, Q.C. and *Barnard* for the plaintiffs.—We admit nothing. The defendant must begin by proving due execution of the will.

LAWRANCE, J.—The plaintiffs are bound by

(*a*) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law.

their pleadings. They must begin by opening their case to the jury.

Solicitors for the plaintiffs, *Colyer* and *Co.*
Solicitor for the defendant, *E. M. Lazarus.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 25 and Aug. 9.

(Before Lord HALSBURY, L.C., LINDLEY and RIGBY, L.JJ.)

Re RUSSELL; DORRELL *v.* DORRELL. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Rule against perpetuities—Will—Gift to daughters of A.—Direction to settle their shares—Daughter living at death of testator—Severable gift.

A testator gave the residue of his real and personal estate to trustees upon trust for A. for life, and, after her death, for her daughters who should attain the age of twenty-one years or marry, in equal shares; and he directed the trustees to stand possessed of the share of any such daughter upon trust for her for life, and, after her decease, upon certain trusts in favour of her children.

Held, that the provision for the settlement of the shares of the daughters of A. was not void for remoteness in the case of a daughter who was living at the death of the testator, and would have been valid though other daughters had been born after the testator's death, to whose shares the proviso could not legally apply.

Decision of Chitty, J. affirmed.

THIS was an appeal from a decision of Chitty, J., holding that a direction by a testator that the plaintiff's share of his residuary estate should be settled upon herself and her children did not infringe the rule against perpetuities, and was consequently not void.

The facts, as stated by Rigby, L.J., were as follows:

George Russell, the testator in this case, by his will, dated the 11th Sept. 1877, gave to his trustees therein mentioned all his real and the residue of his personal estate upon trust to permit his wife to receive the rents, interests, and annual produce during the term of her natural life, and, after her decease, upon trust to pay the legacies therein mentioned; and he directed his trustees to stand possessed of his said real estate and the residue of his personal estate upon trust to allow the same to remain in its then actual state of investment, or to call in and convert the same into money, and to invest the proceeds arising therefrom as therein mentioned, and upon trust to pay the income to his niece Mary Dorrell, the wife of James Dorrell, for her natural life, as therein mentioned; and after her decease to James Dorrell, her husband, for the term of his natural life, and after his decease upon trust to sell and dispose of his said real estate, and to dispose of and convert into money his said residuary and personal estate, and to stand possessed of the proceeds.

In trust for all and every the children or child of the said Mary Dorrell, who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall attain that age, or marry under that age, to be divided between them if more than one in equal shares and proportions, and if there shall be only one such child, in trust for that one and only child.

Then followed a proviso for the settlement of the share of any daughter of Mary Dorrell in these terms:

Provided also, and I do hereby expressly declare, that the trustees or trustee for the time being of this my will shall stand possessed of the share of any daughter under the provision hereinbefore made upon trust to invest the same as hereinbefore expressed, and to pay the rents, interest, and dividends arising therefrom unto her for the term of her natural life, for her sole and separate use and benefit free from the debts, control, or engagements of any husband with whom she may intermarry, and her receipt alone to be a good discharge for the same and from and after her decease, then upon similar trusts for the benefit of her children as are hereinbefore provided for the children of the said Mary Dorrell.

By a fourth codicil to his will, dated the 2nd June 1883, the testator revoked the bequest of any share or interest any son or sons of Mary Dorrell might become entitled to under the trusts of his will arising from the proceeds of sale of his real estate and the conversion of his residuary personal estate after the decease of them the said Mary and James Dorrell, and he directed that his trustees should stand possessed of the whole of such proceeds "in trust for the daughter or daughters of the said Mary Dorrell as in my said will directed."

The effect of the codicil was to exclude sons of Mary Dorrell, and to make the trustees hold the proceeds of sale and conversion of the real and residuary personal estate subject to the life interests in trust for the daughter or daughters of Mary Dorrell who should attain twenty-one or marry under that age.

The testator died in Oct. 1885, leaving him surviving his wife, the first tenant for life, who died in December of the same year; his niece, Mary Dorrell, who died in 1894; and her husband, James Dorrell, who is still living, and is the present and last tenant for life. Mary Dorrell, the niece, had three children, viz., a son; a daughter, who died an infant and unmarried; and the plaintiff, Catherine Mary Dorrell, who had attained the age of twenty-one years when the testator died. Under the combined effect of the will and fourth codicil, and subject only to the life interests and the settlement, the plaintiff immediately on the death of the testator became entitled to all the proceeds of the testator's real and residuary personal estate for a vested interest liable only to be partially divested in the event (which never took place) of any sister or sisters living to attain twenty-one or marrying under that age. After the death of her mother and sister this vested interest became absolute, subject only to a life interest in her father and the proviso on which the question in this case turns.

The plaintiff took out an originating summons to have it determined whether she was entitled absolutely, or whether she took a life interest only.

The summons was heard by Chitty, J. on the 24th May, when he declared that the plaintiff was not absolutely entitled (subject to her father's

(*a*) Reported by W. C. RISE, Esq., Barrister-at-Law.

life interest) to the testator's estate, and the plaintiff appealed.

Upjohn and *W. L. Richards* for the appellant.—In considering whether a gift offends against the rule against perpetuities, the court does not look at the actual events, but at the possible events. The gift to the children of Mary Dorrell is a gift to a class, and she might have had a daughter born after the testator's death who would have taken a share. There is no distinct gift to the plaintiff. She takes as a member of a class as to some of whom the direction to settle the share may be invalid; therefore the direction to settle is invalid as to the whole class, and must be treated as struck out of the will. The court will not split the gift, and say the direction as to the settlement of the daughters' shares only applies to those born in the testator's lifetime. That would be making a new will for the testator. The fact that the plaintiff was actually born in the lifetime of the testator does not make the direction to settle valid as to her. In *Pearks* v. *Moseley* (43 L. T. Rep. 449, 451; 5 App. Cas. 714, 723) Lord Selborne, L.C., said: "A gift is said to be to a 'class' of persons when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is that the vice of remoteness affects the class as a whole if it may affect an unascertained number of its members," and he referred to

Leake v. *Robinson*, 2 Mer. 363.

They also referred to

Re Michael's Trusts, 46 L. J. 651, Ch.;
Lord Dungannon v. *Smith*, 12 Cl. & F. 546;
Arnold v. *Congreve*, 1 Russ. & M. 209;
Greenwood v. *Roberts*, 15 Beav. 92;
Evers v. *Challis*, 7 H. L. Cas. 531;
Proctor v. *The Bishop of Bath and Wells*, 2 H. Bl. 358;
Re Bence; *Smith* v. *Bence*, 65 L. T. Rep. 530; (1891) 3 Ch. 242;
Re Ridley; *Buckton* v. *Hay*, 41 L. T. Rep. 336; 11 Ch. Div. 645.

E. P. Hewitt for the heir-at-law and next of kin of the testator.—The gift to the daughters of Mary Dorrell is a gift to several whose interests are severable. Therefore the direction to settle the shares is valid as to those who were alive at the testator's death and invalid as to any others, and the whole clause as to the settlement of the shares will not be considered as struck out. The plaintiff was alive at the testator's death, and the direction to settle her share is valid:

Griffith v. *Pownall*, 13 Sim. 393;
Cattlin v. *Brown*, 11 Hare, 372;
Wilson v. *Wilson*, 4 Jur. N. S. 1076;
Knapping v. *Tomlinson*, 10 L. T. Rep. 558;
Herbert v. *Webster*, 15 Ch. Div. 610.

The decree in *Arnold* v. *Congreve* (*ubi sup.*) is inconsistent with *Cattlin* v. *Brown* (*ubi sup.*), and in *Knapping* v. *Tomlinson* (*ubi sup.*) Kindersley, V.C. considered all the cases and treated *Arnold* v. *Congreve* as overruled. In *Webster* v. *Boddington* (26 Beav. 128, 136) Lord Romilly afterwards explained his decision in *Greenwood* v. *Roberts* (*ubi sup.*), and it cannot be relied on by the plaintiff. The point that the interests were severable, and therefore that the direction complained of as violating the rule against perpetuities might be good as to some shares and bad as to others, was not taken in *Arnold* v. *Congreve* (*ubi sup.*), *Re Michael's Trusts* (*ubi sup.*), or *Re Ridley*; *Buckton* v. *Hay* (*ubi sup.*) In *Herbert* v. *Webster* (*ubi sup.*) Hall, V.C. said his decision in *Re Michael's Trusts* was unsatisfactory.

Oldham for the trustees of the will.

Richards in reply.

Cur. adv. vult.

Aug. 9.—RIGBY, L.J. delivered the judgment of the Court, and after stating the facts set out above, continued:—There can be no question that the plaintiff takes an absolute interest but for the proviso above referred to. It is suggested that the proviso is void for remoteness, inasmuch as there might have been a daughter of Mary Dorrell, born after the testator's death, who would live to take a vested interest, and whose children would not necessarily attain twenty-one within the period allowed by law for the postponement of the vesting of a benefit. No doubt in the case of such a daughter the settlement over directed by the proviso would have been void, but it would be perfectly good as to the interest taken by the plaintiff, who was alive at the testator's death, unless the possible operation of the proviso with reference to the share of a daughter not in existence at the testator's death makes the whole proviso void. Looking at the state of things at his death, it was then clear that the plaintiff must take either the whole or a share, and other daughters of Mary Dorrell might come in and take shares. Assuming them to do so, yet the share of the plaintiff and the share of the other daughters would be perfectly separate and distinct, and completely ascertained and separated within the time allowed by the law. The proviso in no way mixes them up, but operates separately upon each share. The settlement of the plaintiff's share directed by it is perfectly legal, and would have been so even though there were other shares to which the proviso could not legally apply. If indeed there had been a proviso which could only operate upon all the possible shares if it operated at all, the case would have been different; but the settlement of the plaintiff's share is to take place whether there are other shares or not, and take place from the testator's death in favour of the children of a person then living, and is quite unobjectionable. This is not the case of a gift over which depends upon events so stated as to involve a possibility of its taking place outside the permitted limits, or in favour of persons who might take interests vesting beyond those limits. No splitting of the clause is necessary, since it is so framed as to apply separately to the plaintiff's share. On principle, therefore, the judgment of Chitty, J. ought to be supported. The supposed conflict of authority, when the decisions are looked into, is not so great as the appellant's counsel attempted to make out. No case binding on the Court of Appeal has been cited which in any way conflicts with the conclusion above arrived at, and indeed there is no case in which after argument as to this point any conflicting decision has been arrived at. On the other side, *Griffith* v. *Pownall* (*ubi sup.*), *Cattlin* v. *Brown* (*ubi sup.*), *Wilson* v. *Wilson* (*ubi sup.*), and *Knapping* v. *Tomlinson* (*ubi sup.*), decided respectively by

Shadwell, V.C., Page Wood, V.C., and Kindersley, V.C., are all authorities in support of the conclusion arrived at, so that the weight of authority is clearly in favour of it.

Solicitors: *Crowders* and *Vizard*, agents for *S. B. Garrard*, Worcester; *Kingsford, Dorman*, and *Co.*, agents for *Willoughby*, Daventry.

Friday, Aug. 9.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Linfoot v. Pockett. (a)

APPEAL FROM THE CHANCERY DIVISION.

Bill of sale—Conditions not in bill of sale and not agreed to by borrower—Defeasance—Payment by instalments composed of interest and capital—Statutory form.

A bill of sale provided for the payment of the principal sum together with the interest then due as follows: "The sum of 6l. on the 5th Dec. 1894, on account of interest and principal, and a like sum of 6l. on account as aforesaid on the 5th day of each and every succeeding month thereafter." The borrower paid the first instalment on the day named, and then received from the lender a small book for entering the receipts for instalments, on the cover of which were some printed "rules and regulations" which were not contained in the bill of sale, and which referred to the payment of the instalments and the removal of the furniture, and the defendant afterwards attempted to enforce some of them against the plaintiff.

Held (reversing the decision of Kekewich, J.), that the rules and regulations contained in the book could not be considered as a part of the contract entered into with reference to the bill of sale, and it was therefore not void under sect. 10, sub-sect. 3, of the Bills of Sale Act 1878, as being subject to any defeasance or condition not written on the same paper.

Held also, that the bill of sale was not void as not being in accordance with the form given in the Bills of Sale Act (1878) Amendment Act 1882 by reason of the equal instalments including interest as well as principal; nor because the date when the last instalment of principal and interest was payable was not stated; nor because the last instalment would be less than 6l.

Re Bargen; Ex parte Hasluck (69 *L. T. Rep.* 763; (1894) 1 *Q. B.* 444) *approved.*

In Oct. 1894 the plaintiff, G. W. Linfoot, a medical electrician, being in want of a temporary loan, read in one of the London morning papers the following advertisement issued by the defendant, H. T. Pockett:

Money lent at 5 per cent. From 5l. to 2000l. Why pay more when a private gentleman desires to grant advances to male or female upon their note of hand alone in any part of England and Wales without loan-office formalities? No sureties or bondsmen required. The advances can be paid back by easy instalments or remain out from one to fifteen years by paying the interest only. Call or write to the actual lender, Wilfred Wilberforce, Esq., 11 Stroud Green-road, Finsbury Park, London, N.

The defendant afterwards agreed to lend the plaintiff 100l. on the security of a bill of sale on his furniture. The bill of sale was dated the 5th Nov. 1894, and was made between the plaintiff, thereinafter called the mortgagor, of the one part, and the defendant, thereinafter called the mortgagee, of the other part, and the mortgagor assigned to the mortgagee the chattels specified in the schedule thereto to secure payment of 100l. and interest thereon at the rate of 1s. in the pound per month, and the mortgagor further agreed and declared that he would duly pay to the mortgagee the principal sum aforesaid together with the interest then due as follows:

The sum of 6l. on the 5th Dec. 1894, on account of interest and principal, and a like sum of 6l. on account as aforesaid on the 5th day of each and every succeeding month thereafter.

The plaintiff paid the first instalment on the 6th Dec., and thereupon received a small book for entry of receipts for instalments, on the cover of which was printed on the one side a notice, and on the other "Rules and regulations, which are strictly adhered to." The notice was in the following terms:

It has come to the knowledge of Mr. Wilberforce that certain unprincipled persons have written to clients (the more especially where there is a bill of sale existing) offering and professing to assist them in evading the repayment of their loans (their sole object being to extort large sums of money by way of fees, &c.). Borrowers are hereby informed that they render themselves liable to be convicted of felony should they either remove their goods, chattels, or effects, or assign them by way of security to anyone, or should they obtain a loan on the same elsewhere without the consent of Mr. Wilberforce, and furthermore should any County Court or other judgment be registered, or any executions be entered against them, or whenever Mr. Wilberforce considers he is likely to lose the security of the goods, chattels, or effects, the bill of sale will be immediately enforced without notice. Should you, therefore, receive any communication from "persons offering their assistance," Mr. Wilberforce will feel obliged by your forwarding the same to him without delay.

The rules and regulations were as follows:

1. The instalments are to be paid at my office as agreed, and in case of default in any payment, the whole amount remaining unpaid will become due and payable. If more convenient, borrowers residing at a distance may remit their instalments by post-office orders made payable to W. Wilberforce, at the General Post Office, and crossed "and Co.," inclosing this book, together with stamped addressed envelope for its return.

2. The contract on the part of the borrower and sureties being that the instalments of this loan shall be regularly paid, it is expected the same be done, for in no case are the instalments allowed to be in arrear, as, in the event of default in the payment of any one instalment, legal proceedings will be taken forthwith for the full amount remaining due on the promissory note: and where a bill of sale is given it will be immediately enforced, or if security be held the same will be realised without notice.

3. Where the borrower has given a bill of sale, and he desires to remove the furniture, or is likely to become a bankrupt, or compound with his creditors, notice must be given to Mr. Wilberforce, either personally or in writing, three days previous to such removal, bankruptcy, or compounding, and also the receipt for rent, must be sent to Mr. Wilberforce within two months after the usual quarter-days.

4. It is absolutely necessary that each of the above rules be strictly complied with, as Mr. Wilberforce cannot be held responsible for any mistakes that may occur from neglect thereof.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

On the 21st Dec. 1894 the defendant sent the following letter to the plaintiff:

I see there is a County Court judgment registered against you. I wish to know whether any execution has been levied on your furniture, so that I may take steps to protect my security. If you will refer to your instalment book you will see that you ought to have communicated this to me. Please send all papers you have received in connection with the summons.

The plaintiff, not having paid the instalment due on the 5th Jan. 1895, received the following letter, dated the 21st Jan., from the defendant:

Just a line to remind you that the instalment on your bill of sale fell due on the 5th inst., and the same carries interest at 60 per cent. per annum until it is paid, so that the longer payment of the same is delayed the more it will cost you.

The defendant afterwards threatened to enforce against the plaintiff some of the rules and regulations contained in the book, and he thereupon consulted his solicitor, and eventually this action was commenced to set aside the bill of sale.

The plaintiff contended that the bill of sale was fraudulent and void on the ground that the defendant unfairly took advantage of the plaintiff's position to insert oppressive and extortionate terms, especially the clauses for payment of interest at 60 per cent. and for repayment only by instalments; that, by reason of the rules and regulations contained in the book, the bill of sale was void under sect. 10, sub-sect. 3, of the Bills of Sale Act 1878; and that by reason of the interest as well as principal being included in the instalments, and of the instalments being spread over an indefinite period, the bill of sale was void as not complying with the statutory form.

Bramwell Davis, Q.C. and *Manby* for the plaintiff.

Herbert Reed, Q.C. and *Arthur Powell* for the defendant.

KEKEWICH, J.—In my opinion this bill of sale is void. As the case may go further, it is desirable that I should state with extreme brevity my view of the facts. The plaintiff seems to me to be a transparently honest witness. I have not heard the defendant, and I do not wish to; but I think I could not give the plaintiff any relief on the ground that he has been imposed on. I daresay he thinks he has been, notwithstanding, but I use the word in its legal sense. But then it seems to me there were annexed to this bill of sale conditions which are not expressed on the face of it. I must take it, after the examination and cross-examination, that the plaintiff knew nothing of anything of that kind having been said at the time the bill of sale was signed, and therefore that nothing was actually said at that time about these rules and regulations. They are contained in this little instalment book with some prefatory notices also. I will read one of them, although there are others which might be criticised. The first of them says: "In case of default in any payment the whole amount remaining unpaid will become due and payable." If that is a term of the contract, and it is not expressed in the bill of sale, the bill of sale is void. It is quite unnecessary to refer to any case on that point beyond the last one, *Counsell* v. *The London and Westminster Loan and Discount Company* (19 Q. B. Div. 512). But in the cases which have been cited the document was contemporaneous, and according to my experience the documents always are. I do not mean to say that they are always necessarily signed at the same minute, or even the same day, but they are practically contemporaneous. This certainly was not. This little book was never seen by the plaintiff until after the first instalment became due, a month after the date of the bill of sale, and then, after he paid that instalment, on the 5th Dec. 1894, this book was sent to him, the receipt for the money, the only instalment the plaintiff ever paid, being in the book. I do not rely on the defendant's letters, which have been referred to, except as showing the interpretation which the defendant himself placed on those rules and notices. He obviously, according to these letters, regarded these rules and the notices as part of the contract, and he intended them to be so. But he sent this receipt for the money. It seems to me he says, as clearly as a man can: "I receive this money on the terms of this book; you will understand I take this instalment because it is in time; if you make default in any other instalment the whole amount remaining unpaid will become due and payable; that is part of our bargain. It may or may not have been said before, but they are the usual terms, and you will understand that is part of the bargain. These are my terms, and I insist on your accepting them." The plaintiff might have complained of that, and have said, "It is not part of our bargain," and he might at once have taken proceedings, but I have nothing to do with that now. How could the defendant, having received the money in that way, be heard to say it was not part of the original bargain? It was obviously intended that it should be annexed to the bargain, and it could only have been annexed to the bargain by being, as between him and the plaintiff, treated as part of the original bargain. It is not a question about some default having been made, and then the defendant saying, "Well, if you wish me not to insist on the terms of the bill of sale, we must have some further conditions of a more strict character." There is nothing of the kind here; he treats it as a necessary incident of the original document. I do not think, according to the honour of the transaction (if there is honour in such matters at all), he can now go back and say, "This was not part of the bargain we entered into." Upon that ground, which, I have no doubt, will be canvassed elsewhere—and I should be very glad to have the question settled for the benefit of the profession and of those who deal in these dangerous articles—I think the bill of sale is void.

From this decision the defendant appealed.

Reed, Q.C. (*Arthur Powell* with him) for the appellant.—The rules and regulations are not a part of the bargain, or of the bill of sale. It is admitted that the plaintiff did not know of them until more than a month after the signature of the bill of sale, and he is, therefore, not bound by them. This case is quite different to *Counsell* v. *The London and Westminster Loan and Discount Company Limited* (19 Q. B. Div. 512) and *Edwards* v. *Marcus* (70 L. T. Rep. 182; (1894) 1 Q. B. 587). [He was stopped by the Court.]

Bramwell Davis, Q.C. and *Manby* for the plaintiff.—The defendant had these rules and regulations in his mind, and intended to enforce them when the bill of sale was signed. They are

therefore a condition on which he lent the money, and he cannot now be heard to say the conditions in the book were not a part of the bargain and that the bill of sale is good as the borrower was not bound by them, especially after the letters of the 21st Dec. 1894 and the 21st. Jan. 1895. His reference to the book in the former letter shows he intended the rules to form a part of the contract. The plaintiff had no copy of the bill of sale, and the defendant took advantage of that to insert conditions in this book which the plaintiff would probably think were in the bill of sale. But the bill of sale is void under the Bills of Sale Act 1882, as not being in accordance with the form in the schedule to that Act. The equal monthly instalments are made up of principal and interest, and to be within the form they must be of principal only:

Goldstrom v. *Tallerman*, 55 L. T. Rep. 866; 18 Q. B. Div. 1.

In *Davis* v. *Burton* (11 Q. B. Div. 537, 539) Brett, M.R. said, the object of the Bills of Sale Act 1882 was that the borrower should understand the nature of the security which he was about to give, and here it requires an elaborate calculation to find out how long it will be necessary to continue paying these instalments in order to pay off the principal and interest. Besides, the last instalment cannot be exactly 6*l.* This bill of sale, therefore, is so embarrassing and ambiguous that it does not comply with the form in the Act In *Edwards* v. *Marston* (64 L. T. Rep. 97; (1891) 1 Q. B. 225) the bill of sale was held good, as the exact time when the principal was paid off appeared. The decision of *Re Bargen; Ex parte Hasluck* (69 L. T. Rep. 763; (1894) 1 Q. B. 444) should be overruled. The onus of showing that the plaintiff understood that the interest was to be 5*l.* per cent. per month is on the defendant:

Moorhouse v. *Woolfe*, 46 L. T. Rep. 374.

Another creditor looking at the register of bills of sale a year hence would not know what was still due.

Herbert Reed, Q.C. and *A. Powell* for the appellant.—The form given in the Act shows that the instalments may consist of principal and interest. The instalments will be paid only until the interest and principal is repaid, and the last instalment need not necessarily be 6*l.*:

Simmons v. *Woodward*, 66 L. T. Rep. 534, 536; (1892) A. C. 100, 107.

In *Edwards* v. *Marston* (*ubi sup.*) it did not appear whether the instalment of 2*l.* 10*s.* was principal or interest, and the bill of sale was held good. That case also shows that the bill of sale may stipulate for the payment of the interest alone by equal instalments. *Goldstrom* v. *Tallerman* (*ubi sup.*) shows it may stipulate for the payment of the principal alone by equal instalments; and there is no case which shows that the instalments may not include principal and interest, and in *Re Bargen; Ex parte Hasluck* (*ubi sup.*) it was held that they may. They also referred to

Lumley v. *Simmons*, 56 L. T. Rep. 134; 34 Ch. Div. 698;

Weardale Coal and Iron Company Limited v. *Hodson*, 70 L. T. Rep. 632; (1894) 1 Q. B. 598;

Re Wood; *Ex parte Woolfe*, 70 L. T. Rep. 282; (1894) 1 Q. B. 605;

Haslewood v. *Consolidated Credit Company*, 63 L. T. Rep. 71; 25 Q. B. Div. 555.

Bramwell Davis in reply.

Lindley, L.J.—This is an appeal from a decision of Kekewich, J. declaring that a bill of sale is void and in contravention of the Bills of Sale Act 1878, and that the same ought to be delivered up by the defendant to the plaintiff to be cancelled. Now the question arises in this way: On the 5th Nov. 1894 the plaintiff was induced by an advertisement issued by the defendant, a person named Pockett, who trades as Wilfred Wilberforce, described as of 11, Stroud Green-road, Finsbury Park, to borrow money of him, and he has had good reasons to repent it ever since. The plaintiff borrowed 100*l.* and signed this document: [His Lordship then read the material parts of the bill of sale.] Now 1*s.* in the pound per month is 5 per cent. per month, that is 60 per cent. per annum. The advertisement was that money was lent at "5 per cent.;" but 5 per cent. in a money-lender's mouth means 5 per cent. per month; and 5 per cent. in a borrower's mind means 5 per cent. per annum until he finds out what it really means, and of course when this plaintiff found out what it really meant he did not like it. However, that is immaterial, because it was in fact 60 per cent. Now the plaintiff in this action impeaches this document on the ground of fraud; upon the ground that it is subject to a condition or defeasance which is not expressed in it and is therefore void; and the point was also raised that the form is not in accordance with the Bills of Sale Act 1882. As far as the plaintiff's case rested upon the ground of fraud, Kekewich, J. decided against the plaintiff; that is to say, the learned judge decided against him so far as he sought relief on the ground that he had been taken in and cheated when he signed the bill of sale. There is no reason whatever for quarrelling with that decision, because the man was not cheated into signing the bill of sale, although he was fool enough to be attracted by this advertisement. He, being a man of some intelligence, and quite capable of reading what he signed, went and signed this document, of course wanting the money. That part of the case therefore fails. The next point, and the one which has been the most urged before us, is, that this document was accompanied by some condition or defeasance which was not expressed in it, and which, by reason of its not being expressed, rendered it void under the Bills of Sale Act 1878, sect. 10, clause 3, which runs thus: "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust, not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void." Well, there was no condition, no defeasance, or anything else in this bill of sale, in respect of which that enactment was complied with. But was there any condition or defeasance which ought to have been embodied in this bill of sale? It appears to me, when one understands the facts, that obviously there was not. The bill of sale was executed, and there was no bargain, no condition, no defeasance, nor anything which was part of that bargain. The bargain was complete, the money was paid, and the bill of sale was executed.

After that, there was some conversation apparently about the plaintiff not being at liberty to remove the goods, change of residence, and so on. But that was not part of the terms. It was a statement made by the lender, like other statements which I shall have to refer to presently, which were made to frighten the borrower, and which, like the rest of the system of terrorism and bullying pursued in these cases, is shocking to contemplate; but I cannot on that account hold that a conversation of that kind taking place afterwards and not part of the bargain is a condition or defeasance. Then what happened afterwards was this: The plaintiff paid the first instalment of 6*l.*, and then he received a little book containing certain things called "Rules and regulations which are to be strictly adhered to." Those rules and regulations are oppressive in the extreme. [His Lordship read the "notice" contained in the book set out above and continued:] Anything more preposterous or more atrocious than that can hardly be imagined; it is simply bullying and frightening; it is lying. Then on the other side of the cover are certain rules and regulations which are to be "strictly adhered to." Now, if those rules and regulations were part of the bargain, no doubt they would fall within sect. 10, clause 3, of the Act of 1878. But they were not part of the bargain, and although Mr. Wilberforce said he understood them to be so, or rather said that they were actually so, we cannot fairly or properly retort upon him, "We will take you at your word, and hold that to be part of the bargain which never was so." He tried to bully and frighten his borrower, and he succeeded in doing so, I daresay; but we cannot on that account hold that these regulations, which were first seen by the borrower more than a month after the contract was complete, were in any way part of the bargain. He knew nothing about them, and I cannot accede to the suggestion that we ought to hold them to be conditions of the bargain merely because one side said he thought they were part of the conditions, when the other side had never heard of them. We could not so hold in a case where the parties concerned were two honest people, and we certainly cannot so hold in a case like this. Then comes a totally different point. It has been argued that this bill of sale was void as not being in accordance with the form in the schedule to the Act of 1882; and the objection is that, by mixing as this bill of sale does the principal and interest and making the whole debt payable by equal monthly instalments of 6*l.*, the first being payable on the 5th Dec. 1894, the borrower cannot find out when he has paid off his security, that he cannot find out when the last instalment of principal is due or when the last instalment of interest is payable. Now unquestionably this is a serious matter to borrowers, because such a piece of paper as this in the hand of unscrupulous men like Wilberforce would possibly be used for the purpose of gross oppression. I feel that very strongly, but it does not follow that that constitutes a ground on which we can hold this bill of sale to be void. The first thing we have to do is to construe it, and we must construe a bill of sale as we would construe any other instrument, that is, with the view of understanding it in reference to the transaction to which it relates. After all the transaction comes to this; it is one for lending money, it is a loan transaction, and although the principal sum and interest is to be repaid by instalments of 6*l.* each, if when you come to the last instalment there is not so much as 6*l.* due, you must pay what is due. I think that is the obvious construction to be put upon it. But it has been urged that that does not get over the difficulty, because you cannot find out when the loan is at an end—when the principal has been paid off; and at first I thought that was a serious matter. But when we look closely at the form, I do not think we can go as far as to say this bill of sale is void as not being in accordance with it. The form given in the schedule runs thus: "And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid together with the interest then due by equal payments of *l.* on the day of (or whatever else may be the stipulated times or time of payment.)" There is no time specified, but, as the whole loan must be repaid, I agree if you construe this document as the document was construed by Fry, L.J. in the case of *Goldstrom* v. *Tallerman*, and read it as a contract to pay the principal and interest by equal instalments, and as if the words "interest then due" were in a parenthesis, you can ascertain, by a not very difficult calculation, how much principal or interest you have paid off, and how much you ought still to pay. But still the calculations have to be made; you cannot get at it without calculation, and I cannot hold that a bill of sale is void because that calculation is made a little more troublesome. I think that is a sound principle to go on, and I observe that Lord Halsbury, in the case of *Simmons* v. *Woodward* (*ubi sup.*), says that a point had been raised which "appears to be this: that, whereas an example is given of the form in the schedule, in which you are to state when the instalments are to be due, and the Legislature has there suggested a form in which the instalments are to be equal; therefore, unless the sum lent, together with interest"—now this is the important part—"(because it appears to me that the interest is an essential part of the instalments, according to the provisions both of the Act itself and of the form suggested in the Act, to give effect to the bill of sale) is capable of accurate subdivision, you cannot do it—that you cannot possibly make a bill of sale which shall have an unequal division of the sum lent." I understand that to mean that Lord Halsbury did not quite adopt the construction put upon the bill of sale by Fry, L.J., in *Goldstrom* v. *Tallerman*. But whether that is so or not, in the face of that and of the other decisions which have been referred to, and which I will refer to presently, I do not think we could say that, because a bill of sale requires a little more calculation than the form in the schedule, it must necessarily be void under the clause in the Act which says that bills of sale shall be void if they are not in accordance with that form. If you look at the form it is impossible to say that it forbids a loan upon the terms that the principal and interest shall both be paid by equal instalments. It is not possible to say that, though the interpretation is not so clear as at first sight appears. But what we have been asked to say is, that a bargain such as this, which is common enough in building

societies, is necessarily bad if made in the form of a bill of sale. We are not prepared to go that length. Now, with regard to the authorities which have been cited I do not think it necessary to refer to them at any length. The cases of *Goldstrom* v. *Tallerman* (*ubi sup.*) and *Edwards* v. *Marston* (*ubi sup.*) are not very difficult to deal with because you could find out in those cases without difficulty what the payments were as regards principal and interest. Then as regards the case of *Re Bargen*; *Ex parte Hasluck* (*ubi sup.*), before Williams, J., the terms of the bill of sale were a little different, for it does not state, as it does here, that the instalments are to be on account of interest and principal; still it is quite obvious, from the reasoning of that learned judge, that he was of opinion, and I think he was right, that you cannot hold that a bill of sale which is otherwise unobjectionable is void because you have to make a calculation which is a little more difficult than that which you must make if you adopt the form which is given in the schedule. For those reasons I am of opinion that this appeal must be allowed.

LOPES, L.J.—I am of the same opinion. I am bound to say I have felt, if it could be done legally, that I should like to declare this bill of sale void, but, after much consideration, I fear that it is not possible. Several points were taken before the learned judge in the court below. It was contended that this bill of sale was obtained by fraud. The learned judge heard evidence upon that matter, and considered it, and came to the conclusion that that point was not established, and I think he was right in so holding, because it is impossible to say, having regard to the circumstances, that the borrower was deceived by the bill of sale. He was an intelligent person, able to read and write, and able to understand what he saw; he read the bill of sale and had an opportunity of forming his own opinion with regard to its effect, and he signed it. It is impossible, therefore, to say that he was induced by fraud to sign and become a party to that bill of sale, and I think the learned judge was right in so holding. Then another point was taken. It was said that the bill of sale was subject to a certain condition or defeasance, such as is contemplated by the Act of 1878, sect. 10, sub-sect. 3, which has been already referred to and read by my brother Lindley. I think that means a condition or defeasance which is part of the bargain; but here I think it is impossible to say that there was any condition or defeasance which was part of the bargain. It is said there was a certain conversation at the time the bill of sale was executed, not before it was executed, but afterwards and when the money had been paid. But, looking at the terms of that conversation carefully, I do not think it can be said for one moment that that conversation can be held to be in any respect a condition or part of the bargain. It was merely a conversation which took place between the borrower and lender, and used by the lender for the purpose of terrifying and bullying the borrower. I do not think it amounted to more than that. Then it was said a book was sent, that that book contained rules and regulations, and that they formed part of the bargain; and that, in point of fact by subsequent letters, the lender himself admitted they were part of the bargain. Now, I cannot come to that conclusion. That those rules and regulations, dealt with as they were by Mr. Pockett, were very much in the nature of a scandalous attempt on his part to affect the borrower and terrify him, I have not the slightest doubt. When did the book first come to the knowledge of the borrower? Not until a month after the bill of sale had been executed. It was then that that book was first introduced to his notice; he had never heard of it before, and knew nothing of it at the time of the bargain, and, in my opinion, he never assented in any way which is binding upon him to any one of the terms which are contained in the book. That again, in my opinion, was an attempt to intimidate the borrower of a most disgraceful kind; but to say that it amounts to such a condition or defeasance as is contemplated by sect. 10 of the Act of 1878 is impossible, and therefore that point fails. But then there is another point raised, which is more difficult to deal with. It is said the bill of sale is void, as it does not comply with the statutory form, but has deviated from it. It was contended that, with regard to that portion of the bill of sale which provides for repayment of the loan, it mixes up principal and interest in a way which makes it difficult to understand (the amount being payable by equal instalments) what portion is attributable to principal and what to interest; difficult to say when the debt or loan would be paid off; difficult to know on what terms the borrower might redeem. It was said that all this is so ambiguous, so uncertain, and so embarrassing and confusing, that it amounts to a deviation from the statutory form, and that, therefore, it renders the bill of sale void. It was contended that it was impossible except by extending the period of payment to a very remote time, to come to the conclusion that it was to be paid off by equal instalments—the instalments provided for being these equal amounts of 6*l.* At first I was rather struck with that difficulty; but on consideration I do not think much of that point, because at the end, assuming the balance did not amount to 6*l.*, it could be paid off, according to the cases which have been brought to our notice, on payment of the lesser sum. The question is whether that point is a good one. Is that such a deviation from the statutory form as to render the bill of sale void? In my opinion it is not. If you look at the statutory form it is impossible to say that, even where there is a literal observance of that form some calculation will not be involved, that is to say, it involves a calculation of what is principal and what is interest, and other matters; and the only difference I can see between the statutory form and the present form is this, that in the present case it would be a rather more complicated calculation to make than that which would have to be made if the statutory form were observed. I do not think that is enough to render a bill of sale void. I adopt the opinion expressed by Williams, J. in *Re Bargen*, which was referred to, when he said (69 L. T. Rep. 765; (1894) 1 Q. B. 447): "The statutory form contemplates that the principal sum together with the interest then due may be paid by equal instalments covering principal and interest."

RIGBY, L.J.—I am of the same opinion. With regard to the point of fraud, I do not think there was any fraud in the procuring of the contract. I think there was fraud attempted in reference to the rules and regulations which Wilberforce knew, as well as anybody else, were not part of the con-

tract. In that attempt, and in the unprincipled way he put them forward as part of the contract, I think there was fraud, though I do not see that it succeeded, because the borrower upon taking advice was able to see that this was an attempt to impose upon him, and he was not really imposed upon. With reference to the point of there being a condition not appearing on the bill of sale, of course that cannot be a condition in any way which was not made known to the other side; and therefore the putting forward of those rules and regulations, however improper it might have been, would not make them part of the contract. Whatever Wilberforce intended, he did not put them forward at a time when they could be said to be part of the contract. With reference to the other point, I confess that for some time I was rather disposed to find there an objection, and I should not have been sorry if any objection ultimately satisfactory to me could have been made to this form. But we are bound, of course, to administer the law, and to construe the document, and not because we disapprove of the conduct of one of the parties to strain the construction too heavily against him, and I think there is nothing contained in the form given in the schedule to the statute which would prevent an instrument in the form we have in this case taking effect as a bill of sale. I cannot quite follow Mr. Bramwell Davis's argument upon the case of *Goldstrom* v. *Tallerman*. There the suggestion was very much that the form given for an instrument of this kind was the only form which could be permissible under the statute. Fry, L.J. says (55 L. T. Rep. 867; 18 Q. B. Div. 5): "It is suggested that the form requires the computation of the whole interest on the principal at once, the addition of this sum to the principal, and the division of such total sum into the stipulated number of instalments." That is not exactly the present case, because he assumes there a stipulated number of instalments. But it is very like the present case—like it, I think, in all respects except that one circumstance that the instalments were to work themselves out, and there was no number of instalments stipulated for. Then he says that construction is excluded. He does not say, as I understand, that it is improper to include principal and interest in one instalment, but that you are not obliged to do it, and he arrived at that conclusion by saying, "We think that the words 'together with the interest then due' are parenthetic." I dare say they are, but whether parenthetical or not, I see no decision there that it would not be legal—that it would be a substantial departure from the form in the schedule—to take principal and interest into account at once, and to make the loan payable in that manner, which is practically the way in which building societies' loans are very generally made repayable. Now, if that be so, I do not think there is much left excepting this, which weighed upon me a good deal at first, that it would require not an easy calculation, but a somewhat difficult one—a calculation which in fact a vast number of people entering into these small transactions would not be able to make. There again it is pointed out that it is not quite a simple thing to calculate interest upon the statutory form, and agreeing that it is rather a simple case if you pay instalments of principal until the whole of the principal is got rid of, and then pay the interest, still it is not quite a simple thing to calculate even that; that is to say, there are a vast number of people who could not do it to save their lives, but would have to get assistance even if fairly intelligent people, and I certainly cannot adopt as a principle that, because in this case the arithmetic would be somewhat more difficult, there is therefore a substantial departure from the form given in the schedule. If we were to hold on a very literal construction that you are bound to have a state of things in which the whole principal and interest could be paid by equal instalments, these being instalments of 6*l.*, I am still of opinion that, if that were a problem proposed to a mathematician, he would answer in the way I did, that in order to do that you would be obliged to calculate interest on the principal first of all treating it as a loan for a term, and in doing that it would take a very long time indeed—I gave it, I think, during the arguments as 100 months. I am satisfied that is not the way to construe the contract, but that it really comes to this, that you are to pay the instalments of 6*l.* until there comes a last instalment which will not equal 6*l.*, and that when you get to that you must pay that last instalment whatever it amounts to, although it is not 6*l.* It seems to me that that is the business-like way of dealing with the contract, and I am unable to find that there is anything in it on which we can say that this bill of sale is void.

LINDLEY, L.J.—The appeal must be allowed with costs, and the action will be dismissed, but without costs.

Solicitor for the plaintiff, *Robert Aylward.*
Solicitor for the defendant, *W. J. Greig.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 11, 16, *and* 23.

(Before CHITTY, J.)

Re FOVEAUX; CROSS *v.* LONDON ANTI-VIVISECTION SOCIETY. (*a*)

Charity—Societies for suppression of vivisection.

Societies having for their object the total suppression of vivisection are charities in the technical sense in which the term "charity" is used in law.

FRANCES FOVEAUX, by her will dated in August 1842, appointed her daughter Catherine Foveaux sole executrix and trustee thereof, and gave her the sole management of her money in the public funds for the benefit of herself and her brother Charles Foveaux with certain conditions in the will mentioned.

By a codicil which was undated, the testatrix, after stating that the chief object of her will was to preserve to her daughter the most absolute power, not only over the interest of her (the testatrix's) money for her own and her brother's advantage in equal shares during their lives, but the most uncontrolled right of disposing of the principal from which such interest was derived for some charitable purpose, provided there existed no such heirs as in the will mentioned,

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

stated her will to be that in default of such heirs and provided neither herself nor her daughter had commenced the particular charity for which they were interested, her daughter should either carry on that intention or will the principal of any moneys after her brother's death either to Hanwell, the Royal Free Hospital, or "any other charity," and in default of such appointment the testatrix directed that on the death of her daughter, her money should be divided between the charities before named.

The testatrix died in Jan. 1844, and her son Charles died in April 1873. Catherine Foveaux, by her will dated in February 1895, after reciting that she had under the will of her late mother a power of giving and appointing for charitable purposes a sum of 6000*l.*, then invested in 2*l.* 15*s.* Consolidated Stock, gave various charitable legacies and bequeathed "300*l.* Stock each to the Victoria-street, now joined with the International, Society for the Total Suppression of Vivisection, to the London Anti-Vivisection Society, and to the Scottish Society for the Total Suppression of Vivisection," and appointed the plaintiffs executors of her will. Catherine Foveaux died in March 1895.

The plaintiffs took out a summons to have the question determined whether under the power to appoint among charities, given by the will of Frances Foveaux, the appointment by the will of Catherine Foveaux in favour of the defendants, the London Anti-Vivisection Society and the Victoria-street and International Society for the Protection of Animals from Vivisection, was valid, or whether the same societies were or were not charities.

Farwell, Q.C. and *W. Freeman* for the plaintiffs.

W. D. Rawlins for the defendant societies.

Henry Fellows for the Royal Free Hospital.

CHITTY, J.—The question is, whether the two defendant anti-vivisection societies are charities in the technical sense in which the term "charity" is used in law. There is a third society whose objects are apparently similar, and in whose favour a similar gift has been made; but this society is domiciled in Scotland, and could not, according to the existing rules of court, be served with the originating summons. They, however, are aware of these proceedings, and are content, as it was stated at the bar, to leave the argument to the two defendant societies. The question arises in this way. By the will, informal and ill-expressed, but the meaning of which is not difficult to ascertain, Mrs. Foveaux conferred on her daughter Catherine a special power of appointing a fund of personalty in favour of charity. The daughter, Miss Catherine Foveaux, in exercise of this power, has, by her will, appointed 300*l.* to each of three anti-vivisection societies. Had Miss Foveaux made the gifts out of her own personal estate the gifts would have been perfectly valid. The societies are lawful societies. No question of perpetuity would have arisen on the terms of the daughter's will or from the nature of the constitution of the two defendant societies, or, indeed, of the Scottish Society, so far as I am aware of the nature of the constitution of that society. The object of the two societies before the court is substantially the same—the total suppression of the practice of vivisection. According to the rules of the Victoria-street Society the object is the total abolition of the practice of vivisection as defined in the report of the Royal Commission, and the action of the society in opposing vivisection rests upon moral grounds; other considerations are to be taken into account subordinately only (rules 1 and 2). The object of the London Anti-Vivisection Society is declared by its rules to be to secure the total abolition of the practice commonly called vivisection. Should it ever be desirable, either from its object having been attained or from other reasons, to dissolve the society its general surplus property is to be applied for the benefit of the animal creation in such manner as the general committee shall determine (rules 14, 19). In determining this question of charity the court does not enter into or pronounce any opinion on the merits of the controversy which subsists between the supporters and opponents of the practice of vivisection. It stands neutral. Humane men and women of a high order of intelligence and education are found in the ranks on either side. Stated broadly, one side holds that the practice, under carefully guarded provisions, although it may inflict some suffering on the lower order of animals, is justifiable and tends to promote the welfare of the human race and also of the lower order of animals in general. They have the Act of Parliament in their favour (39 & 40 Vict. c. 77). On the other hand, the anti-vivisectionists hold that the practice is wholly unjustifiable. The repeal of the Act of Parliament is undoubtedly part of their object; it is not, however, confined to this, but extends to the total suppression of what the members of the societies consider to be a cruel and immoral practice. The element of morality and the improvement of morality from their point of view must, I think, be taken to be involved in their object. Cases arise, such as the present, in which it is not easy to ascertain whether a particular institution is or is not a charity. Charity in law is a highly technical term. The method employed by the court is to consider the enumeration of charities in the statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose, something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice. In *The Commissioners of Income Tax* v. *Pemsel* (*ubi sup.*) Lord Macnaghten said that charity, in its legal sense, comprises four principal divisions —trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. In examining the purposes of any particular trust the court has taken a liberal rather than a narrow view of the subject. Under the head of the advancement of religion the court has not confined itself to the advance-

ment of the tenets of the Church as established by law; it has held trusts for the promotion of many diverse forms of the Christian religion to be valid charities. A strong illustration of this is to be found in *Thornton* v. *Howe* (*ubi sup.*). Sir John Romilly held there that a trust for the publication of the works of Joanna Southcott was a valid charity. He found that her works were not immoral or subversive of religion, although he found in them much that was very foolish, and, although he said that they were in a great measure incoherent and confused, he considered that they were written with a view to extend the influence of Christianity—*i.e.*, the advancement of religion. This was the ground on which he based his decision. He did not think that it was incumbent on him to say that religion would in fact, or according to his own judgment, be advanced. He looked to the view or purpose of the writer. Again, take the head of relief of poverty. Dole charities were greatly in favour with our ancestors. Modern experience, regard being had to the increase of population, change of residence, and other altered circumstances, has shown that such charities tend to pauperise a district, and are not beneficial; and in framing new schemes the court, having within the limits of judicial discretion to express its own views on the question, sets itself against this form of charity. Yet undeniably a dole charity, if created at the present day, is a valid charity. I proceed to deal with the authorities more particularly bearing on the present question. In *The University of London* v. *Yarrow* (*ubi sup.*) it was held that a bequest for establishing an institution for investigating, studying, and curing maladies, distemper, and injuries to which any quadrupeds or birds useful to man might be found subject was charitable. It was part of the testator's bequest that kindness to the animals committed to the charge of the superintendent of the institution should be a general principle of the institution. Lord Cranworth thought that by animals or birds useful to mankind domestic animals were meant; but if a more expansive meaning ought to be attributed he would not at all say that the charity would be bad. In *Marsh* v. *Means* (*ubi sup.*) Wood, V.C. appears to have considered that if the gift had been for supporting the objects and principles enunciated in the prospectus published in "The Voice of Humanity" there would have been a good charity. Stated generally, the main object was to prevent cruelty to animals, and the animals intended to be protected were not merely domestic animals. In *Re Vallance* (*ubi sup.*) a society to promote prosecution for cruelty to animals was deemed charitable. In *Re Douglas; Obert* v. *Barrow* (*ubi sup.*) Kay, J. considered that gifts to the Royal Society for the Prevention of Cruelty to Animals and the Society for the Protection of Animals liable to Vivisection, and to the Home for Lost Dogs, were all charitable. On the appeal Lindley, L.J. was of the same opinion, but he declined to express any opinion one way or the other, whether "The International Society for the Total Suppression of Vivisection," in its then present shape, was as good an object for a charitable bequest as it had been before its constitution had been altered, and Bowen, L.J. expressly reserved this question for future consideration. In *Re Joy* (*ubi sup.*) there was a gift in favour of a society which the testatrix described as "The Society for Suppressing Cruelty by United Prayer." My decision was that there was no such society in existence at the time of the testatrix's death; that, in substance, the lady herself was the society, if it ever existed; and that the society, assuming that it continued to exist until her death, at all events died with her; and that no general charitable intent was manifested. The question whether an anti-vivisectionist society was a charity was discussed, but was not decided. In *Armstrong* v. *Reeves* (*ubi sup.*) the Vice-Chancellor held that legacies to two societies, the objects of which were the suppression of vivisection, were charitable legacies. In opposition to the claim of the defendant societies, it was argued that the Vice-Chancellor took an erroneous view of the effect of the authorities he referred to; but, however this may be, the Vice-Chancellor clearly expressed his own opinion on the subject, apart from *Re Joy* and *Re Douglas*; *Obert* v. *Barrow*. Again, it was urged that, having decided that there was no perpetuity, it became unnecessary for the Vice-Chancellor to consider the question of charity. But the Vice-Chancellor considered this question on the assumption that there was a perpetuity, and the conclusion at which he arrived cannot be treated as a mere dictum; it was part of his decision. Now, although the judgment does not bind me as an authority, still I ought to treat it with the respect due to the learned Vice-Chancellor of Ireland. In *The Commissioners of Income Tax* v. *Pemsel* the present Lord Chancellor refers to the purposes of anti-vivisection societies as being comprehended in England within the term "charitable purposes." The result appears to me to be this. There is a balance of judicial opinion in favour of the defendant societies; there is no express authority against them. On principle, if a society for the prevention of cruelty to animals is a charitable society, it would seem to follow that an institution for the prevention of a particular form of cruelty to animals is also charitable. The mere infliction of pain is not necessarily cruelty; into the question of what is cruelty the moral element largely enters: (*Lewis* v. *Fermor*, 18 Q. B. Div. 532.) It may be truly said that the infliction of justifiable pain is not cruelty. The question of what is and what is not justifiable is a question of morals, on which men's minds may reasonably differ, and do in fact, differ. Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would in fact be benefited is a question on which I think the court is not required to express an opinion. The defendant societies may be near the border line, but I think they are charities.

Solicitors: *King* and *McMillin*; *F. Cotton*; *Hyde, Tandy, Mahon*, and *Sayer*.

July 17 and 25.

(Before CHITTY, J.)

BROOK v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY. (a)

Railway company—Part of building—Part of manufactory—Lands Clauses Consolidation Act 1845, s. 92.

A railway company gave the plaintiffs, who were manufacturers, notice to treat for part of a building in the occupation of the plaintiffs' tenants, another part of the same building, together with adjacent premises, being used by the plaintiffs as their manufactory. The plaintiffs gave the company a counter-notice requiring them to take the whole manufactory.

Held, that the part of the building for which the company had given notice to treat was part of the manufactory within sect. 92 of the Lands Clauses Consolidation Act 1845, and that the company were bound to take the whole manufactory.

THE plaintiffs were the lessees of certain lands and buildings in Cromford-street and Waterway-street, in the town of Nottingham, Nos. 1 to 8 on the plan produced, where they carried on the business of waste and shoddy manufacturers. The building No. 3 on the plan was a three-storey brick building, the ground floor of which was underlet by the plaintiffs. The first and second floors were divided about the middle by a rough wooden partition, readily removed, with a door therein. The northern portion of these two floors was occupied by one Sanson, as tenant at will of the plaintiffs, and the southern portion was used by the plaintiffs for the purposes of their manufactory.

In April 1895 the defendants gave notice, under the powers of their Act passed in 1893 (with which the Lands Clauses Consolidation Act 1845 was incorporated), to treat for the land beneath the northern portion of the first and second floors of the building No. 3 on the plan, and the part of such building standing thereon. In the same month the plaintiffs gave the defendants a counter-notice requiring them to purchase the whole of their interest in all the lands and premises shown on the plan Nos. 1 to 8, and claimed the sum of 7740*l.* as the purchase money, and compensation. As the defendants refused to accede to this claim, the plaintiffs commenced this action, asking for a declaration that the defendants were not entitled to take any part of the premises belonging to the plaintiffs without taking the whole or duly paying the purchase money, or compensation for the whole, and for an injunction restraining the defendants from entering on the part comprised in the notice to treat.

Upon this motion for an injunction coming on for hearing, it was agreed that the motion should be treated as the trial of the action.

Whitehorne, Q.C. and *E. Ford*, for the plaintiffs, contended that the building No. 3 on the plan was part of the plaintiffs' manufactory within sect. 92 of the Lands Clauses Consolidation Act 1845, and, although a part of that building was not at the time of the notice to treat actually used for the purposes of the manufactory, the plaintiffs might at any time require to so use it, and they submitted that the counter-notice was good.

Farwell, Q.C. and *Macnaghten*, for the defendants, argued that, as the part of the building comprised in the notice to treat was let to a tenant, and was not used by the plaintiffs, the railway company were not taking part of a manufactory. At the most it was part of a "building" within the 92nd section.

Whitehorne, Q.C. in reply.

CHITTY, J.—The plaintiffs claim an injunction founded on the rights which they assert are vested in them under the 92nd section of the Lands Clauses Consolidation Act 1845. The railway company have given notice to take a part of a property. The plaintiffs have given them a counter-notice to take the whole of the property, and they must stand or fall by their counter-notice. The defendants say the counter-notice is bad, because it requires them to take more than they are bound to take under the 92nd section. The plaintiffs' case is, that the defendants require part of a manufactory, and they assert that they are entitled by virtue of their counter-notice and the section to require the defendants to take the whole of the manufactory. It is not necessary that I should give a detailed description of all the different parts of the property. I will deal with property No. 3 on the plan. Now, No. 3 may be taken to be and looked upon structurally as one house; it consists of these particulars: The ground floor is in the occupation of two tenants of the plaintiffs. It is divided by an internal wall only. Passing on to the first and second floors of the building, the southern portion is occupied by the plaintiffs as part of their manufactory. The northern part of those floors is occupied by a tenant at will of the plaintiffs named Sanson, and these two floors are divided by rough wooden partitions so as to mark off the part occupied by the plaintiffs and the part occupied by Sanson, and in the wooden partitions there is a door of communication. The rough partitions and the wall on the ground floor can be readily removed in the course of a few hours. The defendants by their notice to treat propose to take the northern portion of No. 3, no part of which portion is used by the plaintiffs as part of their manufactory. It is plain that, if the plaintiffs had given a counter-notice requiring the defendants to take the whole of No. 3, such counter-notice would have been good, because the defendants in that case would be proposing to take a part of a house. But the defendants say that they do not require to take part of a manufactory, because they say that they only require part of the house in which the manufacture is carried on, that part which they require being the part of the house in which the manufacture is not carried on. Now, to ascertain what is a manufactory, regard must be had, and perhaps principally, to the user at the time of the notice to treat. It would not be necessary that every part of what would be reasonably called a manufactory should actually be in use at the time for the purpose of manufacture; for instance, there might be a manufactory, and some part of it, say a large room, might not be required for the purpose of the business. Still, it being all within the walls, although not then in use for the purpose of the business—the rest of the building being sufficient

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

—the large room would, in my opinion, be part of the manufactory. I make this observation to guard myself from appearing to overstrain the question of user. Practically it must be used as a manufactory. Now, are the defendants right in their contention? I agree that all Acts of Parliament must be construed fairly and according to the intention of the Legislature as shown in the Act itself. Hall, V.C., in the case of *Richards* v. *Swansea Improvement and Tramways Company* (38 L. T. Rep. 833; 9 Ch. Div. 425), uses these terms: "As was said by Lord Westbury, who, to use his own expression, was favourable to companies rather than to the individual, 'You must construe it,—"that is, the 92nd section"—'in a liberal sense,' I, construing it in a liberal sense, hold that all the premises have something to do with and fairly constitute part of the manufactory within the terms of the Act of Parliament." Cotton, L.J, on the appeal, said: "Although I do not at all think that we ought to construe this liberally to favour the landowner, yet we ought to construe it reasonably and fairly, having regard of course to previous decisions, and having regard to this, that the object and intention of this section was evidently to give a certain protection to landowners, to persons whose property was taken away from them against their will, so that no person should be required to sell a fraction only of that which ought to be regarded as a unit, when he might be very materially prejudiced by having left on his hands certain fractions only of that unit not capable of being used efficiently when one fraction had been taken away from it. What we have to do is to construe the section fairly." Endeavouring to construe the section fairly, I come to the conclusion on this point that the counter-notice is good. I think that the argument presented by Mr. Farwell is ingenious and refined; but, in my opinion, where a railway proposes to take part of a building, another part of which building is used as a manufactory, they are in substance claiming to take part of the manufactory within the fair meaning of the 92nd section, and I do not think it reasonable to adopt Mr. Farwell's refined construction. It is not necessary for me to travel through all the authorities. It is quite plain that the southern portion of No. 3, is used and was, used at the time of the notice to treat. as part of the manufactory, and I hold that the other portions of the property are part of the manufactory.

Solicitors: *Lee, Ockerby*, and *Everington*, for *J. and H. Bright*, Nottingham; *Cunliffes* and *Davenport*, for *Lingard Monk*, Birmingham.

Saturday, Aug. 10.

(Before CHITTY, J.)

Re LORD COLERIDGE'S SETTLEMENT. (*a*)

Settled Land Act 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22—*Capital money—Right of tenant for life to direct particular investment.*

A tenant for life is entitled, under sub-sect. 2 *of sect.* 22 *of the Settled Land Act* 1882, *to direct the particular investment in which capital money arising under the Act in the hands of the trustees shall be invested, and cannot be controlled by the trustees or by the court so long as he honestly exercises his discretion and the investment directed is one authorised by the settlement, and the trustees are bound to comply with the direction and are safe in doing so.*

THIS was a summons taken out by the trustees of a settlement made by the late Lord Coleridge, in 1887, to obtain the decision of the court on the question whether the power of direction as to the investment of capital moneys arising under the Settled Land Act 1882, given to the tenant for life under the settlement by sub-sect. 2 of sect. 22 of the Act was limited to giving a general direction for investment under sub-sect. 1 of sect. 21, or whether the tenant for life was entitled to direct the investment of such moneys in any particular securities authorised by the settlement. The present Lord Coleridge, the tenant for life in possession under the settlement, had under the powers of the Act sold a leasehold house in Sussex-square, forming part of the settled property, and he had directed the trustees to invest the moneys arising from such sale in debenture stock principally of certain commercial joint-stock companies, which stocks were investments authorised by the settlement, but were not such as the trustees would have selected if the selection had been left to their discretion. The prices of many of the stocks were considerably above par, the price of one stock which was liable to be paid off in twenty-eight years at par being 120*l.* per 100*l.* of stock, but the net annual proceeds of the investments as a whole did not much exceed the rate at 3*l.* per cent.

Mark Romer for the trustees.

Macnaghten for the tenant for life.

CHITTY, J.—This is an application by the trustees of the settlement executed by the late Lord Coleridge, in 1887, for the purpose of obtaining the decision of the court on the question whether they will be justified in investing certain capital money which has arisen from a sale of a leasehold house, part of the settled property, according to the direction of the present Lord Coleridge, the tenant for life in possession. The sale was effected by him under his statutory power. The settlement contains a wide power of investment. It expressly refers to the Settled Land Act 1882, and declares that capital money arising under that Act may be invested in the names of the trustees, or under their control in any investments in which trustees are by law authorised, or in other the various investments mentioned, including specifically the stocks, funds, debentures, mortgages, or securities of any corporation, company, or public body, municipal, commercial, or otherwise, in the United Kingdom or India, or any colony or dependency of the United Kingdom. The investments which the tenant for life has directed are all within the scope of the settlement power, but they are not such as the trustees themselves would, if they have any discretion in the matter, themselves select. The question turns on sects. 21, 22, and 53 of the Settled Land Act 1882. Sect. 21 enacts that capital money under the Act shall be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the modes after mentioned, and these modes are specified in the ten following sub-sections. This division into ten sub-sections is merely for the sake of clearness and convenience. Sub-sect. 1 run thus: "In investment on Govern-

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

ment securities" (by sub-sect. 10 (viii.) of sect. 2 this term "securities" includes stocks, funds, and shares), "or on other securities on which the trustees of the settlement are by the settlement or by law authorised to invest trust money, or on" other the securities mentioned in the sub-section. Sect. 22 enacts that the investment or other application of capital money by the trustees "shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees." It was argued by counsel for the trustees that the only direction which the tenant for life could give to the trustees was to invest or apply the money according to some one or other of the ten sub-sections in sect. 21, each sub-section being regarded as a whole, and that, in regard to the various modes of investment or application specified in each sub-section, the choice of the particular investment or application lay with the trustees. There is nothing in the Act to justify this construction; it would cut down the power of the tenant for life in a manner not contemplated by the Legislature, and render it almost nugatory. The argument was abandoned, and rightly, by counsel, on my pointing out some of the results which would ensue from its adoption. The power thus conferred on a tenant for life of directing the mode of investment, and of selecting the particular investment, is no doubt extensive. The enactment is in accordance with the general policy of the Act. In cases falling within its provisions, the Act transfers, in regard to investment, a function ordinarily exercised by trustees from the trustees to the tenant for life. The only limitations imposed on him are those to be found in the Act itself—notably in the 21st and 53rd sections. By the 53rd section a tenant for life, in exercising any power under the Act, is bound to have regard to the interest of all parties entitled under the settlement, and in relation to the exercise thereof by him is deemed to be in the position and to have the duties and liabilities of a trustee for those parties. Supposing that this case had not fallen within the Act, and that the trustees had in exercise of their ordinary discretion selected these securities in good faith, their discretion could not have been questioned; they would have been acting within the scope of the authority conferred on them by the settlement. Similarly, the tenant for life, in the exercise of his statutory power, cannot be controlled by the trustees, or by the court, so long as he really and honestly exercises his discretion. This the present tenant for life has done; he has considered the question of the propriety of the investments, and has consulted a broker of good standing in the city of London, who has advised him on the subject. He has offered to produce an affidavit verifying the paper on which the broker's advice is given. This should be done. I hold, then, that the trustees will be safe in complying with the direction given, and that they are bound to comply with it.

Solicitors; *C.* and *S. Harrison* and *Co.*; *Spencer Whitehead.*

Tuesday, June 18.

(Before NORTH, J.)

Re STENNING; WOOD *v.* STENNING. (*a*)

Solicitor and client—Person in fiduciary character—Banking account—Following trust money—Appropriation of payment—Rule in Clayton's *case.*

A solicitor paid several sums of money which he received on behalf of several clients successively, into his own banking account, mixing them with his own money, and afterwards drew out money for his own use, so that the balance standing to the credit of the account became less than the amount of the sums paid in which belonged to his clients, but more than the sum belonging to the first client in the order of priority of the payments into the account. After the death of the solicitor an action was brought by a creditor for the administration of the estate, and the balance to the credit of the solicitor's banking account at his death was paid into court to a separate account. Upon the application of the first client claiming payment of the sum due to him from the solicitor out of such balance:

Held, that the first sum paid in must be taken to have been first drawn out according to the rule in Clayton's *case* (1 *Mer.* 572), *and therefore that the sum due to the first client did not form any part of the balance to the credit of the solicitor's account at the time of his death, so that the claim of the first client to be paid out of such balance failed.*

SUMMONS for the determination of a question arising in the administration of the estate of Charles J. Stenning, the testator in the action, who died on the 1st Nov. 1890.

The action was brought by a creditor of the testator against his executor, and on the 8th Dec. 1890 a common order was obtained for the administration of the testator's estate which proved to be insolvent.

The testator was a solicitor, practising in London, and had an account at the Bank of England into which he paid both his own moneys and also moneys received on behalf of his clients.

On the 13th March 1890 the testator paid into that account the sum of 593*l.* 18*s.* 6*d.* being the proceeds of the sale of Consols belonging to Mrs. Sydney Smith, a client, and sold by her direction, of which sum 145*l.* only was paid over to her, leaving a balance of 448*l.* 18*s.* 6*d.* due from the testator.

On the 23rd April 1890 the testator paid into that account the sum of 999*l.* 19*s.*, forming part of an estate called Thorowgood's estate which was vested in trustees, for whom the testator acted as solicitor; and no part of that sum was paid over to the trustees who had been admitted to prove for that amount in the action.

On the 21st Aug. 1890 the testator paid into that account the sum of 1094*l.* 1*s.* 1*d.*, received by him as part of an estate called Cooke's estate, which was vested in trustees for whom the testator acted as solicitor; and there was no evidence that such sum had ever been paid over to the trustees.

On the 30th Aug. 1890 the testator paid into that account the sum of 500*l.* belonging to the estate of one Downing, for whose executors the

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

testator acted as solicitor; and there was no evidence of the payment of such sum to the executors.

From time to time the testator drew out various sums for his own use, so that the balance to the credit of his banking account on the 31st Aug. 1890 was reduced to 1088*l.* 13*s.* 6*d.*, but was never less than the amount due to Mrs. Sydney Smith.

The balance of the testator's banking account at the time of his death was found by the chief clerk to be 4443*l.* 11*s.* 8*d.*, which sum was ordered to be paid into court to a separate account to answer the claims of clients, including Mrs. Sydney Smith, who alleged that it consisted of trust moneys belonging to them, received by the testator in a fiduciary character as their solicitor, and who claimed payment out of such balance in priority to other creditors of the testator.

This summons was taken out by Mrs. Sydney Smith claiming that the sum of 448*l.* 18*s.* 6*d.*, remaining due to her from the testator, should be paid out of the balance of 4443*l.* 11*s.* 8*d.*

Gent for Mrs. Sydney Smith.—If money held by a person in a fiduciary character has been paid by him to his account at his bankers the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands. If the person who has paid it in mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's* case (1 Mer. 572) attributing the first drawings out to the first payments in does not apply, and the drawer must be taken to have drawn out his own money in preference to the trust money. As between *cestuis que trust*, whose money the trustee has paid into his own account at his bankers, the rule in *Clayton's* case (*ubi sup.*) may apply; but it is not a question between *cestuis que trust* in the present case, as none of the persons whose money the testator paid into his banking account after he paid in Mrs. Smith's money, are claiming to earmark the balance of the testator's banking account at the time of his death, so it may be assumed that they have been paid or satisfied in some way. He referred to

Re Hallett's Estate; Knatchbull v. *Hallett*, 41 L. T. Rep. 186; 42 L. T. Rep. 421; 13 Ch. Div. 696.

It is a question between Mrs. Smith and the executors of the testator, who have no claim to the money as against Mrs. Smith:

Hancock v. *Smith*, 51 L. T. Rep. 341; 41 Ch. Div. 456.

Swinfen Eady, Q.C. and *C. E. E. Jenkins*, for the executors of the testator, were not called upon.

S. Hall, Q.C. and *Heath*; and *Badcock*, for other parties to the action.

NORTH, J.—When the facts of the case, which are somewhat complicated, are understood I think the law is perfectly clear. [His Lordship then reviewed the evidence in support of them and proceeded:] Looking at the evidence I come to the conclusion that the money which the testator received for Mrs. Smith was lent to him by her, and was not held upon trust for her, but that she allowed him to retain it as a loan upon which he was to pay her interest. This is conclusive against her claim. But assuming that she is right in her contention that the money was a trust fund in the hands of the testator, and so remained down to the time of his death, there is another answer to her claim. Did the sum of 448*l.* 18*s.* 6*d.*, which she claims, form part of the balance of the testator's banking account at the time of his death? Clearly not. Upon the evidence there is no doubt that, on the 31st Aug. the testator had drawn out all his own money and some of his clients' as well, which is the most favourable view you can take of his conduct. Since Mrs. Smith's money had been paid into his banking account, he had paid in several other sums of trust money. [His Lordship then stated the payments in as set out above and continued:] On the 31st Aug. the total amount of the balance to the credit of his account, instead of being 3042*l.* 18*s.* 10*d.*, the amount of the trust moneys which had been paid in, was 1088*l.* 13*s.* 6*d.* only, much of the trust moneys having been paid out. Of whose money did that balance consist? According to the decision in *Re Hallett's Estate* (*ubi sup.*) the rule in *Clayton's* case (*ubi sup.*) applies as between two *cestuis que trust*, whose money the trustee has paid into his own account at his bankers, so that the first sum paid in will be held to have been first drawn out; and, therefore, this balance consisted of those trust moneys which had been paid in most recently. It is clear that Mrs. Smith's 448*l.* 18*s.* 6*d.*, paid in on the 30th March 1890, had, before the 31st Aug., been drawn out and disappeared. Her money did not form any part of the balance at that date, and it is impossible to say that any part of the balance at the time of the testator's death can be earmarked as her money. *Hancock* v. *Smith* (*ubi sup.*) is entirely different from the present case. There it was proved that all the moneys which had been paid into the stock-broker's account at his bank were moneys of his clients, and that he had paid out to or for all his clients the moneys which he had received for them respectively, except in the cases of the four clients who claimed the balance at his bankers. In the present case it has been proved that Mrs. Smith's money has been drawn out of the account, and her claim must, therefore, be disallowed. It was suggested that since the other trust creditors have made no claim against the balance of the testator's banking account, it should be assumed that they have been paid in some other way. Thorowgood's trustees, however, have been admitted to prove in the action for their debt, and it cannot, therefore, be assumed that they have been paid. But, even if they had, I cannot see how such payment could create a trust in favour of Mrs. Smith attaching to the balance standing to the credit of the testator at his death.

Solicitors: *Burgoynes, Milnes*, and *Greatbach*; *Sole, Turner*, and *Knight*; *Tocque* and *Rodyk*.

Wednesday, Aug. 7.

(Before NORTH, J.)

CHILLINGWORTH *v.* CHAMBERS. (*a*)

Trust—Administration—Trustee and beneficiary—Unauthorised investments by trustees—Loss resulting to trustee who was also beneficiary—Co-trustee not liable to make up any part of loss.

The two trustees of a will committed a breach of trust by investing trust moneys upon eight un-

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

authorised mortgage securities for the purpose of giving the beneficiaries a higher rate of interest. After the date of the first four mortgage securities, one of the trustees became entitled, as legal personal representative of his wife who then died, to a beneficial interest in one-fifth of the trust estate so that, when the four remaining mortgage investments were made, he was both trustee and beneficiary. Legal proceedings were taken which resulted in the administration of the trust estate. The mortgaged properties were sold and realised less than the amount advanced upon them by the trustees, part of the loss being in respect of the four mortgages made prior to the date when the trustee became a beneficiary, but the greater part being in respect of the four mortgages made after that date. In consequence of that loss the trust moneys were insufficient, after providing for the shares of the other beneficiaries, to satisfy the claim of the trustee who had become beneficially entitled to one-fifth of the trust estate. Upon a summons by the trustee, who was also a beneficiary, asking that his co-trustee might be compelled to bear part of the loss which had been incurred:

Held, that the trustee who afterwards became beneficially entitled to a share in the trust estate, could not call upon his co-trustee to bear any part of the loss which he had sustained by reason of the breach of trust in which he had concurred.

THE action was brought for the purpose of obtaining the removal of Nathan Chambers from being trustee of the will of John Wilson, deceased, on the ground of alleged breaches of trust.

The plaintiff Robert Jesse Chillingworth was one of the two trustees and executors of the will, and was also as the legal personal representative of his late wife Selina Elizabeth Chillingworth, entitled to a beneficial interest in one-fifth part of the testator's estate. The other plaintiff, Susannah Page, the wife of John Page, was entitled beneficially to another one-fifth part of the testator's estate. The defendant in the action, Nathan Chambers, was the remaining trustee and executor of the will. The remaining three-fifths of the testator's estate belonged to three children of the testator, of whom one was an infant.

The charges of alleged breach of trust against the defendant failed with one exception, that the defendant had renewed in his own name certain expired leases which had formed part of the testator's estate. But this had been done after consultation with the plaintiff Robert Jesse Chillingworth, and at his request, in order that the estate might escape from claims for dilapidation; and the court decided that two of the renewed leases should be held by the defendant as trustee except the one-fifth share of the plaintiff, Robert Jesse Chillingworth, in one such lease which one-fifth share the defendant was to retain for his own benefit.

Subsequently an order was made by Pearson, J. for accounts and inquiries under Order XV. Pursuant to that order the trustees brought in an account of the testator's personal estate, including investments on mortgage securities. These comprised an investment of 8650*l.* secured by eight several mortgages, of which the first four were made before the death of Selina Elizabeth Chillingworth, and all of which the chief clerk disallowed on the ground of insufficiency of the securities. Upon a summons being taken out to vary the chief clerk's certificate, the matter was directed to stand over until the property comprised in the mortgages had been realised. In the meantime the share of the plaintiff Robert Jesse Chillingworth; under the will, was carried over to a separate account to meet his possible liability in respect of the investments.

The property was sold, and realised only 7070*l.*, or 1580*l.* less than the amount advanced upon it by the trustees. The summons to vary the chief clerk's certificate was then heard, and by an order dated the 24th Feb. 1893, the plaintiff Robert Jesse Chillingworth and the defendant Nathan Chambers were ordered to pay the 1580*l.* into court.

By an order dated the 27th April 1893, made with the consent of the defendant, an inquiry was directed "how and in what proportions as between the plaintiff Robert Jesse Chillingworth and the defendant, the sum of 1580*l.* by the order of the 24th Feb. 1893, directed to be paid by both of them into court, is to be ultimately borne and paid."

The chief clerk by his certificate dated the 23rd April 1895, made in answer to such inquiry, found that the whole of the 1580*l.* was to be ultimately borne and paid by the plaintiff, Robert Jesse Chillingworth, on the ground that he was not a trustee only, but a beneficiary who had concurred in a breach of trust which had resulted in the loss in question, and was therefore bound to the extent of his interest in the trust funds to indemnify the defendant as trustee in respect of the claims and liabilities in respect of that loss.

Of the loss of 1580*l.*, 570*l.* only was incurred on advances made in the lifetime of Selina Elizabeth Chillingworth, and 1010*l.* on advances made since her death.

The present summons was then taken out on the part of the plaintiff, Robert Jesse Chillingworth, that the certificate of the chief clerk dated the 23rd April 1895, of the result of the proceedings under the order of the 27th April 1893, might be discharged or varied (1) By directing that the sum of 1580*l.* by the order of the 24th Feb. 1893, directed to be paid by the plaintiff, Robert Jesse Chillingworth, and the defendant, be ultimately borne by the plaintiff and the defendant in equal moieties. (2) In the alternative that the plaintiff, Robert Jesse Chillingworth, be solely directed ultimately to bear so much of the sum of 1580*l.* as represented the loss accrued on such of the loans carried out by the mortgages in the chief clerk's certificate mentioned as were made after the death of Selina Elizabeth, his wife, and which the plaintiff, Robert Jesse Chillingworth, instigated or requested, or consented to in writing, the said plaintiff and the defendant being directed to bear the residue of the sum of 1580*l.* in equal moieties.

Vernon Smith, Q.C. and *H. C. Hull* for the summons.—There is no reason why one trustee should bear the loss more than the other. The trustees ought to bear the loss between them. The defendant in this case ought to bear half of four-fifths of the whole loss. The plaintiff Chillingworth must bear the whole of one-fifth

of the loss, and the other half of four-fifths of the loss:

Bahin v. *Hughes*, 54 L. T. Rep. 188; 31 Ch. Div. 390.

In any case as regards the loss on the advances made prior to the death of his wife the plaintiff is not liable to bear the whole of the loss as he only became beneficiary on the death of his wife.

Swinfen Eady, Q.C. and *Neville Tebbutt* for the defendant.—The plaintiff Chillingworth is a beneficiary as well as a trustee, and a beneficiary who has concurred in a breach of trust resulting in a loss to him cannot come upon his co-trustee to make good the loss. They cited

Raby v. *Ridehalgh*, 7 De G. M. & G. 104.

As regards the argument that the plaintiff was not liable in respect of the loss on the advances prior to his wife's death the plaintiff's contention is contrary to the decision in *Evans* v. *Benyon* (58 L. T. Rep. 700; 37 Ch. Div. 329), where it was held that the share of E. C. Evans was liable to make good a breach of trust approved of by him before he became entitled to a share in the trust fund. A *cestuis que trust* who concurs in a breach of trust is liable to indemnify his trustee against the loss incurred to the extent of his interest in the trust. The case of *Bahin* v. *Hughes* (*ubi sup.*) is not in point, because there the trustee was not a beneficiary. [NORTH, J.—It seems to come to this, that the trustees have received 7070*l.*, and have had to satisfy the claims of the other four beneficiaries to the extent of 6920*l.*, that being four-fifths of the whole sum of 8650*l*, so that they have now left in their hands assets only to the amount of 150*l.* That 150*l.* belongs to the plaintiff Chillingworth in respect to his one-fifth share, but I do not see how he can call upon the defendant to make good any part of what he has lost.]

Vernon Smith, Q.C. in reply.—The case of *Evans* v. *Benyon* (*ubi sup.*) is not in point, because there E. C. Evans took under the settlement a contingent interest at the time he concurred in the breach of trust, while here the plaintiff Chillingworth was a stranger to the trust fund before his wife's death. As regards *Raby* v. *Ridehalgh* (*ubi sup.*) the decree was limited to the amounts which had actually been received by the concurring *cestuis que trust* from the trust fund improperly invested, and that is the extent to which the law renders the *cestuis que trust* liable to indemnify their trustee.

NORTH, J.—I think that the chief clerk's certificate is right. The plaintiff Chillingworth and the defendant Chambers were co-trustees. They apply 8650*l.* upon unauthorised investments for the purpose of giving the beneficiaries a higher rate of interest. The investments turn out to be insufficient when the properties are sold. The total loss is 1580*l.*, making the amount realised only 7070*l.* The question is, how that amount ought to be distributed among the beneficiaries. The beneficial interest passes in fifths, and each beneficiary ought to receive 1730*l.* It was right to apply 6920*l.*, which is four-fifths of the fund, in paying to each of the four beneficiaries who had not been guilty of any breach of trust, a full share. When that had been done 150*l.* only was left to satisfy the remaining fifth share. The plaintiff would be entitled to receive that share in full if the fund was sufficient; but as there remains only 150*l.*, that is all he can claim. This is not the course that was actually adopted. But that seems to me a matter of form not of substance, a difference of machinery and nothing more. The course adopted led to an inquiry being directed, and the finding of the chief clerk is that the whole loss should be borne by the plaintiff. Both trustees are liable for the breach of trust, but the plaintiff seeks to make his co-trustee indemnify him against a portion of the loss. What is left of the fund goes to the plaintiff, but he is not entitled to call upon the defendant to make up half the loss. The case of *Bahin* v. *Hughes* (*ubi sup.*), cited by Mr. Vernon Smith, bears this out. When the first four mortgage investments were made the plaintiff was only a trustee and his wife was entitled to one-fifth of the trust moneys. She afterwards died, and he, as her administrator, became entitled to her share. As regards the last four mortgages he was a beneficiary as well as a trustee when they were made; but the case of *Evans* v. *Benyon* (*ubi sup.*) shows that that is immaterial. At the time of the division of the trust moneys the plaintiff has committed a breach of trust. He is entitled to a share, but can take nothing until the breach of trust has been made good. It is suggested by Mr. Vernon Smith that one trustee is entitled to an indemnity against a co-trustee. This ignores the fact that the plaintiff was also a beneficiary, and the case of *Bahin* v. *Hughes* (*ubi sup.*) does not apply to this. The loss must be borne by the plaintiff, and he cannot come upon the other trustee to make good a portion of the loss. I dismiss the summons with costs.

Solicitors: *Brown, Sons*, and *Vardy*; *Bramall, White*, and *Saunders*.

QUEEN'S BENCH DIVISION.

July 17 *and* 19.

(Before Lord RUSSELL, C.J.)

HILL *v.* SCOTT. (*a*)

Common carrier—Carrier by sea—Goods shipped without bill of lading—Damage to goods—Liability of shipowner.

The plaintiff, a wool merchant, carrying on business at Bradford, employed the defendant, a shipowner, to carry certain bales of wool in his ship from London to Goole, and thence forward them by rail to Bradford, and a regular course of business had been going on for some time between them in that respect. The plaintiff's business consisted of two classes of goods, one, wool which he bought at the sales in London, and the second, wool which he imported into London from Australia. The course of business as to the London goods was that when the plaintiff bought the wool he gave a delivery order to the defendant; with this order the defendant went to the warehouse, obtained the goods, brought them to the wharf, shipped them on his steamer, carried them by sea from London to Goole, unshipped them there, and sent them on by rail to Bradford. For this the defendant received a fixed sum of 1l. 7s. 6d. per ton as freight, which covered the whole journey. and the defendant, in pursuance of a direction by the plaintiff that he

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

should insure, insured the goods upon such terms and with such underwriters as he chose, and with such insurances the plaintiff had nothing whatever to do. With regard to the wool imported from Australia, the plaintiff generally insured this by a policy which covered the whole risk from Australia to Bradford, and as to these goods the defendant merely transshipped them at London, and forwarded them as before, but had not to insure them; and for such foreign goods he received a less freight by 1s. 9d. per ton. In the delivery order given with regard to the goods now in question, which were bought in London, were these words addressed by the plaintiff to the defendant: "Insurance to be effected on above-mentioned —— bales at the rate of 15l. per bale," and the defendant insured accordingly but no bill of lading had been given. The goods were damaged by sea-water while on the defendant's vessel, and an action was brought to recover the loss from the defendant as being under the same liability as a common carrier.

Held, that, as the defendant was exercising the public employment of carrying goods by sea, he was under the prima facie *liability of a common carrier of carrying the goods at his own absolute risk; that the insurance effected by him, although at the plaintiff's request, was effected by him in his own interest and for his own protection, and not as agent for the plaintiff; that there was no stipulation, express or implied, to limit the defendant's liability, and that he was therefore liable for the loss.*

ACTION for damage to goods.

The facts as taken from the judgment were as follows:—

The plaintiff was a wool merchant carrying on business at Bradford, and the defendant was a shipowner trading under the style of "Jescott Steamers," and owning vessels carrying goods between London and Goole.

The plaintiff claimed to recover the sum of 484*l.* 11*s.* 11*d.* for damage alleged to have been caused by sea-water to 206 bales of wool delivered by the plaintiff to the defendant to be carried from London to Bradford, and the damage was alleged to have been caused while the goods were being carried on board one of the defendant's steamers from London to Goole, in Yorkshire.

The plaintiff alleged that he entered into a contract with the defendant safely to carry and deliver certain wool, and that the defendant failed to carry out that contract, and did not deliver the goods safely, but delivered them in a damaged condition, and he now sought to recover the loss represented by that damage, the sole question in this action being one of liability.

The defendant did not plead any formal defence, but in a very clear and succinct letter stated what was in fact the nature of his defence. His defence was in effect a denial that he undertook safely to carry and deliver, and an allegation that he agreed to carry upon special terms, which may be shortly stated to be these: That he agreed with the plaintiff that he, the defendant, should act as agent for the plaintiff, take out policies of insurance upon the goods committed to his charge as a carrier, and that the agreement between him and the plaintiff was that he (the defendant) was not liable for any damage caused to the goods, except such damage as was occasioned by causes not covered by the policy of insurance.

The course of business between the plaintiff and the defendant was this: The plaintiff had relations with the defendant for a considerable period of time, partly when he was representing another and a different firm, and partly on his own account, and the course of business was much the same in each case.

The plaintiff's business, so far as this question of the carriage of goods to his place of manufacture at Bradford was concerned, consisted of two classes of goods, one, wool goods which he bought in London, and the second, wool goods which he imported into London from Australia.

As regards the London goods, he, the plaintiff, bought these at the London sales, and having bought them gave a delivery order to the defendant entitling the defendant to get them from the warehouse where they were warehoused. The defendant undertook to go to the warehouse and to carry them from the warehouse to the wharf at which his steamer was loading for Goole, to ship them on to the steamer, carry them in the steamer, to unship them at Goole, there deliver them to the railway company, and by means of the railway have them carried to Bradford, there to be delivered to the plaintiff.

His payment of freight was at a fixed sum per ton, which covered the whole of the necessary labour during the course of transit from the warehouse in London to the plaintiff at Bradford, that is, in the case of the goods bought in London. The freights appear to have been subject to variations, but at the period in question, and for some considerable time before, the fixed rate had been 1*l.* 7*s.* 6*d.* per ton.

As regards the London goods it was according to the course of business that the defendant effected insurances upon such goods upon such terms, and with such underwriters as he chose in pursuance of an order, or at least after directions by the plaintiff that he should so insure, and—still speaking of the London goods—the further course of business had been that where a loss had happened, and after a proper examination of the goods by a skilled appraiser, the plaintiff claimed upon the defendant for the amount of that loss. The defendant in his turn claimed upon the underwriters with whom he had effected his policy, and so far as antecedent transactions throw any light upon the matter, the defendant having settled with the underwriter then settled with the plaintiff, and it had so happened that in the few not important cases of damage that had previously occurred, the amount paid by the underwriter to the defendant had been approximately and substantially the amount claimed by the plaintiff, and with that amount so recovered from the underwriter the plaintiff had expressed himself satisfied and had taken it.

With the effecting of the actual insurances the plaintiff had nothing to do; he selected neither the insurers nor brokers to insure, nor had any voice in the premiums, nor had ever possession of the policy of insurance, and had no relation, either before or after the loss, with the underwriters at all.

As regards the wool imported from Australia, the usual course had been for the shippers abroad, or the consignee at home, to effect policies upon and from the shipment in Australia, which

policies were so framed as to cover all risk of damage not only during the sea voyage to the port of London, but also during the further and necessary transit of the goods by sea or by land to Goole, and from Goole (if they went by sea) to Bradford by rail.

In such cases a distinction was made as to the amount of freight charged. The defendant had simply to take the goods from the ship in which they were imported and load them on board his own ship for Goole. He did not go to the warehouse as in the former case, and the whole risk was covered by an existing policy. Therefore the usual course of business was, in the case of such foreign imported wool, that the defendant, for the services he rendered as carrier in carrying and forwarding the wool to Bradford, charged a less sum to the plaintiff than for the goods taken from the London warehouse, by the amount of 1*s.* 9*d.* per ton. That is to say, 1*l.* 7*s.* 6*d.* per ton was the charge at the period in question for taking goods from London warehouses; but as regards foreign imported wool it was 1*l.* 7*s.* 6*d.* less 1*s.* 9*d.* per ton.

A document, dated the 3rd Oct. 1893, in a printed form, which had been in use for a considerable time between the parties, was put in. This document was addressed by the plaintiff to the broker, and was as follows: "Please deliver to J. E. Scott" (the defendant) "the wools bought in your sale of the 20th Sept., particulars at foot." The broker having received this order would in the ordinary course give the same to the warehousemen in whose warehouse the particular wool dealt with was stored. Then there was an enumeration of the bales, and at the foot, addressed specifically to the defendant, was this clause: "Insurance to be effected on above-mentioned 224 bales at the rate of 15*l.* per bale.—James Hill."

It was common ground between the plaintiff and the defendant, that this clause was in effect evidence of an expression of wish by the plaintiff —or perhaps a mandate — that the bales in question should be insured and insured by the defendant, and that the acceptance of this wish or mandate by the defendant without objection did amount to a contract as between him and the plaintiff that he would insure the bales in question upon the named value of 15*l.* per bale.

In the present case when the wool was delivered from the defendant's steamer at Goole to the railway company there for carriage to Bradford, it was found that a number of bales had been damaged by sea-water.

A delay took place in claiming from the underwriters in respect of this damage, and when a claim was made the underwriters refused to pay in respect of the damage, alleging as the reason for their refusal the delay in making the claim and in examining the wool. The plaintiff then contended that the defendant was bound to pay him in respect of the loss, and then claim, if he chose, against the underwriters. The defendant, on the other hand, contended that the plaintiff was the proper party to proceed against the underwriters, and he refused to pay, and the question in this action was whether, under the circumstances, the defendant was liable to pay the plaintiff the amount of the loss.

No bill of lading had been given in respect of the goods, and an allegation of negligence on the part of the defendant had failed.

Channell, Q.C. and *English Harrison* for the plaintiff.—There was here no bill of lading, and the defendant, not being protected by a bill of lading, was liable as a common carrier. The defendant was exercising the public calling or business of carrying goods for a shipowner, and, unless there was something to limit his liability, he was liable as a common carrier:

The Liver Alkali Works Company Limited v. *Johnson*, 31 L. T. Rep. 95; L. Rep. 9 Ex. 333.

There was no express stipulation or agreement which would in any way limit the defendant's liability, nor was there any implied stipulation to that effect. The defendant carried these goods as a common carrier, and the contract was simply a contract to carry the goods safely, which the defendant has not done; and if the defendant sets up anything to limit this general liability it lies upon him to prove it, which he has not done. Again, it is said that the insurance was effected by the defendant, not on his own account, but on account of, and as agent for, the plaintiff. But the whole course of dealing between the parties shows that that is not so. The defendant was liable to the plaintiff as carrier of the goods, and the insurance was effected by him on his own behalf and on his own account, and to protect himself from the risk which he was under to the plaintiff as the carrier of the plaintiff's goods; and the insurance was not effected by him as agent for the plaintiff. The whole course of dealing shows that; because the defendant selects the insurers, and he alone pays the premium; so that the plaintiff has nothing whatever to do with the insurance, the whole transaction having been carried out by the defendant. The request by the plaintiff that the defendant should insure at 15*l.* per bale is very reasonable, as the plaintiff would thereby be protected by the insurance as well as by the liability of the shipowner to pay, and the shipowner would be better able to pay in respect of a loss, as he would have the insurance to fall back upon. Even if the defendant is not liable as a common carrier, he is under an equal liability as a shipowner, so that in either event he is liable:

The Liver Alkali Works Limited v. *Johnson* (*ubi sup.*).

Joseph Walton, Q.C. and *Hollams* for the defendant.—From the course of dealing between the parties, it is clear that the intention was that the underwriters should bear the risk. That being so, the plaintiff should have sued the underwriters, and not the defendant. It is said that the defendant is a common carrier, and as such liable for the damage to the goods; but the defendant is a shipowner, and a shipowner is not a common carrier:

Nugent v. *Smith*, 34 L. T. Rep. 827; 1 C. P. Div. 423;

The Liver Alkali Works Company v. *Johnson* (*ubi sup.*).

When goods were brought from Australia, less freight was paid to the defendant, because, in that case, he was exempt from paying the premium for insurance; but, when goods were bought in London, the defendant, for the convenience of all parties, effected the insurance and paid the premium in the first instance, but it is clear that he did so for the benefit of, and as agent for, the plaintiff, inasmuch as the request to insure came from the plaintiff, and as the

defendant, although he paid the premium in the first instance, received this premium from the plaintiff in the increased freight, he was paid 1*s.* 9*d.* per ton when the goods were bought in London, that is, when the goods were insured by the defendant. The defendant, therefore, is not liable in this action.

Channell, Q.C. in reply. *Cur. adv. vult.*

July 19.—Lord Russell, C.J.—[After stating the facts his Lordship proceeded:] The question that I have to determine is whether or not the defendant, who is undoubtedly a carrier of goods, and who undertook to carry these goods, entered into a contractual relation with the plaintiff so as to exclude the liability which from his position as a carrier pure and simple would otherwise have attached to him. The law on the subject is laid down in the case of *The Liver Alkali Works Company* v. *Johnson* (31 L. T. Rep. 95; L. Rep. 9 Ex. 338), decided in the Exchequer Chamber in 1874. In that case the defendant was the owner of certain barges or vessels employed in carrying goods in the river Mersey to and from various points along the coast, not general ships to carry the goods of any particular person, but barges employed from time to time by one person by special agreement—more in the nature of a charter—and Blackburn, J., after referring to the history and the reason of the principle upon which the liability of common carriers is based, in his judgment says (L. Rep. 9 Ex. at p. 340): "It is too late now to speculate on the propriety of this rule"—that is to say, the rule that common carriers were liable for all damage coming to the goods committed to their care as carriers during the process of carriage, except such damage as was occasioned by the act of God and the Queen's enemies—"We must treat it as firmly established that in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability." The present Master of the Rolls (then Brett, J.) makes the distinction, a distinction theretofore and since recognised, that although in that case of *The Liver Alkali Works Company* v. *Johnson* (*ubi sup.*), he comes to the conclusion that the defendant could not, in the old acceptation of those words, be described as a common carrier, having regard to the character of his business, yet he arrives at the conclusion that he had all the liabilities and carried on his contract of carriage subject to the liabilities of a common carrier. He says (at p. 343): "He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier. The defendant, in the present case, in my opinion, carried on his business like any other owner of ships or vessels, and was not a common carrier, and was in no way liable as such. But I think that, by a recognised custom of England—a custom adopted and recognised by the courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and recognised by them—every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions. I prefer to use and adopt the language (though there is no essential difference for any purpose in this case between the two learned judges) of Blackburn, J., who says that, "in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur the liabilities of a common carrier." The question, then, which I have to determine is this: was there, in the contract between the parties, any stipulation, express or properly to be implied from the circumstances of the case, limiting the defendant's liability? The defendant was undoubtedly exercising the public employment of carrying goods, and he undoubtedly undertook to carry goods. Did he undertake that responsibility subject to limitations of liability? It is admitted that there was no express limitation. There were no statements made, no circulars delivered, no notices, no bill-heads to invoices, nothing to limit the liability. The defendant, however, contends that there was an implied limitation. In considering this question of an implied limitation, we have to assume the course of business proceedings between these parties, and we have to consider also the only document in the case to which I attach any importance, namely, the document of the 3rd Oct. 1893, which is in a printed form and which begins by a delivery order given to the defendant entitling him to get possession of the goods with a view to carriage. [His Lordship then stated the course of business between the plaintiff and the defendant as already set out]. It was admitted that the words at the end of the document of the 3rd Oct., "Insurance to be effected on above mentioned 224 bales at the rate of 15*l.* per bale," were in effect evidence of a wish or mandate that the bales in question should be insured and by the defendant, and that the acceptance of this wish or mandate by the defendant without objection did amount to a contract as between him and the plaintiff that he would insure the bales upon the value of 15*l.* per bale. But the main question turns on two things. In the first place, was the true inference that this was an insurance to be effected by the defendant as agent for the plaintiff, or was it a mere requirement by the plaintiff that the bales should be insured. The answer to each suggestion one way or the other had—in the opinion of both sides—an important bearing on the question in issue. In the next place it was also in controversy what was the true meaning of the whole of this stipulation when expanded, because as it stands it does not express its full meaning. The defendant says that the effect is that the plaintiff stipulated with the defendant that he (the defendant) shall insure the bales in question at 15*l.* per bale, and that if the defendant does so the plaintiff agrees not to look to the defendant in respect of any loss or damage, in so far as such loss or damage may be properly covered by an insurance in the usual form. The plaintiff, on the other hand, says the true meaning is this: "I, the owner of the goods, require you, the shipowner, to insure; you, as carrier, have an insurable interest in these goods, you can insure yourself against the liability which you undertake by your contract of

carriage, and I require that you shall so insure; that requirement, and your insurance following in compliance with that requirement, will give me further security that I may look to you, and you will have behind you a policy which will give me the greater certainty of payment in the event of a loss." As to the first of these questions, namely, whether this policy was effected by the defendant as agent for the plaintiff, or was effected by him for his own protection, as is frequently done by carriers themselves who are not protected by widely sweeping bills of lading, or other contracts exempting them from liability, I confess I have some doubt, but on the whole I arrive at the conclusion that it was effected by the defendant for his own protection, in compliance undoubtedly with the requirement. It is not usual for the merchant to ask a shipowner, who is carrying his goods, to insure his goods; if the merchant wants to insure his goods he insures them himself through his broker. In the next place, the whole transaction of the insurance was carried out by the defendant, who did not consult the plaintiff as to the premiums, or the brokers or the insurance. From beginning to end the plaintiff had nothing to do with the insurance; and when the loss occurred he did not claim that the policy should be sent to him in order that he might formulate his claim against the insurers, nor did he ask the defendant to formulate a claim against the insurers. All he did was to make his claim for the loss against the defendant, as carrier, thus leaving the defendant to proceed against the underwriters if he chose. Moreover, I find no relation in the sense of proportion between what is represented as being the fixed estimation of insurance premium at per ton, 1*s.* 9*d.*, and the premium in the policies, because we were told by the plaintiff that the goods in question varied in value to a very surprising extent, namely, that some of the wools were worth 3*d.* a pound, and some as high as 2*s.* a pound. But while the value of the goods varies so largely the fixed rate of freight of 1*l.* 7*s.* 6*d.* applies equally to goods worth 3*d.* as to goods worth 2*s.* a pound. Lastly, I see nothing surprising in the shipowner, who had an insurable interest, insuring himself against liability under his contract of carriage. In the case of bills of lading with widely sweeping exceptions, a carrier would have very little or no interest to insure; but where there is not a definite written contract with fully specified exceptions, he has a clear and definite interest to insure, and he frequently as a matter of business does insure for the protection of his own interests and against possible liabilities. I therefore come to the conclusion that this insurance was effected by the defendant, not as agent for the plaintiff, but for the protection of his own interests. But, even if I am wrong in that conclusion, and if the insurance was effected by the defendant as agent for the plaintiff, I should not think that conclusive evidence upon the point which I have to determine. In the ordinary case a merchant insures, but it is common experience that he may nevertheless sue the carrier. In the ordinary case, the carrier protects himself by elaborate stipulations in elaborately prepared bills of lading, but that does not seem to me to affect this principle, namely, that the fact of a merchant insuring is not necessarily an indication that he is looking only to his insurer, and not also looking to such claim as he may have upon his contract with the carrier. From an examination, therefore, of the course of business, and of this document of the 3rd Oct., I have failed to discover any stipulation, expressed or properly to be implied from the course of business, or from this document, that the defendant has limited such liability as attached to him from this contract of carriage. But it is said that the case of the foreign imported wools is a strong illustration of the meaning of the parties, and a strong ground from which an inference could be drawn that there was a stipulation to limit liability. I do not think so. What it amounted to was this, that, in the case of goods from Australia, already insured during the whole course of transit from Australia to Bradford, there was an allowance made by the defendant of 1*s.* 9*d.* per ton. The reason is obvious; the goods were already insured, there was no need for a double insurance; and although it is not necessary to decide the point, I adhere to the view that I expressed during the argument, that I see no difficulty in reading that arrangement as to the allowance of 1*s.* 9*d.* per ton, as amounting to this: "In consideration of you, the defendant, allowing me 1*s.* 9*d.* per ton off the rate that you ordinarily charge, making me that allowance in respect of these foreign wools, I will admit you, if necessary, to the benefit of my insurance." I entertain a strong view that, in point of good sense, that is a natural explanation and conclusion to be drawn from that arrangement acted upon. I come, therefore, to the conclusion that, it being clear that the defendant does exercise the public business of carrying goods by sea and also by land, he has undertaken *primâ facie* the liabilities of a common carrier, and is liable to make good the damage now in question, unless he can show that he stipulated to limit that liability either expressly or impliedly, and I fail to see anything in this case from which I can draw the inference that there was any such limitation of liability. I have perhaps treated this case more elaborately than it demanded, because in the circumstances of it, it is not one of very great interest seeing that there is a policy in existence to which, without at all prejudging the case, I at present see no defence on the part of the underwriters. I should add that this litigation was probably brought about owing to the fact that through the forgetfulness of someone in the defendant's employment the claim upon the policy was allowed to slumber for so considerable a time that when advanced the underwriters viewed it with suspicion, and in a way they would not have viewed it if it had been promptly put forward in the ordinary way. I am of opinion, therefore, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Flower, Nussey*, and *Fellowes*, for *Killick, Hutton*, and *Vint*, Bradford.

Solicitors for the defendant, *Hollams, Son, Coward*, and *Hawksley*.

Friday, Aug. 2.

(Before POLLOCK, B. and WRIGHT, J.)

STODDART AND OTHERS (apps.) *v.* SAGAR (resp.). SAGAR (app.) *v.* STODDART AND OTHERS (resps.).

Gaming—Betting—Lottery—Coupon competition—Prizes for selecting winners in horse races—Issue of coupons attached to newspaper—Lottery Acts (42 *Geo.* 3, *c.* 119, *s.* 2; 4 *Geo.* 4, *c.* 60, *s.* 41—*Betting Acts* 1853 *and* 1874 (16 *&* 17 *Vict. c.* 119, *ss.* 1, 3, 4; 37 *Vict. c.* 15, *s.* 3, *sub-sect.* 3).

The appellants, who were respectively the proprietor and publisher of a certain newspaper, and the owner and occupier of the office where it was published, all having the care and management of the business, published in their paper a "coupon competition," which consisted of a prize offered for selecting the winners in a specified horse race. In a certain issue of their paper they offered a prize of 100*l. for placing the* 1*st,* 2*nd,* 3*rd, and* 4*th in the "Grand National," which was to be run a few days after. In the newspaper, and underneath this notice, were the coupons, of which there were twenty-five in number. According to the "coupon conditions," the first coupon could be filled up, cut out, and sent in for the competition free of charge, and a competitor was not required to use more than the one free coupon if he so desired. There was no limit to the number of coupons that might be sent in, but if any of the other twenty-four blank coupons were sent in, one penny stamp would have to be sent with each, and if the whole twenty-five were sent in* 2*s. would have to be sent. Predictions could also be sent on plain paper if accompanied by one free coupon, and if more than one competitor succeeded in getting the prize, the money was to be divided equally. Remittances were received at the office in respect of the competition.*

Held, that this competition did not constitute a lottery within the meaning of the Lottery Acts, and that the appellants had not committed any offence either under the Lottery Acts or under the Betting Acts 1853 *and* 1874.

Two cases stated by Alderman Knill, sitting as a court of summary jurisdiction at the Mansion House, in the city of London, on the 18th April 1895.

STODDART AND OTHERS (apps.) *v.* SAGAR (resp.).

Three several informations were preferred by the respondent, Sagar, under the Act to suppress certain games and lotteries—42 Geo. 3, c. 119—and the Acts amending the same, against the appellants, Ada Stoddart, Joseph Stoddart, and Frederick Brandon, and these informations were heard together.

These three informations charged the appellants with the following offences:

(1.) That Ada Stoddart did, on the 26th March 1895, unlawfully and publicly open and keep an office at 53, Fleet-street, to exercise by a certain contrivance and device called a coupon competition a lottery not authorised by Parliament contrary to the provisions of the Act 42 Geo. 3, c. 119, s. 2, and that the other two appellants did unlawfully and knowingly aid and abet in the same.

(2.) That Ada Stoddart did, on the same day, unlawfully sell certain tickets and chances in a lottery, to wit, a lottery called a coupon competition, contrary to the provisions of the Lottery Act 1823 (4 Geo. 4, c. 60), s. 41, and that the other two appellants did aid and abet in the commission of the said offence.

(3.) That Frederick Brandon did, on the same day, unlawfully publish a certain proposal or scheme, to wit, a proposal and scheme called a "coupon competition" for the sale of certain tickets and chances in a certain lottery contrary to the 4 Geo. 4, c. 60, s. 41, and that the other two appellants did aid and abet in the commission of the said offence.

The appellants were convicted of the three several offences, and each of them was ordered to pay the sum of 10*s.* upon each of the informations.

At the hearing the following facts were proved:

Ada Stoddart was the occupier of an office situate at 53, Fleet-street, and was the registered proprietor of a newspaper called *Turf Life*. She sold copies of the said newspaper published on the 26th March 1895, and she opened and kept the office for the purpose of carrying on the business of *Turf Life*, and for the purpose of receiving all remittances relating to the business of the newspaper, including remittances in respect of the "coupon competition; and she, in fact, received remittances relating to the copies of the said newspaper issued on the 26th March 1895, including remittances in respect of the "coupon competion" advertised in that number.

The appellant, Joseph Stoddart, was the owner of the office, and permitted the office to be used for the purpose of the circulation of the newspaper, with knowledge of all its contents. He, jointly with the appellant Brandon, had the care and management of the business of the newspaper, and assisted in conducting the business, which, during the period named in the summonses, included the coupon competition of the 26th March 1895.

The appellant Brandon was the publisher of the newspaper, and he published the copies of the newspaper issued on the 26th March 1895, with knowledge of the contents thereof; and he, jointly with the appellant, J. Stoddart, had the care and management of the business of the newspaper, and assisted in conducting the business.

The conditions of the coupon competition appeared in the newspaper issued on the 26th March 1895. At the top were the words: "100*l.* for placing 1st, 2nd, 3rd, 4th in the Grand National (Run next Friday). Note the conditions." Then, underneath, were the coupons. There were four spaces across the paper, marked first, second, third, fourth, and there were twenty-five coupons, the first coupon being free. Then, underneath the coupons, were spaces for the name and address of the sender, and this notice: "Two shillings must be remitted if all the above coupons are used." The coupon conditions contained these provisions: "If more than one succeed in securing the prize, the money will be equally divided amongst them. The No. 1 coupon in the above column can be used free of charge. This coupon can be filled up, cut out, and despatched to us, and will be accepted for competition without any charge or fee being sent with it. If, however, the remaining twenty-four blank coupons are used, one penny stamp must be sent with each of these coupons so used. Thus, if twenty-five different attempts are made on the above sheet to correctly arrive at the winners, 2*s.* must be remitted. In all cases the coupon marked No. 1 is free. The extra coupons are included in each

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

issue for those who experience a difficulty in obtaining *Turf Life*, so that predictions can be thus forwarded on the extra coupons, but must be accompanied by one penny stamp with each extra coupon. There is no limitation to the number of coupons to be sent in. Predictions can also be made on plain paper on the same terms, but one free coupon at least must accompany same, to show that the competitor is a subscriber to *Turf Life*. There is no compulsion to use any more than the one free coupon, if the competitor desires to confine himself to one attempt. All coupons must be addressed, "Coupon Competition, *Turf Life*, &c. The three winners must be on any one coupon."

The magistrate found as a fact that the winning of the prize in the competition would be determined by choice and not by skill.

It was contended on behalf of the respondent that the conditions of the coupon competition, together with the other above-stated facts (which were not disputed), were sufficient in law to support convictions against the appellants for the offences charged in the informations.

It was contended on behalf of the appellants that the said conditions and above-mentioned facts were not sufficient in law to support convictions under the informations.

The magistrate, after consideration of the authorities cited, was of opinion that the facts were sufficient in law to support the offences in the three informations under the Lottery Acts, and he convicted the appellants on the three informations.

The question for the opinion of the court was whether the magistrate came to a correct determination in point of law.

SAGAR (app.) *v.* STODDART AND OTHERS (resps.).

Five several informations were preferred by the appellant against the respondents, and were heard together.

These informations charged the respondents with the following offences:

(1.) That Ada Stoddart, on the 19th March 1895 and on divers other days between that date and the 9th April 1895, being the occupier of a certain office and place, did unlawfully open, keep, and use the said office and place for the purpose of money being received on behalf of the said occupier as and for the consideration for an assurance and undertaking to pay thereafter money on events and contingencies relating to horse-races, and that the other two respondents did unlawfully and knowingly aid, abet, and procure the commission of the said offence, contrary to the Betting Act 1853, sects. 1 and 3.

(2.) That the respondents, Joseph Stoddart and Brandon, on the aforesaid dates, did unlawfully have the care and management, and did unlawfully conduct and assist in conducting the business of the said office which was then opened, kept, and used for the purpose aforesaid, and that the respondent, Ada Stoddart, did unlawfully aid and abet and procure the commission of the offence, contrary to the Betting Act 1853, sects. 1 and 3.

(3.) That Ada Stoddart, being the occupier of the said office then opened, kept, and used for the purpose aforesaid, did unlawfully and knowingly receive certain moneys as deposits on bets on condition of paying the sum of 100*l.* in money on the happening of certain events and contingencies relating to horse-races, and that the other two respondents did aid, abet, and procure the commission of the offence, contrary to the Betting Act 1853, sects. 1 and 4.

(4.) That the respondent, Joseph Stoddart, being the owner of the office, did unlawfully and knowingly permit the said office to be unlawfully opened kept, and used by the said Ada Stoddart for the purpose of money being received by the occupier as and for the consideration for an assurance and undertaking to pay thereafter money on events and contingencies relating to horse races, and that the two respondents did aid and abet the commission of the offence, contrary to the Betting Act 1853, sects. 1 and 3.

(5.) That the respondent Brandon did, on the 26th March 1895, unlawfully and knowingly publish an advertisement of a competition called a "coupon competition" in the newspaper called *Turf Life*, inviting all who read the advertisement to make and take shares in certain bets and wagers, to wit, such bets and wagers on such events and contingencies as are mentioned in the Betting Act 1853, and that the other two respondents did abet, aid, and procure the commission of the said offence, contrary to the Betting Act 1874, sect. 3, sub-sect. 3.

The facts proved were the same as in the previous case, and had reference to the issue of five numbers of *Turf Life*, containing similar competitions, though the informations had reference only to the "coupon competition" announced in the issue of the 26th March.

It was contended on behalf of the appellant that the conditions of the said "coupon competition," together with the other facts (which were not disputed) were sufficient in law to support convictions against the respondents for the offences under the Betting Acts 1853 and 1874, charged against them in the informations.

It was contended on behalf of the respondents that the said conditions and above mentioned facts were not sufficient in law to support convictions under the said informations.

The magistrate was of opinion that the above facts were not sufficient in law to support any of the offences charged under the Betting Acts 1853 and 1874, and he accordingly dismissed the five informations.

The question for the opinion of the court was whether the learned alderman came to a correct determination in point of law.

Carson, Q.C. (*Grain* and *L. Kershaw* with him) for the appellants in the first case as to the lottery.—The appellants, who were respectively the occupier and owner of the office where the newspaper was published, and the proprietor and publisher of the paper were convicted here of having organised a lottery under the Lottery Act, and the question is whether the contrivance resorted to in this case was a lottery within the meaning of the Act, that is, whether a proposal to fill in the coupon the winners of a certain horse race is a lottery. We submit that it is not, and that it has never been successfully attempted to bring a case of this kind within the Lottery Act. In the case of *Barclay* v. *Pearson*, 68 L. T. Rep. 709 (1893), 2 Ch. 154—the case of the missing word competition—the filling in of missing words was held to be a lottery, and the reason it was so held was that that depended upon mere chance, the question really being whether the person has exercised any skill on his part, or has been driven to take his chance. The same principle was laid down in *Taylor* v. *Smetten* (11 Q. B. Div. 207), where the transaction was held to be a lottery for the same reason. Hawkins, J., in delivering the considered judgment in that case. said (at p. 212): "The purchaser bought the tea coupled with the chance of getting something of value by way of a prize, but without the

least idea of what that prize might be. In making his purchase he exercised no choice—what he got he got without any option or action of his own will, but as the result of mere chance or accident." Those cases, as well as the case of *Caminada* v. *Hulton* (64 L. T. Rep. 572; 17 Cox, C C. 307), show that to be a lottery within the meaning of the Lottery Act there must be a contrivance or device to obtain money by chance. The facts and decision in *Caminada* v. *Hulton* (*ubi sup.*), where the transaction was held not to be a lottery, are really conclusive of the present case. [WRIGHT, J. —That case is exactly in point.]

R. D. Muir for the respondents.—It must be a question of degree how far the matter in question is decided by chance, and how far it is decided by skill. [WRIGHT, J.—Is it open to us to decide this in your favour against *Caminada* v. *Hulton* (*ubi sup.*) ?] The case of *Caminada* v. *Hulton* (*ubi sup.*) is very clearly distinguishable from the present case. In that case, Day, J. said in his judgment, "I am clearly of opinion that this was not a lottery," and the reason he gives for that opinion is important, "for there was no contrivance or device to obtain money by chance, and therefore it does not come within the scope of the Act" In the present case the appellants allow in their newspaper any number of attempts or chances. Skill cannot have very much to do with the matter if a person has—as he has in this case—twenty-five attempts to do the thing, and moreover, although there are only twenty-five spaces, the appellants allow any number beyond the twenty-five on blank paper at one penny a piece. That was the ground upon which the magistrate found that there was an element of chance, and it is most important to remember that the magistrate has found as a fact that the winning of the prize in the competition would be determined by chance, and not by skill. While that is so, I admit that, if to be a lottery it must be a pure chance for every person who enters into the competition, then this is not a lottery. Here, however, it is not so.

R. D. Muir for the appellant in the second case under the Betting Acts.—[*Carson*, Q.C.—The case of *Caminada* v. *Hulton* (*ubi sup.*) is really conclusive on this point, as well as on the former point.] The conditions of this competition. which are in the newspaper, bring the present case within the exact words of sect. 1 of the Betting Act of 1853, which says that "no house, office, room or other place, shall be opened, kept, or used, for the purpose of the owner, occupier, &c., betting with persons resorting thereto; or for the purpose of any money being received by such owner, occupier, or keeper, &c." These things are exactly what the respondents in this case did. They kept this office, and they advertised that moneys were to be sent there; and if that is good for one penny it is good for one pound equally, so that this office was nothing but a mere betting house. [WRIGHT, J.—How do you get over *Caminada* v. *Hulton* ?] There, there was no money given at all for the betting, apart from the price of the book. When the purchaser bought his book, he got value for his money; here, for his penny, he gets only a chance. In *Wright* v. *Clarke* (34 J. P. 661), and the two other cases there reported, money was sent by letter to a person who kept a house or office for the purpose of executing commissions to bet on horse races, and it was held that that person kept open an office for betting within the meaning of sect. 1 of the Betting Act of 1853. The fact that here the purchaser for his one penny buys only a chance, brings this case within every definition of a bet: *Carlill* v. *The Carbolic Smoke Ball Company* (67 L T. Rep., at p. 839; (1892) 2 Q. B., at pp. 490-91), where Hawkins, J. says: "It is essential to a wagering contract that each party may under it, either win or lose, &c." Here, both parties may win and both may lose, which brings the case within that description. The question intended to be reserved here was: is this a betting-house or is it not. The magistrate found, on the facts, that it was not; but I submit the magistrate was wrong, as this case comes exactly within the definition of betting as given by Hawkins, J. in the case just referred to. Here it is found that the office is kept for the receipt of these sums of money, and that brings it within the Act.

Carson, Q.C., *Grain*, and *L. Kershaw*, for the respondents, were not called upon.

POLLOCK, B.—I in no way propose to give any definition as to what is, or what is not, betting. It is extremely difficult to do so, and although I think that Hawkins, J. in the *Carbolic Smoke Ball* case (*ubi sup.*) did so with great accuracy as applicable to that case in particular, it would be very undesirable if I attempted in this case to give a general definition of betting. But I am clearly of opinion that in the present case the learned alderman having said that upon these facts as stated he has come to the conclusion that they were not sufficient in law to support any of the offences charged under the Betting Acts, was well within his jurisdiction; and if the learned counsel, who appeared before him, intended to present any other argument they ought to have done so at the time. The defendants having been acquitted upon the alderman's finding, we certainly ought not to send the case back. As the case stands there is nothing to show the criminal intent which would bring the defendants within the statute. I am strengthened in that opinion by what was said by my brother Day, which seems to me very conclusive, in the case of *Caminada* v. *Hulton* (*ubi sup.*), where he says: "It might be said, but I think with considerable difficulty, that this is a bet because a person by paying a penny for one of these books and returning the coupon to the respondent backed six horses." That is the clearest way he could put it. Then he says: "But I think that is clearly not the correct view to take, and that this is not a bet within the meaning of the statute. A person purchasing one of these books did not, even if he was not successful in obtaining one of the prizes offered, lose any money by the transaction." I think that was clear, sound, and vigorous reasoning, which shows that this is not betting, and on that ground I am perfectly satisfied. As to the meaning of the word "lottery," my learned brother, Day, J. is clear: "I am clearly of opinion that this was not a lottery, for there was no contrivance or device to obtain money by chance." That is to say, a horse race is clearly not a matter of chance. Upon the running of the four horses named as the first, second, third, and fourth, and their being placed as the first, second, third, and

fourth, the event depended. That shows with equal clearness that this was not a lottery.

Wright, J.—I am of the same opinion. This is clearly not a lottery. Then as regards the Betting Act, the case is much more difficult and much more important. I have no doubt that such a competition as this may be in truth only betting in disguise; and it would be quite easy to suggest cases in which the magistrate could hardly come to any other conclusion in point of fact than that such competitions were betting in disguise. That is to say, if he found as a fact, in the language of the section, that the office or place was kept for the purpose of money and so forth being received as the consideration for an assurance to pay thereafter money and so forth on an event relating to a horse race; or if he found in other words the same thing, namely, that it was a wagering contract, then I think the Betting Act would be held to be applicable. But in the present case there is no such finding by the magistrate, and it would be contrary to all rules if we took on ourselves to find it.

Appeal allowed and conviction quashed in the first case as to the lottery. Appeal dismissed in the case under the Betting Acts.

Solicitors for the appellants, *C. O. Humphreys, Son,* and *Kershaw.*

Solicitor for the respondent (Sagar), *H. H. Crawford.*

Wednesday, July 31.

(Before Grantham and Wright, JJ.)

The Woolwich Local Board (apps.) *v.* Gardiner and another (resps.). (*a*)

Local government—Pedlars—Pedlar's certificate—Whether a pedlar's certificate entitles holder to act as "licensed hawker"—Market and Fairs Clauses Act 1847 (10 *Vict. c.* 14), *s.* 13; *Pedlars Act* 1871 (34 *&* 35 *Vict. c.* 96), *s.* 6; *Pedlars Act* 1881 (44 *&* 45 *Vict. c.* 45), *s.* 2.

By sect. 6 *of the Pedlars Act* 1871 *a certificate under that Act is to have the same effect as a hawkers' licence for the purpose of the Markets and Fairs Clauses Act* 1847, *and the term "licensed hawker" shall be construed to include a pedlar holding such a certificate; and by sect.* 13 *of the Markets and Fairs Clauses Act* 1847, *a penalty is imposed upon every person "other than a licensed hawker," who sells in a market, except in his own dwelling-place or shop, any articles in respect of which tolls are authorised to be taken in that market.*

A person who held a pedlar's certificate, but not a hawker's licence, in a market sold or exposed for sale in a cart drawn by a horse articles in respect of which tolls were authorised to be taken in that market:

Held, that such person, although he held a pedlar's certificate, was not a "licensed hawker" by virtue of sect. 6 *of the Pedlars Act* 1871, *as the word "pedlar" in that section means a pedlar when he is acting as a pedlar, and that therefore he was not exempted by the pedlars' certificate from the penalty imposed by sect.* 13 *of the Markets and Fairs Clauses Act* 1847.

Howard *v.* Lupton (*L. Rep.* 10 *Q. B.* 598) *considered.*

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

Case stated by Mr. Marsham, metropolitan police magistrate, sitting at Woolwich Police-court.

1. At a police-court, holden at Woolwich on the 1st Feb. 1895, and by adjournment on the 23rd Feb. and on the 6th April 1895, complaint was made by the Woolwich Local Board of Health (the appellants) under sect. 13 of the Markets and Fairs Clauses Act 1847 that Clifford Gardiner and Maria Gardiner, the above-named respondents, had sold or exposed for sale in a cart drawn by a horse on the 29th Jan. 1895, in Ogleby-street, Woolwich, within the said police district and within the limits of the market owned by the said board articles, namely, potatoes, in respect of which tolls are and were authorised to be taken in the said market.

2. The facts alleged in the said complaint were proved, and it was either proved or admitted that the appellant board was a local authority within the meaning of the Public Health Act 1875 (38 & 39 Vict. c. 55) and the Pedlars Act 1871 (34 & 35 Vict. c. 96) and as such authority was the owner of a market to which sect. 13 of the Markets and Fairs Clauses Act 1847 applied; and that portion of such market had been set aside by the said board in which vehicles might be stored upon payment of 2*s.* 6*d.* a day.

3. It was also proved that neither of the respondents held a hawkers' licence, and that each of them held a pedlars' certificate obtained under the Pedlars Act (34 & 35 Vict. c. 96), which certificate, by sect. 2 of the 44 & 45 Vict. c. 45, authorises the person to whom it is granted to act as a pedlar within any part of the United Kingdom. And by sect. 6 of the 34 & 38 Vict. c. 96, a pedlar's certificate under this Act is for the purposes of the Markets and Fairs Clauses Act 1847 to have the same effect within the district for which it is granted as a hawker's licence, and the term "licensed hawker" in the Markets and Fairs Clauses Act 1847 is to be construed to include a pedlar holding such certificate. By sect. 24 of the 34 & 35 Vict. c. 96 nothing in this Act shall take away or diminish any of the powers vested in any local authority by any general or local Act in force in the district of such local authority.

4. By sect. 3, sub-sect. (*c.*), of 51 & 52 Vict. c. 33, it is not necessary for a hawker's licence to be taken out by a person selling fish, fruit, victuals, or coal. And by sect. 23, sub-sect. 2, of 34 & 35 Vict. c. 96, nothing in this Act is to render it necessary for a certificate to be obtained by sellers of vegetables, fish, fruit, or victuals. The word "victuals" has been held to include barm or yeast: (*Rex* v. *Hodgkinson,* 10 B. & C. 74.)

5. On behalf of the respondents it was contended, on the authority of *Howard* v. *Lupton* (L. Rep. 10 Q. B. 598) that they were, by virtue of sect. 6 of the Pedlars Act. 1871, licensed hawkers for the purposes of sect. 13 of the Markets and Fairs Clauses Act, 1847, and therefore exempt from the penalties prescribed by the latter section.

6. On behalf of the appellant board it was contended that the effect of sect. 6 of the Pedlars Act 1871 was merely that the term "licensed hawker" in sect. 13 of the Markets and Fairs Clauses Act 1847 was to be construed to include the persons whom the term "pedlars" was defined by sect. 3 of the Pedlars Act 1871 to mean, namely, "any hawker, pedlar, petty chapman,

tinker, caster of metals, mender of chairs, or other persons, who, without any horse or other beast bearing or drawing burden, travels and trades on foot, and goes from town to town, or to other men's houses, carrying to sell, or exposing for sale any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise, immediately to be delivered, or selling, or offering for sale his skill in handicraft." And that neither of the respondents came within this definition at the time of the acts complained of. That a pedlar's licence issued by the police for 5*s.* was not equal to a hawker's licence costing 2*l.*, and that the defendants were liable to be prosecuted by the Inland Revenue for hawking with a horse and cart having only a pedlar's licence. Further that though a pedlar could peddle, and a hawker could hawk, yet that a pedlar could not legally hawk, and that sect. 24 of the Pedlars Act 1871, specially reserves the powers of a local authority to protect its market.

7. The learned magistrate was of opinion that in the face of the decision in *Howard* v. *Lupton*, he was bound to dismiss the summons, which he accordingly did. The appellants being satisfied with the decision as being wrong in law, duly required the magistrate in writing to state a case for the opinion of the High Court of Justice; and as there has been some alteration in the law by 44 & 45 Vict. c. 45, s. 2, since the case of *Howard* v. *Lupton* (*ubi sup.*) was decided, he agreed to do so.

The question for the opinion of the court was whether or not the magistrate was bound in law to dismiss the summons.

The nature of the arguments is sufficiently indicated in the special case.

Channell, Q.C. and *R. Cunningham Glen* for the appellants.

Travers Humphreys for the respondents.

GRANTHAM, J.—We have no doubt in this case that we are not bound by the decision in *Howard* v. *Lupton* (*ubi sup.*), and we are both of opinion that we ought not to follow it. The question it is necessary to consider in this case is whether the word "pedlar" in sect. 6 of the Act of 1871 means any pedlar, or whether it means only a pedlar when he is acting as a pedlar, and going about peddling. When we consider that the statute has thought fit to define what a pedlar is, and when we look at the language of the Act, to my mind it is perfectly clear that it means a person who is a pedlar, when he is acting as a pedlar with a pedlar's licence; and that it is not necessary for us to read any words into the section for the purpose of construing the same. It seems to me that the language of the section is sufficient to show that if a person is not acting as a pedlar, it was not intended to cover him and bring him within the definition. Under these circumstances I think the learned magistrate was wrong, and that the case must go back.

WRIGHT, J.—I am of the same opinion. I do not desire to criticise the case of *Howard* v. *Lupton* (*ubi sup.*) further than this: We come to the same conclusion as Lush, J. It seems to me evident that at any rate Mellor, J. would have looked at the case very differently if the Act 44 & 45 Vict. c. 45, had been in force when he decided that case, and I am not sure whether Blackburn, J. would not have done so also. They both appear to have been very much affected by the consideration that the definition of pedlar was confined to a special district, or a special division.

Appeal allowed; no costs.

Solicitor for the appellants, *Edwin Hughes.*
Solicitor for the respondents. *C. O. Pook.*

June 25, *July* 4, *and Aug.* 7.

(Before WRIGHT and KENNEDY, JJ.)

SMALLWOOD *v.* SHEPPARDS. (*a*)

Landlord and tenant—Parol agreement—Letting for non-continuous periods—Entry and payment of rent for part of period—Right of landlord to rent for remainder of period—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

By a parol agreement the defendant agreed to pay the plaintiff 45*l. for the use of a piece of waste land for the three bank holidays following* (*Easter, Whitsuntide, and August*), 15*l. to be paid for each day, and the defendant was to have exclusive possession of the land for those days. The agreement was a single entire letting for a lump rent of* 45*l., and not three lettings at a separate rent for each. The defendant entered under the agreement, and occupied and used the land for the first holiday, and made a payment for such occupation, but he did not occupy or use the land on either of the two other holidays, and refused to pay rent for the same. The defence of the Statute of Frauds having been raised to a claim for the balance of the rent:*

Held, that, as the agreement was for a single letting (*although the period of the letting was not continuous*), *and as there had been an entry under the agreement and a payment of rent on account, the defence of the Statute of Frauds failed.*

APPEAL by the defendant from a judgment of his Honour Judge Chalmers, sitting at Birmingham County Court.

The action was brought to recover the sum of 26*l.* 13*s.* 4*d.*, balance of rent alleged to be due from the defendant to the plaintiff.

The defendant, who was in the habit of attending fairs with "roundabouts," called upon the plaintiff in Feb. 1894, and said that he wished to have the use of some waste land belonging to the plaintiff, for the three bank holidays following, that is, Easter, Whitsuntide, and August 1894, for the purpose of his performances.

According to the evidence of the plaintiff—which the learned judge accepted—the defendant agreed to pay the plaintiff 45*l.* for the piece of ground for the three bank holidays, and in consideration of his pulling down a shed which was on the land, the defendant was to receive 5*l.*, which was to be allowed and spread over the three payments of 15*l.* in respect of each of the three holidays.

The defendant paid a deposit of 5*l.*, and if the land was let the defendant was not to pay for the time he did not occupy.

The defendant's evidence was that the plaintiff said he would let him (the defendant) have the land for Easter for 15*l.*, that he (the defendant) offered him 10*l.*, less 2*l.* for taking down the shed, and that there was nothing said about the 45*l.*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

The defendant entered upon the land and occupied the same on the Easter bank holiday, and paid a sum of 8*l.* 6*s.* 8*d.*, in respect of such occupation, but he did not occupy or use the land on the other two holidays, and refused to pay in respect of the same.

The plaintiff then brought this action to recover the balance of the rent due.

The learned judge accepted the plaintiff's account, and found for him for 26*l.* 13*s.* 4*d.*, but reserved judgment on the question of law that was raised for the defendant, namely, that sect. 4 of the Statute of Frauds applied, and that there was no writing and no part performance to take the case out of the section.

The learned judge held that there was a single entire contract for 45*l.*; that there was an entry under the contract on to the land, and a user of the land and a payment on account, which could only be referable to one entire agreement, and not to three separate agreements; that whether the contract be regarded as a lease, or as an agreement under sect. 4, the statute had been complied with, and that the plaintiff was entitled to recover.

The defendant appealed.

Rawlinson and *G. Edwards Jones* for the defendant.—This was a verbal arrangement or licence to use the ground for one day; it was not a lease at all, but it was an agreement for an interest in land, and therefore came within sect. 4 of the Statute of Frauds. There was no unqualified right of any kind given to the defendant for the two latter days; the plaintiff reserved to himself the right to turn the defendant out if the land was let to another. [WRIGHT, J.—Have you any authority to show that an agreement of this kind may not be one tenancy?] It may be one tenancy under certain circumstances, but here it is a mere licence to use the land for the day. It comes under sect. 4, as being an agreement for an interest in land. That being so, and as there has been no part performance sufficient to take the case out of the statute (*Maddison* v. *Alderson*, 49 L. T. Rep. 303; 8 App. Cas. 467), the plaintiff cannot maintain this action.

C. C. Scott for the plaintiff.—The plaintiff here relies on a contract—one contract—for the defendant to have this piece of land for the three days for 45*l.* A deposit of 5*l.* was paid; the defendant entered under the agreement, and occupied under it, and paid the sum of 8*l.* 6*s.* 8*d.*, leaving the balance now sued for. The judge found that the contract was the contract set up by the plaintiff, namely, one entire contract to let the land for the three days at the lump rent of 45*l.* There was thus really only one letting, though it is quite true that the letting was for three days separated by intervals. There seems to be no express decision on the point as to whether the fact that an interval intervenes prevents the agreement being a lease, but it is submitted that it does not:

Taylor v. *Caldwell*, 8 L. T. Rep. 356; 3 B. & S. 826.

Thus, if a person takes a deer-forest for three months for three successive summers, it is one letting though an interval intervenes. Other analogies might be put, such as a letting for cricket or football, which no doubt would be one letting. It is all important for us to make out that this is a demise, for we are suing for rent. It is either a letting or it is not; if it is not a letting, it is not within the Statute of Frauds at all:

Ryley v. *Hicks*, 1 Strange, 651.

If it is a letting, then it is one letting, and there is sufficient part performance to take the case out of the statute:

Fry on Specific Performance, 3rd edit., ss. 580-582; *Maddison* v. *Alderson* (*ubi sup.*).

Where there is an executory agreement for a tenancy, and such agreement is followed up by possession, that is, by entry under the agreement, then there is an actual demise, and the landlord would be able to sue for rent apart from the Statute of Frauds altogether:

Wright v. *Stavert*, 2 L. T. Rep. 175; 2 E. & E. 721.

G. Edwards Jones in reply. *Cur. adv. vult.*

Aug. 7.—The judgment of the Court (Wright and Kennedy, JJ.) was read by

WRIGHT, J.—In this case it is agreed that we are to draw any inference of fact from the evidence as stated in the judge's notes which the judge might have drawn. We draw the inference that the parties intended that the defendant should have exclusive possession of the land for the three bank holidays. The judge has found that the contract was a single entire contract for 45*l.*, by which we understand him to mean that he finds that it was not an agreement for three lettings at a separate rent or price for each of the three bank holidays, but one agreement for the possession and use of the ground on the three occasions at a single lump rent or price of 45*l.* for the three—in other words, for one letting. The defendant entered upon the land for the purpose of occupation under the agreement on one of the three days. After entry he made (as the County Court judge finds) a payment of money on account, which can be referable only to one entire agreement. He might have occupied had he chosen to do so on the two later days which the letting covered. In order to maintain an action for "use and occupation," after the close of the period for which it is sought to make the party sued liable, actual occupation is not necessary; it is sufficient if once there has been an entry, provided that the defendant might have gone on occupying had he chosen to do so. He has "held" (11 Geo. 2, c. 19, s. 14), although he has not "enjoyed." It appears to us that upon the facts the defence of the Statute of Frauds fails. There having been an entry for the purpose of occupation under an agreement for a single letting (although the period of the agreed letting was not continuous), at a single or lump rent or price, and a payment of rent on account of the entry, the plaintiff's right to recover the balance after the termination of the letting period is, in our judgment, not affected by the fact that the agreement was a parol agreement. *Appeal dismissed.*

Solicitors for the plaintiff, *Debenham* and *Walker*, for *J. P. Lambert*, Birmingham.

Solicitors for the defendant, *Morse* and *Simpson*, for *Whitelock*. Birmingham.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Monday, May 13.

(Before WILLIAMS, J.)

Re CAREY; *Ex parte* JEFFRIES *v.* CAREY CYCLE COMPANY. (*a*)

Bankruptcy—Conversion of business into a company—Conveyance to defeat creditors—Rights of creditors of bankrupt.

The debtor, when insolvent, converted his business into a limited company, which consisted of himself and his nominees.

Held, that, inasmuch as the company was merely a sham, the trustee in bankruptcy was entitled to a declaration that the conveyance to the company was void as against him, and that he was entitled to the company's assets.

Held, further, that the trustee must pay the creditors of the company in full, in priority to the bankrupt's creditors, on the ground that the company was agent of the bankrupt, and he was bound to indemnify it.

MOTION by the trustee in the bankruptcy of Edward Carey for a declaration that the transfer by the bankrupt of his property and business to the Carey Cycle Company Limited, and the assignment by the liquidator of the Carey Cycle Company Limited of the property and business of the company to Messrs. Edwards and Flaxman were fraudulent and void or void as against the trustee, and for an order that the company or the liquidator should hand over the said property and business, or the proceeds thereof, to the trustee.

The bankrupt had originally carried on business in his own name, but in July 1894 he was very much pressed by his creditors and decided to turn his business into a limited company.

In Aug. 1894 the company was formed, the signatories of the memorandum and articles of association being all relatives or servants of Carey.

On the 16th Aug. he executed the agreement by which he purported to convey to one Charles May, as trustee for the company, his business, stock-in-trade, and effects, in consideration of 1500*l.* in cash and 1500*l.* in shares. No cash was ever handed over to him, but only bills of the company. The business continued to be managed by him in the same way as before, and the company even used his banking account down to the 11th Sept.

Carey tried to satisfy his old creditors with the bills given to him by the company, but being unsuccessful in this attempt he filed his own petition and the company went into liquidation upon the 4th Dec.

The liquidator sold the business of the company to Edwards and Flaxman, Edwards having been a clerk of the bankrupt, for 370*l.*, of which he stated upon the hearing of the motion that he had 200*l.* still in hand.

Herbert Reed, Q.C. and *Carrington*, for the trustee, applied that the transfer of the business should be declared a sham, and for the assets to be handed over to the trustee. [WILLIAMS, J.—You say this company is a sham; unfortunately these shams contract debts, and their creditors have certain rights which I have to regard.]

Wildey Wright opposed the application.

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

WILLIAMS, J.—This company was a legal corporation incorporated in accordance with the Companies Acts; but, although Carey's business was sold to this company, it continued, notwithstanding the form of sale, to be a business under the control of Carey and for his exclusive good, and he sold it to the company because he was in a situation of embarrassment. When there is such a conversion into a company as this it is not true to say that there are two contrary interests. It is true that there is a buyer and a seller; but the vendor is in the position of principal, the company in that of agent. Therefore, as between the trader and the company, one ought to treat the agreement to sell as a nullity; that is, alone between the vendor and the company as his agent, because really there is only one person, the trader himself. The company is merely another form he has assumed, a mere *alias*. But it would be wrong that third persons who were not parties to the agreement should suffer thereby; and, as far as they are concerned, I ought to treat this sale to the company as a reality. I see no difficulty in treating it as real for one purpose and not for another. In equity, if not in law, a sale is often treated as good for some purposes if not for others, and in law bills of exchange and bills of sale are often so treated. Here I think that, although this transfer to the company is a sham as far as the bankrupt is concerned, yet it is a reality as far as the creditors of the company are concerned. I therefore do not put the creditors of the company *pari passu* with the creditors of the bankrupt. I think they have a right to be paid first out of the company's assets. The bankrupt has allowed it to trade as if separate from himself, and it seems to me that his creditors take his estate subject to this estoppel, which would prevail against the bankrupt himself. The bankrupt could not deny the rights of the creditors of the company, and neither can his trustee. I declare that, although the assets of the company form part of the general estate of the bankrupt, they are subject in the first place to the creditors of the company being paid in full out of them. The bankrupt used the company as his agent, and must therefore indemnify it, and I must hold that his trustee can only take its assets subject to this obligation to indemnify.

Solicitor for the applicant, *Arthur Pyke*.
Solicitors for the respondent, *Bassett* and *Co.*

Tuesday, July 23.

(Before WILLIAMS, J.)

Re SMITH AND HARTOGS; *Ex parte* THE OFFICIAL RECEIVER. (*a*)

Bankruptcy — Landlord and tenant — Lease — Subsequent agreement altering terms as to rent —Failure to pay rent—Right to distrain.

Certain premises having been demised to a tenant, his assignees entered into an agreement with their landlord altering the terms on which the rent was to be paid under the demise. The rent was paid for a short period on the new basis, when on the assignees becoming bankrupt the landlord distrained after the bankruptcy for the rent then due according to the demise, and not

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

on the altered basis. The trustee paid the rent claimed under protest.

Held, that the landlord was entitled to distrain after the bankruptcy for the rent due according to the terms of the demise, as the effect of the agreement was merely to postpone the landlord's rights under the demise so long as the rent was paid on the altered basis according to the agreement, and as the rent had not been so paid, the landlord's rights under the demise could be enforced.

THIS was a motion by the Official Receiver as trustee of the bankrupt's estate, for an order that the respondent should repay to the official receiver the sum of 78*l.* 10*s.* paid by him to the respondent under protest.

The respondent, James Leverson, demised to Messrs. Flatau, on the 14th Oct. 1890, certain premises situate in Bateman's-row, Shoreditch, for the term of twenty-one years from the 29th Sept. 1890, at the yearly rent of 150*l.* for the first three years of the term, and 200*l.* for the remainder of the term. The lessee's interest was subsequently assigned to Charles Mereik and Walter Smith, and by them assigned to Smith and Hartogs, against whom a receiving order was made on the 4th Oct. 1894, on which they were adjudicated bankrupt on the 11th Oct. In the year 1893 a correspondence had taken place between Mr. Leverson and Messrs. Smith and Hartogs, which resulted, it was alleged, in an agreement that Mr. Leverson should accept 100*l.* a year rent up to the 29th Sept. 1894, 250*l.* a year for the two following years, and 200*l.* a year until the end of the term. On the 31st Jan. 1894 Messrs. Smith and Hartogs paid Mr. Leverson 25*l.* as for rent due on the 29th Sept. 1893, under the alleged agreement, and on the 30th April 1894 25*l.* was paid for the quarter ending Lady-day 1894. In Aug. 1894 a distress was levied on the premises for 25*l.*, the amount due to Midsummer, which was satisfied by payment by the tenant of the amount due. After receiving order, on the 10th Dec. 1894, Mr. Leverson levied a distress for 100*l.* for arrears of rent due to Michaelmas 1894, and on the 17th Dec. the official receiver paid under protest 103*l.* 10*s.*, the amount claimed for rent and costs. The official receiver, as trustee in the bankruptcy, now applied for a return of the said sum of 103*l.* 10*s.*, less 25*l.* the amount due for rent up to the 29th Sept. 1894.

By sect. 42 of the Bankruptcy Act 1883:

> The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's rent [now six months by sect. 28, 53 & 54 Vict. c. 71] accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available.

Muir Mackenzie for the Official Receiver.—The arrangement come to was that the rent should be 100*l.* a year down to the 29th Sept, 1894, and the landlord could only therefore distrain for at most 50*l.*, as by sect. 42 of the Bankruptcy Act 1883, amended by sect. 28 of the Act of 1890, the power of the landlord to distrain after the bankruptcy is limited to six months rent accrued due prior to the date of the order of adjudication, which was the 11th Oct. The landlord here had agreed to accept a reduced rent, and he could only enforce his right to that rent as agreed. Here the tenants are assignees who might have got rid of the lease at any moment, and they deliberately make this arrangement with their landlord, and now ask that it may be enforced as against the landlord.

Benjamin Leverson for the landlord.—In any case this agreement was a mere *nudum pactum*. [He was stopped.]

WILLIAMS, J.—This was a mere agreement by the landlord that he would not enforce the remedies he had for recovering his rent in the event of the instalments agreed on being punctually and properly paid. It being admitted here that the agreement was not carried out by the tenant, the right of the landlord to distrain for the rent reserved remained unaltered. It cannot be denied that the original rent was unaltered, and that it continued to be rent reserved by the original lease. To put the case in the manner most favourable to the trustee: Here was an agreement that, if the tenant paid the rent agreed upon by instalments, the landlord would not enforce his original remedy. Treating the agreement as being one for good consideration, it cannot be enforced by the tenant if he was in default, and here he was in default. I am of opinion that the rent claimed was rent accrued due prior to bankruptcy within the meaning of sect. 42. I am not at all sure that the contention is not right here that there was absolutely no consideration for the agreement: if so, it was a mere voluntary statement by the landlord that he would be willing to accept the rent in this way: it did not affect the landlord's remedy in law or equity, it was not a binding agreement of such a nature that a tenant in default could take advantage of and prevent the landlord distraining for the original rent.

Application refused.

Solicitors for the Official Receiver, *Adams* and *Adams*.

Solicitors for the landlord, *Campbell, Reeves*, and *Hooper*.

Tuesday, Aug. 6.

(Before WILLIAMS and WRIGHT, JJ.)

Re FOLLOWS; *Ex parte* FOLLOWS. (*a*)

Bankruptcy — Bankruptcy notice — Amount for which it may issue—Amount for which execution may be issued—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (*g*).

A creditor may not, in a bankruptcy notice, demand more than the amount for which he can issue execution.

Per Williams, J.: Where execution has been levied on a judgment, a bankruptcy notice based on the same judgment cannot be issued until a return has been made to the writ of execution.

THIS was an appeal from the decision of the registrar of the Birmingham County Court making a receiving order against the debtor.

The debtor was a farmer, and was tenant to a Mr. Grove. On the 23rd March judgment was obtained against him, under Order XIV., for the

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

sum of 89*l.* 16*s.* 9*d.* for rent due, &c. On the 27th March the sheriff levied execution on the debtor's goods for the amount of the debt. On the 9th April the goods were sold, and realised 42*l.* gross and 29*l.* 16*s.* 9*d.* net.

On the 22nd April the petitioning creditor issued a bankruptcy notice for the whole sum of 89*l.* 16*s.* 9*d.* A claim having been made to the proceeds of the sale of the goods, the sheriff, on the 26th April, took out an interpleader summons. On the 29th April the bankruptcy notice was served, and on the 30th April an issue was ordered to be tried on the interpleader summons, the sheriff to retain the proceeds of sale to abide the result.

A petition was presented against the debtor, alleging the debt to be 84*l.* 10*s.*, and the act of bankruptcy to be non-compliance with a bankruptcy notice.

On the 27th May a receiving order was made against the debtor by the registrar of the Birmingham County Court. On the 19th June the interpleader issue was heard, and judgment was given for the petitioning creditor.

This was an appeal by the debtor against the decision of the registrar making the receiving order.

Hansell for the appellant.—The receiving order ought not to have been made. By sect. 4 of the Bankruptcy Act 1883, a debtor commits an act of bankruptcy (*g*) if a creditor has obtained a final judgment against him for any amount and execution thereon not having been stayed, has served on him a bankruptcy notice requiring him to pay the judgment debt, and he has not complied with the requirements of the notice. No bankruptcy notice could issue, because execution was stayed by reason of the interpleader proceedings, which prevented a return being made by the sheriff to the writ of execution. A creditor can select his remedies no doubt, and proceed by a writ of execution or a bankruptcy notice, but he must wait for a return to the writ before issuing the notice:

Re Ford; *Ex parte Ford*, 56 L. T. Rep. 166; 18 Q. B. Div. 369;
Re Bates; *Ex parte Lindsey*, 57 L. T. Rep. 417.

Next, the bankruptcy notice was bad, as the amount for which it was issued was too large. There was no right to issue execution for the whole debt, as 29*l.* 16*s.* 9*d.* had been recovered, and a bankruptcy notice can only demand what a creditor can enforce by execution:

Re Miller; *Ex parte Nugent*, 69 L. T. Rep. 260.

Further, no second execution could have issued here, as no return had been made to the first writ, and the second must recite the result of the first. He also referred to

Re Phillips, 8 Mo. 40.

Muir Mackenzie for the respondent.—The appeal ought not to be allowed. Execution had been executed, and the fact that no return had been made does not matter:

Morland v. *Pellatt*, 8 B. & C. 722.

[WRIGHT, J.—Are not these proceedings bad on the ground that the bankruptcy notice was issued for 89*l.* 16*s.* 9*d.*?] The original debt remains here. The only amount by which it could be reduced is the 29*l.* 16*s.* 9*d.*, and at the time the bankruptcy notice was issued it was quite uncertain whether the creditor had this sum to his credit in the sheriff's hands or not. There is an interpleader as to whether this money belongs to the execution creditor or the assignee under a deed of assignment. There was no occasion at the hearing to ask for leave to amend, as the point was not taken.

WILLIAMS, J.—One ground of appeal in this case was that no act of bankruptcy had been committed on which a receiving order could be made; the act of bankruptcy alleged was non-compliance with a bankruptcy notice. By sect. 4 of the Bankruptcy Act 1883, a debtor commits an act of bankruptcy (*g*) if a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or by leave of the court elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice in case the service is effected in England, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained. That being the section, the facts are as follows: Judgment was obtained for 89*l.* 16*s.* 9*d.* against the debtor, and a *fi. fa.* was delivered to the sheriff for execution, and on the 27th March the sheriff levied and sold the debtor's goods and realised the sum of 29*l.* 16*s.* A claim was made to the goods the exact date of which was not given, but it is a reasonable inference that the sheriff did not at once make a return to the writ and pay over the amount realised. On the 26th April an interpleader summons was taken out by the sheriff, a bankruptcy notice having been issued on the 22nd April. Now it followed from these dates that when the bankruptcy notice had been issued a *fi. fa.* had been placed in the sheriff's hands and a levy had been made, but no return. The date of the service of the bankruptcy notice was on the 29th April, and so after the issue of the interpleader summons. In my judgment it followed from these facts and dates that on the date of the issue of the bankruptcy notice, and also at the date of the service of it, the execution creditor was not in a position to issue execution for the 89*l.* 16*s.* 9*d.* Up to the date of the issue of the bankruptcy notice he was not in a position to issue execution, because execution had been issued and no return made; and according to the common law you can only issue a second *fi. fa.* after a previous one if a return has been made to the first one, and this had not been made, as the second must recite the amount realised by the first. It seems to me also that at the date of the service of the bankruptcy notice the execution creditor could not issue execution for the whole amount for the same reason, as there had been no return to the writ, and also because at the date of the service of the bankruptcy notice there was already the interpleader summons in existence. That such a summons had been issued brings the case within the principles of *Re Ford* and *Re*

Phillips. Now, if that is correct that no execution could issue for the whole amount of the debt, it seems to me that the bankruptcy notice which gave the debtor notice to pay the whole amount of the debt was bad, not on the ground of any right to stay of execution—and I do not say that there are any words in the section that the bankruptcy notice shall not issue under these circumstances—but on the plain intention of the Act of Parliament, *i.e.*, that a bankruptcy notice shall only demand what a creditor can enforce by execution. It was conceded that, if part of the judgment debt had been paid, the execution creditor could not levy execution or issue a bankruptcy notice for more than was due. Under these circumstances, in order to decide this case, it is enough to say that at the moment of the issue of the bankruptcy notice there was no right to issue execution for 89*l.* 16*s.* 9*d.* The question might have been raised as to whether there was a matter for amendment. If one takes the view of Mathew, J. in *Re Bates*, there is strong ground for saying that this was a good ground for amendment. If, however, one takes the view of Cave, J. in *Re Phillips*, then there was no ground for amendment. But we have not to decide this question, as Mr. Mackenzie declined to ask for leave to amend. The question then is, Can a bankruptcy notice issue for a sum for which execution cannot issue? The answer is, it cannot; and when once you arrive at that conclusion then the only question is, could execution have been issued at the date of the issue of the bankruptcy notice or at the date of its service for the whole amount of the debt? It is clear it could not, for you must deduct the 29*l.*

WRIGHT, J.—I desire to express no opinion on the general question whether a bankruptcy notice can be issued when execution has been issued and not perfected by a return being made to the writ.

Solicitors for the appellant, *Ralph Raphael* and *Co.*, for *Blackham* and *Taylor*, Birmingham.

Solicitor for the respondent, *T. White*, for *Tonbridge*, Birmingham.

Thursday, Aug. 8.

(Before WILLIAMS and WRIGHT, JJ.)

Re PURRETT; *Ex parte* PURRETT. (*a*)

Bankruptcy—Hearing of petition—Attendance of petitioning creditor—Right to cross-examine—Bankruptcy Rules 1886, *r.* 164.

According to the established practice of the Bankruptcy Court the attendance of the petitioning creditor is necessary at the hearing of the petition, unless the court think fit to dispense with it.

Per Williams, J.: That if the petitioning creditor attends he may be cross-examined, whether he is a witness to prove the act of bankruptcy or the petitioning creditor's debt.

Per Wright, J.: That the attendance of the petitioning creditor is required for the purpose of scrutiny by the court, and not necessarily for cross-examination.

THIS was an appeal against the decision of the registrar of the County Court at Luton. The debtor was tenant of a farm to Madame de Falbe, under a lease at 500*l.* a year, of which three years had to run.

Disputes had arisen between the tenant and his lessor, which resulted in judgment being obtained against him by Madame de Falbe for 300*l.* A petition was presented by Madame de Falbe, and an affidavit by her in support of it was placed on the file. At the hearing, an office copy of the judgment was produced and put in by the solicitor to the petitioning creditor, but the affidavit on the file was not used. The debtor gave notice specifying the statements in the petition that he intended to dispute.

The petitioning creditor was in attendance, and the debtor, by counsel, applied for leave to cross-examine her, the suggestion of the debtor, amongst other things, being that the bankruptcy proceedings were being used by her for the purpose of getting rid of the debtor from the farm, and not for the purpose of collecting the debtor's assets.

The registrar declined to order the petitioning creditor to go into the witness-box to be cross-examined until some evidence to displace the judgment had been given.

He also found, as a fact, that the object of the petition was to collect the assets of the debtor, and accordingly allowed the petition, and made a receiving order against the debtor. The debtor appealed.

By the Bankruptcy Rules 1886, r. 162:

On the appearance of the debt or to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved, and if any new evidence of those matters or any of them shall be given, or any witness or witnesses to such matter shall not be present for cross-examination and further time shall be desired to show cause, the court shall, if the application appears to the court to be reasonable, grant such further time as the court may think fit.

163. If any creditor neglects to appear on his petition, no subsequent petition against the same debtor or debtors or any of them, either alone or jointly with any other person, shall be presented by the same creditor in respect of the same act of bankruptcy without the leave of the court to which the previous petition was presented.

164. The personal attendance of the petitioning creditor, and of the witnesses to prove the debt and act of bankruptcy or other material statements upon the hearing of the petition, may, if the court shall think fit, be dispensed with.

G. M. Cohen for the appellant.—The registrar was wrong. The petitioning creditor was present in the court and could easily have gone into the box; I had a right to have her there to cross-examine her. The intention of the petitioning creditor was to make the tenant bankrupt, so that the trustee might disclaim the lease and thus it would come back into her hands; this was an improper use of the Bankruptcy Act, and ought to have been elicited by cross-examination.

Reed, Q.C. and *M. Shearman* for the respondent.—The registrar found as a fact that the object of the petition was to collect the assets, and not for an ulterior purpose. The debt was proved by the office copy of the judgment, and the attendance of the petitioning creditor was not necessary, as she was not a witness to a material fact. The registrar dispensed with her attendance, and the court will not interfere with his discretion.

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

Williams, J.—I am very unwilling to arrive at the conclusion that I have done in this case, because the result of this judgment is of no great importance either to the petitioning creditor or the debtor; but I sit here to administer the bankruptcy law, and I feel very strongly the importance of the rules of procedure being closely adhered to, and I cannot bring my mind to think that they were properly adhered to in in this case. The attendance of the petitioning creditor at the hearing of a petition, or, as it was in the old times, after striking of the docket, has been a uniform practice even since the practice in bankruptcy took an established form at all. In my judgment that practice was right and well founded. The consequences of bankruptcy are very serious; the consequences of a petition and receiving order, which are preliminary to adjudication, must be very serious too, and under these circumstances one finds in the bankruptcy practice that the courts have always insisted on the strongest proof of good faith in the petitioning creditor; it is for this purpose that many rules and sections were drafted. One instance will suffice; *e.g.*, where a legal debt is vested in a trustee the court will never allow an adjudication without the presence of the *cestui que trust*; yet the proof is complete, and so are the legal essentials to bankruptcy, but the court wants more, and one knows cases where a bankruptcy petition has been presented for an ulterior purpose. One need not go further than two illustrations cited yesterday. The first was when the intention was to stop a prosecution at the Old Bailey, that was the case of *Re Adams; Ex parte Griffin* (41 L. T. Rep. 515; 12 Ch. Div. 480); and the other was to get rid of a troublesome partner. That is the rule of practice, and it is I think very properly carried out by rule 164, which is as follows: "The personal attendance of the petitioning creditor and of the witnesses to prove the debt and act of bankruptcy, or other material statements, upon the hearing of the petition, may, if the court shall think fit, be dispensed with." That rule contemplates the attendance of the petitioning creditor wholly irrespective of whether he is or is not a witness to prove the act of bankruptcy or the debt of the petitioning creditor, and his attendance is for the purpose of enabling questions to be put to him unless some good reason exists for his attendance being dispensed with. I will also read the terms of the rule 162 just to show it has not escaped my mind, but it has no application to the present case, first because the petitioning creditor was personally present in court, and so there was no necessity for an adjournment; and, secondly, notwithstanding the words of the rule, I doubt if the affidavit of verification, which is the condition precedent to filing a petition, is in evidence at that period at all; you may give notice to read it, and there is some reason to suppose that the draftsman of rule 162 thought it was in evidence, probably on account of the words "new evidence" appearing in the rule. The rule runs: "On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy or such of these matters as the debtor shall have given notice that he intends to dispute, shall be proved, and if any new evidence of those matters, or any of them, shall be given, or any witness or witnesses to such matter shall not be present for cross-examination and further time shall be desired to show cause, the court shall, if the application appears to the court to be reasonable, grant such further time as the court may think fit." If the petitioning creditor is in attendance, the debtor has a right to question him unless the "court shall think fit (that the personal attendance should) be dispensed with." In this case it is plain that the registrar had the right to dispense with the attendance of the petitioning creditor for the purpose of being questioned, and *Re Rayner* (37 L. T. Rep. 38) shows that one ought to follow the discretion exercised by the registrar. In this case, however, according to the registrar's own note, he did not decide to dispense with the evidence of the petitioning creditor on the ground that it would not serve any useful purpose, but on the ground that rule 164 has no application in a case where the petitioning creditor's debt is based on a judgment; that is what his note comes to. That was wholly wrong. I am not satisfied that he applied his mind to the true question, *i.e.*, whether or not his examination could serve any useful purpose. Had he done so, the very moment it was suggested that these proceedings were foreign to the bankruptcy court and a scintilla of evidence had been given to that effect, he would have allowed the cross-examination. It should be understood, where the debt is based on a judgment verified by the affidavit of the petitioning creditor, that does not deprive the debtor of the right to cross-examine unless and until he gives evidence displacing the judgment. The receiving order was wrong; the matter must go back. I do not say that the examination is necessary, but the registrar must exercise his discretion.

Wright, J.—I am not prepared to dissent from the view taken by my brother Williams, and on the facts of this case it may very well be that the production of the creditor for cross-examination is necessary; but no such result follows from rule 164. The rights of the parties depend on statute. Sect. 7 provides that the affidavit of verification may be made by the petitioning creditor or someone on his behalf, and the following sub-section does not say anything as to the examination of the petitioning creditor himself. If the parties chose to use his affidavit he ought to be subject to cross-examination, but no use was made of it here, and there is no right under rule 164 to insist on cross-examining a person who has not been put into the witness-box. Necessary attendance means attendance for the purpose of scrutiny by the court.

Appeal allowed.

Solicitors for the appellant, *Calcott.*
Solicitors for the respondent, *Rowcliffes.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 8 and 9.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Louis *v.* Smellie. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Master and servant—Use of information and materials acquired during service—Taking copies from employer's books—Damages—Injunction.

The good faith which exists between an employer and those in his employ renders it illegal, even in the absence of any stipulation to the contrary, for the persons so employed to make use after the termination of the employment of any materials or any information acquired by them while they were in that confidential relationship; and the court will grant an injunction to restrain such use, in addition to awarding damages.

Order of Kekewich, J. varied.

This action was brought by the plaintiff, Adolphus Herman Louis, who carried on in London the business of a process-server, under the title of "Flowerdew and Co.," to restrain the defendant, Robert Smellie, who had recently started a similar business under the name of "Smellie and Co.," from pirating the plaintiff's register and index of agents and forms used in process-serving.

The plaintiff's business was extensive, he being employed by more than 2000 solicitors for the purpose of process-serving, and having upwards of 1000 agents throughout the United Kingdom. For carrying on his business he kept a register and index of his agents, and had also compiled many special forms of documents differing from those previously compiled by other persons.

In 1886, after the plaintiff had been carrying on business for about two years, the defendant, then a lad, entered his service as a shorthand clerk, and for some time he was also employed by the plaintiff in the special business of process-serving. The plaintiff alleged that the defendant took advantage of his position to secretly make, for his own purposes, extracts from the plaintiff's register and index of agents, and to copy the plaintiff's forms.

In Oct. 1894, the defendant left the plaintiff's employ and set up as a process-server on his own account, and for that purpose sent out circular cards copied, it was said, from the plaintiff's form of circular card, and also made use of the extracts and copies he had made while in the plaintiff's service.

The plaintiff thereupon brought this action for an injunction and other relief, and also for damages.

On the 4th April 1895 the action came on for trial before Kekewich, J., when the following judgment was delivered:

Kekewich, J.—This branch of the law has received much consideration lately in the case of *Robb* v. *Green* (72 L. T. Rep. 686; (1895) 2 Q. B. 1; on app. 73 L. T. Rep. 15; (1895) 2 Q. B. 315). I believe it reviews all the authorities, and it is instructive to those who desire instruction. But so far as I am concerned, apart from *Robb* v. *Green*, the doctrines of the court having been recently and fully expounded in *Lamb* v. *Evans* (68 L. T. Rep. 131; (1893) 1 Ch. 218), there is no need for me to dilate on it. It is sufficient to say by way of summary that no servant or pupil is allowed to use the industry or skill of his master further or otherwise than is provided by the expressed or implied terms of the bargain between them. This statement avoids any distinction between the use by copying or the like, or by an effort of memory. And it is the logical result of the doctrine that no such distinction exists. Are the register and index of agents, and are the forms employed by the plaintiff works of skill and industry deserving protection? Speaking generally, and without reference for the moment to any particular document, and independently of course of copyright, I entertain no doubt that they are all of this character. First as regards the register and index of agents, which must be treated together and as practically one work, the plaintiff's evidence proves the labour and ingenuity expended on them; and there is evidence which shows how smoothly and well they are used in daily practice. There was some suggestion on the part of the defendant of failure in the plaintiff's first attempts, and of his own contribution to the ultimate result; but this really does not affect the conclusion, even if I could treat the defendant in this respect otherwise than as the agent of the plaintiff. It is clear that the defendant was not intended to use the register and index except for the purposes of the plaintiff's business, and then only in the manner prescribed by the practice of the office. If, therefore, he has used them for the purposes of the business which he is now carrying on in rivalry with the plaintiff, he is doing that which the law will not allow. Throughout the trial, and during subsequent reflection, I have found much difficulty in determining what the defendant really did. That he possessed himself of some of the contents of the register, and endeavoured to use this knowledge in his own business, is patent. But, according to him, this was only an exercise of memory supplemented by reference to notes properly made when in the plaintiff's employment, and in connection therewith, or to directories to which he has access in common with the rest of the world. The defendant, of course, is entitled to carry on a business similar to that of the plaintiff, and in rivalry with him. He is also, of course, entitled to employ agents for the purposes of his business, and no complaint can be made of his employing as his agent in any particular town the man who is also employed by the plaintiff there. Nor could fault be found if, when requiring an agent in any particular town, he used the experience gained in the plaintiff's employment and appointed one whom he remembered as having been appointed by the plaintiff, and as having done his work creditably. There would be nothing dishonest in that; and, if this were allowable in one case, it is difficult to see why it should not be allowable in a dozen or more. The difficulty must be solved, as are many other difficulties, practically. It is a question on the evidence, and on the proper inference from the

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

evidence, whether the defendant has done that which is reasonable and honest, or that which is unreasonable and dishonest. I fully appreciate the plaintiff's suspicion that the defendant must have had some list of agents other than what has been produced, but on the evidence I am bound to hold that this suspicion has not been justified by the facts proved, and I acquit the defendant on this count of the charge against him. But he has in his memorandum-book written down the names of several agents appointed, but not in every instance employed by the plaintiff, and he has endeavoured to secure the services of some of them as agents for himself. Whence did these materials come? [His Lordship considered the evidence on this part of the case and continued:] I must hold that the defendant obtained the particulars of several of the plaintiff's agents from the materials available to him in the course of his employment for the purpose of using them, as he endeavoured to use them, in his own rival business. To what relief does this entitle the plaintiff? To an injunction, if one can be found to meet the exigency of the case; but I do not see any way to do this. I could, of course, restrain the defendant from using any materials improperly obtained, but I do not see my way to restraining him from employing the same agents as the plaintiff so far as he knows them, notwithstanding that he has acquired the knowledge improperly. Moreover, an order of that character, if extended beyond the names which have been disclosed in evidence, might and probably would lead to different questions arising in motions for committal, and as regards the names disclosed compensation in damages of small amount will suffice. As regards this part of the case, therefore, I propose to give the plaintiff damages only. Bearing in mind what has already been said, the rest of the case presents no serious difficulty. [His Lordship considered the plaintiff's claim for relief as regarded his forms used in process-serving, and continued:] It is reasonably clear that the defendant made use more or less of the plaintiff's forms, and without any title so to do. But I pass them over lightly, because the substance of the charge against the defendant being proved to the extent above mentioned, they do not deserve separate consideration, and cannot really justify any addition to the relief to which the plaintiff is entitled. No special damage has been proved, or even suggested; and although no doubt the defendant was not unwilling to reap any advantage which might accrue to him by using forms, whether office forms or advertisements, which the plaintiff had found successful, I am not asked to hold, and there is no ground for holding, that he intends to represent himself as carrying on the plaintiff's business. The plaintiff cannot complain of competition; and, according to his own evidence, his business is so large and so well established that the defendant's acts, though wrongful, cannot have done and cannot do him serious injury. Under these circumstances a nominal amount of damages must be sufficient by way of compensation. Vindictive damages are out of the question. There will be judgment for the plaintiff for 5*l.* damages, and the costs of the action.

From that decision the plaintiff now appealed, claiming that he was entitled to an injunction as well as to damages.

Renshaw, Q.C. and *W. F. Hamilton* for the appellant. — We submit that the plaintiff is entitled to an injunction which Kekewich, J. refused to grant, although he held him entitled to damages. He requires an injunction to restrain the defendant from making any use of the special forms used in his business. The defendant has committed a breach of the confidential relationship which existed between him and the plaintiff, entitling the plaintiff to an injunction as well as to damages.

Lamb v. *Evans*, 68 L. T. Rep. 131; (1893) 1 Ch. 218;
Tipping v. *Clarke*, 2 Hare, 383;
Prince Albert v. *Strange*, 2 De G. & Sm. 652; 1 Mac. & G. 25;
Merryweather and Sons v. *Moore*, 66 L. T. Rep. 719; (1892) 2 Ch. 518;
Robb v. *Green*, 72 L. T. Rep. 686; (1895) 2 Q. B. 1; on app., 73 L. T. Rep. 15; (1895) 2 Q. B. 315.

The principle on which the plaintiff is entitled to an injunction is that the court will grant an injunction to restrain a breach of an agreement. It is not material whether that agreement is implied or expressed. There is an implied stipulation that a servant while in employ or afterwards will not make use of any information acquired by him while in his master's service. Damages are an utterly inadequate remedy. Injunctions are granted to prevent repetitions of the acts complained of. The plaintiff will have to commence an action each time that the defendant uses his forms if he does not get an injunction to restrain the defendant from using any of those forms. Such a course will be very oppressive both to the plaintiff and the defendant.

Warrington, Q.C. and *Austen Cartmell* (with them *J. G. Butcher*) for the respondent.—Kekewich, J. did not see his way to grant an injunction which will meet the exigencies of this particular case. An injunction will not do the plaintiff any good, and it will ruin the defendant. It will lead to continual litigation and motions to commit if it is granted in the wide terms that plaintiff asks for. The defendant has always offered to give up the memorandum-book, offers now to do so, and also will undertake not to use the agents' names from that book. But questions will constantly arise if an injunction is granted. The doubt will be whether the defendant gets the names from the directory or from the memorandum-book. We submit that sufficient relief has already been granted against the defendant. The most that is required beyond the damages and costs is delivery up of the memorandum-book, and a further undertaking that the defendant will not communicate with any of the agents whose names appear in the agents' book. To go further will not benefit the plaintiff, and will greatly harm the defendant. As to the forms, the defendant will destroy all in his possession. He does not claim any right to, nor has he any desire or purpose to use, the plaintiff's forms.

Renshaw, Q.C. replied.

Lindley, L.J.—This case is rather more serious than I was disposed at first to think, and I am satisfied that it is one of importance, and it is by no means an easy case. On the one hand we must bear in mind that the plaintiff, with regard to the clerk who left him, never took the trouble to get any covenant by the clerk not to carry on busi-

ness in opposition to his master. We must, therefore, be very careful not to deal with the case as if the plaintiff had obtained the benefit of any such covenant. On the other hand, we must bear in mind that the defendant was entitled to set up in business in the absence of such a covenant in rivalry with his late employer. What he is not entitled to do is to make an unfair use in the carrying on of such a rival business of information acquired by him while he was acting as clerk to the plaintiff. The difficulty lies in drawing the line. With respect to the law, I do not think it is necessary to say more than that it was laid down by this court with quite sufficient accuracy for this purpose in the case which has been referred to of *Lamb* v. *Evans* (68 L. T. Rep. 131; (1893) 1 Ch. 218). The good faith which exists between an employer and those in his employ renders it improper and illegal for the persons so employed to make use after the termination of the employment of those matters which they learnt whilst they were in that confidential relationship. The defendant is perfectly entitled, when he starts as a rival in business to the plaintiff, to carry it on in the same way as his principal does. He has learnt to do it, and he is entitled to the benefit of that knowledge. The difficulty is in drawing the exact line as to what he may or may not do. But it is quite obvious to my mind, assuming for the moment that he has got copies of the plaintiff's register, or extracts, or memoranda, and so on, that he has no business to use them. Those are things that the court can forbid to be used. The plaintiff says that the defendant has in his possession or has had (I do not know whether he has it now or not) either copies of extracts from, or memoranda relating to, persons mentioned in this register of agents and index of agents. The plaintiff says that whilst the defendant was in his employ he got extracts from that register, or copies of it, which he has no right to use. The defendant denies that. It is for the plaintiff to make out his case, and that gives rise to some difficulty. It does not follow that, because the defendant is an untruthful witness as he obviously is, that the plaintiff's case is made out. It would be a very curious method of reasoning to infer that the plaintiff's case was true because the defendant had told lies. But Mr. Renshaw does bring before us certain specific instances which I think force one to the inference that the defendant either has or has had a good deal more in the shape of extracts or memoranda made out of these books than the defendant admits. That he has a copy of the register I should doubt very much; but that he has more than is allowed, is, I think, established. Whether he has it now or not I do not know; he may have destroyed it; but he had it at one time. [His Lordship discussed the evidence and continued:] I think that enough is established to warrant our granting an injunction against the defendant upon the principle that the court is satisfied that he had these notes and was making an improper use of them, and that he would do it again now if he were not stopped. I think, therefore, an injunction ought to go, although not quite in the form in which the plaintiff asks for it. What I think the plaintiff is entitled to is an injunction to restrain the defendant, his servants and agents, from making use of any copies or extracts from the plaintiff's register of agents, or index, or any memorandum made or obtained by the defendant when in the plaintiff's employ relating to any person named in those books or either of them. That, I think, is as far as we can go. If the defendant happens to remember that there is an agent whose address he can find out from the ordinary directories, he is at liberty to do it. But he has no right to do that which he has done, and which he certainly would do again if he had the chance. As regards the plaintiff's forms, inasmuch as the defendant has certainly violated the plaintiff's rights in that respect, I think that the plaintiff is entitled to an injunction as to them. I think that the plaintiff is entitled to an injunction to restrain the defendant from further printing and publishing, sending, delivering, or otherwise disposing of, sheets of letter-press paper, marked so and so, or any copy or copies thereof, and so on. It follows that the injunction will be added to the order made by Kekewich, J., and the defendant, of course, will have to pay the costs of the appeal.

LOPES, L.J.—I am entirely of the same opinion. In the circumstances of this case the defendant no doubt was entitled to set up as a rival to the plaintiff, his employer. There being no covenant entered into between the plaintiff and the defendant that the defendant would not, when the period of his contract terminated, carry on his business as a rival in trade, he was entitled to set up as a rival to the plaintiff. But, although he was entitled to set up as a rival to the plaintiff, he was not entitled to use any materials or any information which had been acquired by him when he was in the confidential employ of the plaintiff. He is not entitled to utilise any memoranda which he had obtained from the books of the plaintiff when he was in his employ. For instance, if he made a copy of the list of the plaintiff's agents, as is complained of in this case, he would not be entitled to use it. Now, clearly he had some memoranda, and I think it cannot be doubted that he used those memoranda. I think it is equally clear that, if this action had not been brought, he would have continued to use them. What he says is this: "True it is that I had these memoranda; but I have destroyed them—or I am ready and prepared to destroy them, and I will have no more." The question is, whether we can believe him when he so says. He is a person, as is clearly established by the evidence, who is not trustworthy, and the learned judge in the court below so thought. [His Lordship discussed the evidence and continued:] But then it is said that, although the defendant may have perjured himself in that matter, he still may be telling the truth with regard to other matters. That, no doubt, is correct; but it is not only here that the defendant is to be believed; because, according to my view, the plaintiff makes out what I may call a *primâ facie* case. He establishes circumstances with regard to certain specific matters which in my judgment raise the presumption that the defendant must have more materials in his possession than those which he says he has. If that is so, then, when we get that presumption raised on the part of the plaintiff, and also come to the conclusion that the defendant cannot with any degree of safety be believed, it seems to me that a case is made out by the plaintiff entitling him to relief, and entitling him, in my opinion, to an injunction. As to what form

that injunction should take, that is a matter about which it is necessary to take some care. The form of the injunction which the court is disposed to grant in this case has been stated by my brother Lindley, and, although it will not unduly press the defendant, having regard to the gross violation of confidence of which he has been guilty, still it will afford all the protection that is necessary for the plaintiff. I agree, therefore, that the injunction should be in the form which my brother has stated.

RIGBY, L.J.—I am of the same opinion. Of course, it is necessary for the plaintiff to make out his case on which the court will act. I think it is plain that the defendant had some memoranda, and the probability is that he had some memoranda showing the names of the agents. [His Lordship considered the facts of the case and continued:] I do not think the case can be more favourably considered for the defendant than by treating it as if he had allowed the matter to go to the court without any evidence at all to the contrary, for I think his evidence is entirely unsatisfactory, and for the purpose of deciding this case I shall strike it out altogether. Then it becomes an action not met by any credible evidence at all, and in such a case I think the plaintiff has gone far enough (I do not say that he has done more than to raise a presumption) to entitle us to grant an injunction in general words, it being proved that the defendant had made memoranda, and made use of those memoranda. I think that the injunction granted by my brother Lindley will not be unduly oppressive, and I have no doubt that the defendant's business will not be much interfered with. But, if it is unduly oppressive, then I think that, having regard to the evidence put before us, it is the defendant's own fault for allowing the litigation to come into court.

Order varied.

Solicitors for the appellant, *Haynes* and *Claremont.*

Solicitors for the respondent, *Emanuel, Round,* and *Nathan.*

Saturday, July 13.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

Re MILLS' TRUSTS. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Bankruptcy—"Order and disposition"—"True owner"—Consent.

To give consent as "true owner," within the order and disposition clause of the Bankruptcy Act, the owner must be sui juris.

JOHN MILLS, by his will dated the 16th Jan. 1836, after directing payment of his debts and funeral and testamentary expenses, gave the residue of his personal estate to John Isaac Hensley and Charles Hensley upon trust (*inter alia*) after the death of the survivor of his three sisters, Nancy Mills, Lydia Sarah Hensley, and Sarah Wills (the mother of John Mills Wills), to divide the same equally between all the children of his said three sisters.

The testator died on the 8th Sept. 1837, and letters of administration with the will annexed were on the 31st Oct. 1837 granted to John Isaac Hensley and Charles Hensley.

John Isaac Hensley died on the 28th July 1855 and Sarah Wills, the last survivor of the three sisters, died on the 7th Nov. 1866. Her son, the testator's nephew, John Mills Wills, then became, under the trusts of the will, entitled in possession to one-eighth of the residuary estate of the testator.

Some years previously, viz., in 1861, John Mills Wills, partly in consideration of his wife having handed him a sum of 600*l.*, which she had received under the trusts of her father's will, executed a post-nuptial settlement whereby he assigned his reversionary interest under the will of his uncle John Mills, as also a contingent interest to which he was entitled under the will of his grandfather, to Thomas Leeman Henley and John Bickford upon the trusts therein declared in favour of his wife and children.

This deed of settlement was not executed by the trustees, who appeared to have had no knowledge of its existence until after the bankruptcy of John Mills Wills, and they then declined the trusts. Both the trustees had since died.

John Mills Wills was adjudicated bankrupt on the 3rd July 1865, and Henry Martyn Wills was appointed creditors' assignee, and Edward Watkin Edwards official assignee under his bankruptcy.

In May 1868 Charles Hensley, the surviving trustee of the will of John Wills, after giving Henry Martyn Wills and Edward Watkin Edwards notice of his intention so to do, paid the share of the bankrupt John Mills Wills of the residuary estate of John Mills into court under the Trustee Relief Act, and no steps were taken to get it paid out until a petition was presented to Kekewich, J. by Peter Paget, who had been appointed by an order of the Bankruptcy Court, dated the 6th Dec. 1894, sole assignee of the estate and effects in bankruptcy of John Mills Wills.

On the first hearing of the petition, on the 16th Dec. 1894, Kekewich, J. required the beneficiaries under the settlement of Feb. 1861 to be represented, and ordered it to stand over, and it ultimately was heard on the 30th April 1895.

The petitioner relied mainly on a decision of Wood, V.C. in *Hensley* v. *Wills* (16 L. T. Rep. 582) to the effect that the contingent interest of John Mills Wills under the trusts of his grandfather's will comprised in the settlement of Feb. 1861 belonged to the assignees under his bankruptcy and not to the beneficiaries under the settlement, and claimed that the interest of John Mills Wills under the trusts of the will of John Mills also belonged to the assignees under his bankruptcy, that interest having at the date of the bankruptcy been in the "possession, order, or disposition of the bankrupt" "by the consent and permission of the true owner thereof" within the meaning of the Bankruptcy Act 1849, s. 125, and that the fund in court should therefore be paid out to him for distribution amongst the creditors.

At the date of the bankruptcy of John Mills Wills his two children were infants. One of them a married woman, and her husband, were made respondents to the petition.

The following judgment was delivered by

KEKEWICH, J.—This case is not an easy one. The petition dealing with the fund belonging to the assignee in bankruptcy was, in the first instance, presented on the footing that the Vice-

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Chancellor's decision in *Hensley* v. *Wills* (16 L. T. Rep. 582) settled the whole question, and that really the settlement under which the respondents claim was void and declared to be void by the Vice-Chancellor. Without saying that *Hensley* v. *Wills* (*ubi sup.*) is not in point, and is not deserving of attention in this case, it does not, I think, purport to decide the point with which we are now dealing. It referred to the same settlement, but to a different fund. Why, if the decision in *Hensley* v. *Wills* (*ubi sup.*) applies directly to this fund, and applies to the same settlement, was not it dealt with at that time? If the argument and decision in *Hensley* v. *Wills* (*ubi sup.*) applied to this fund also, why was this fund left intact for so long after? There is no answer. And it would not be a true answer, if it were attempted to be put forward, to say that the learned judge did not know of this fund because it was in the same settlement and the same parties claimed. The report of *Hensley* v. *Wills* (*ubi sup.*), of course, can be relied on, but I confess that I do not think that it is a very safe guide. I should not feel myself at liberty to say that I would not follow it if I thought it was directly in point, but I do not think that it is. And without going so far as to say that I ignore it, I do not find sufficient guidance in it to enable me to come to a conclusion based upon it. It was assumed there that this settlement was voluntary. That was part of the common ground. It is now said that it does not matter whether the settlement was voluntary or not. I am not sure that it does, but still I have got to deal with it, and my opinion on the evidence before me is, that it was not a voluntary settlement. The bankrupt's wife and her sister have not been cross-examined, and although their evidence was wanting in precision as to the dates and other details, still I think it is to be relied on to this extent, that she gave up money which was hers to her husband on the bargain that he should make a settlement of this other property. Not a particular settlement, not a settlement in any particular form, but a settlement on her and her children. [His Lordship discussed the evidence, and continued:] I decide, therefore, that it is not a voluntary settlement or disposition. Now comes the question, who was the "true owner." That I do not think it necessary to decide. I am not sure who was the true owner, and I am not disposed to investigate a question which in my point of view is not really essential to the decision of this case, there being a great deal of law to be considered with which we are not now concerned. But I cannot come to the conclusion that the assignor was the true owner. You cannot say that for the purpose of order and disposition or true ownership the assignor is the true owner. There never were any trustees, in the proper sense of the word, of the settlement, so that there are no true owners there. Were the wife and children the true owners? I leave that undetermined. I think that Wood, V.C., in *Hensley* v. *Wills* (*ubi sup.*), considered that notice by them would have been sufficient; that is to say, notice by persons claiming under the voluntary settlement even would have been sufficient. But he does not go so far as to say that they are the persons—the true owners—whose consent must be given, or whose consent is sufficient to give, the property to the assignee in bankruptcy. I do not see any reason why I should decide a question which he has left at large. I think the case turns upon this: What notice was given of this deed? It is a perfectly good deed. No notice was given to the trustees of the will from which the property came. I think that it is perfectly clear that no notice was given to them at the time, and I do not think it reasonably clear that any notice was given to them directly before the bankruptcy. [His Lordship considered the facts of the case, and continued:] The assignee in bankruptcy does not seem to have known anything about the settlement at all, and made no claim whatever. But there is a claim by persons coming before the settlement. Those parties are before the court, and those parties come forward and claim the fund. I am told that the present case depends on *Stuart* v. *Cockerell* (L. Rep. 8 Eq. 607), which is a strong authority. It is followed in *Re Russell's Policy Trusts* (27 L. T. Rep. 706; L. Rep. 15 Eq. 26), which has no value as confirming *Stuart* v. *Cockerell* (*ubi sup.*), because it is not a case of the same kind. There was a policy in an insurance office, and one question argued was whether notice by conversation was good, a notice in writing not having been required. The question was whether such a notice was enough to take the case out of the order and disposition of the bankrupt who effected a policy on his own life, and the court held that the conversation was sufficient. The point in that case was, that this notice to the office was before, as I understand, he became bankrupt, but at any rate before any claim by the trustee in bankruptcy was made. The trustee in bankruptcy could not have claimed on account of there being no bankruptcy, but what was decided was this, that directly the office was told that there was someone else to claim, then the order and disposition was gone. In the present case I think that the proper inference from all the facts is, that the trustees of the will knew of the settlement before they knew that the assignee in bankruptcy claimed. That being so, it seems to me that the trustees should hold the fund—that is to say, they would hold it if they still had it in trust—for the persons claiming under the settlement, and not for the assignee in bankruptcy. It seems to me, therefore, that the petition must be dismissed with costs.

From that decision the official assignee now appealed.

Muir Mackenzie (with him *W. Higgins*) for the appellant. — The question here turns on the reputed ownership clause in the Bankruptcy Law Consolidation Act 1849, sect. 125, which is the same, substantially, as sect. 44 (iii.) of the Bankruptcy Act 1883. The case is reported on a point arising before Wood, V.C., whose decision practically covers the present case:

Hensley v. *Wills*, 16 L. T. Rep. 582.

The learned Vice-Chancellor followed

Re Rawbone's Trusts, 3 K. & J. 300, 476.

He referred also to

Joy v. *Campbell*, 1 Sch. & Lef. 328.

Herbert Reed, Q.C., *Dibdin*, and *Errington*, for the respondents, were not called upon to argue.

T. T. Method for the official solicitor.

LINDLEY, L.J., after stating the facts of the case, and reading sect. 125 of the Bankrupt Law

Consolidation 1849, continued:—It is not disputed that the interest under the trusts of the will of John Mills comes within the terms "goods and chattels" as used in that section. What we have to decide is, whether the fund was in the bankrupt's "possession, order, or disposition" "by the consent and permission of the true owner thereof." If the persons appointed by the settlor as trustees of the settlement of Feb. 1861 were the "true owners" within the meaning of the section, they clearly never consented to the fund remaining in the possession, order, or disposition of the bankrupt settlor, since they had no knowledge of their having been so appointed trustees until after the settlor became bankrupt. If, as I think, the correct view is that the trustees were not the "true owners," but that the beneficiaries were, then, inasmuch as one was a married woman, and some of them were infants, they were incapable of consenting, and it is impossible for the assignee in bankruptcy to successfully contend that the fund remained in the bankrupt's possession with the consent of the beneficiaries. It appears to me, therefore, that on those grounds, without going into the one upon which Kekewich, J. based his decision, this appeal must be dismissed with costs.

Lopes and Rigby, L.JJ. delivered judgment to the same effect.

Appeal dismissed.

Solicitor for the appellant, *Richard Ballard.*

Solicitors for the respondents, *Pitman* and *Sons*, agents for *Jones*, *Macintosh*, and *Dixon*, Cardiff; *The Official Solicitor.*

Monday, July 29.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Re Farnham (a Lunatic). (*a*)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunatic—Bankruptcy—Adjudication after debtor found a lunatic—Property of bankrupt taken by trustee subject to powers of court in lunacy—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 42), *s.* 47, *sub-sect.* 1—*Lunacy Act* 1890 (53 *Vict. c.* 5), *ss.* 117, 129.

Where a person found lunatic by inquisition has been subsequently adjudicated a bankrupt, and a trustee in bankruptcy has been appointed, the trustee in bankruptcy can only take the bankrupt's property subject to the powers of the court in lunacy under the Lunacy Act 1890. *And the court, in the exercise of its discretion, having regard to the value of the lunatic's estate, will protect him by retaining such property notwithstanding the bankruptcy.*

Whether a lunatic can be validly adjudicated a bankrupt, quære.

A summons was taken out by the trustee in the bankruptcy of W. Farnham, a lunatic, asking that certain chattels—*i.e.*, chests of silver plate—which had been deposited in court in the lunacy, might be delivered out to the applicant as being property of the bankrupt.

The application was opposed by the lunatic's wife, who had been appointed committee of his person and estate.

Farnham had been found a lunatic by inquisition on the 6th Aug. 1893, and the committee was appointed at the same time.

In Nov. 1893 some judgments were recovered against the lunatic, and executions were issued, under which the sheriff seized some of his goods, and retained possession of them for twenty-one days. This retainer being, under sect. 1 of the Bankruptcy Act 1890, made an act of bankruptcy, a bankruptcy petition, founded on that act of bankruptcy, was presented by a creditor, and a receiving order was made against the lunatic on the 17th March 1894. A trustee was appointed, and, on the 19th May 1894, the adjudication of bankruptcy was made.

On the 19th March 1895 an order was made in lunacy that the chattels in question, which had been deposited in a bank in the name of the lunatic's wife, should be deposited in court in the lunacy.

The wife had claimed the chattels as her own property, under an alleged verbal gift thereof made to her by her husband in Dec. 1892, before the lunacy. But, on its being pointed out that this gift would be void as against the trustee in the bankruptcy, under sect. 47, sub-sect. 1, of the Bankruptcy Act 1883, she withdrew this claim, and asserted a claim to the chattels only in the character of committee in the lunacy.

On the 28th March 1895 the Bankruptcy Court made an order declaring that the chattels were the property of the trustee in the bankruptcy, subject to the directions of the judge in lunacy.

The summons was then taken out by the trustee with the view of obtaining delivery of the chattels to him, which now came on for hearing.

Swinfen Eady, Q.C. (with him *R. J. Parker*) for the applicant.—Two questions arise in this case: First, Can a lunatic be validly adjudicated bankrupt at all? Here the lunatic has been adjudicated bankrupt in respect of an act of bankruptcy, there having been a seizure by the sheriff of goods of the lunatic, which goods were held for twenty-one days, and a receiving order was subsequently made against the lunatic. [Lopes, L.J.—In *Re James* (50 L. T. Rep. 471; 12 Q. B. Div. 332), where it appeared to be for the benefit of a lunatic, the court under sect. 148 of the Bankruptcy Act 1883 gave leave to the committee in the name of the lunatic to file a declaration of insolvency, or to present a bankruptcy petition, under sect. 4 (*f.*) of that Act.] I submit that a lunatic adversely to himself can be adjudicated bankrupt:

Ex parte Cahen, 39 L. T. Rep. 645; 10 Ch. Div. 183;

Re Lee, 48 L. T. Rep. 193; 23 Ch. Div. 216.

It is clear that a lunatic can be sued, and therefore he can be made bankrupt:

Anon., 13 Ves. 590.

[Lindley, L.J.—A lunatic cannot at all events commit an act of bankruptcy involving an intent unless during a lucid interval: *Ex parte Stamp; Re Spence* (De G. 345.)] As to the regularity of the bankruptcy, I say that it is right, and cannot be set aside, and that the title of the trustee in bankruptcy is made out. Then, as the adjudication was made after the lunatic had been so found by inquisition, the second question is, whether the trustee in bankruptcy did not take the property of the bankrupt subject to the discretionary jurisdiction of the

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

court in lunacy under sects. 117 and 129 of the Lunacy Act 1890. As to that question, I submit that this is not a case like *Horne* v. *Pountain* (61 L. T. Rep. 510; 23 Q. B. Div. 264) or *Re Leavesley* (64 L. T. Rep. 269; (1891) 2 Ch. 1). The sole point here is, whether the court shall apply for the benefit of the lunatic someone else's property, for the plate in question was not the bankrupt's property at all. He had made a settlement of it. That settlement having been set aside, the subject-matter of it vests in the trustee in bankruptcy. The contest is therefore between the trustee in bankruptcy and the lunatic's wife; the bankrupt lunatic is not concerned at all. The effect of the bankruptcy was to set aside the settlement and divest the property from the beneficiary, the wife, and vest it in the trustee in bankruptcy, and not from the bankrupt in the trustee in bankruptcy:

Re Hinds, 37 L. T. Rep. 768; 7 Ch. Div. 26.

[RIGBY, L.J.—In that case the property was paid in lunacy by mistake.] As to the jurisdiction of the court sitting in lunacy to impound the property, I say that none of the old cases apply. This is a case which comes for the first time before the court.

Warmington, Q.C. and *S. O. Buckmaster* for the respondents.—The title of the trustee in bankruptcy must be subject to the provisions of sect. 129 of the Lunacy Act 1890. Then sect. 117 of that statute empowers the court to raise money by disposing of property of a lunatic to be applied to the purposes specified in that section. Where a settlement has been set aside as void as against the trustee in bankruptcy of the settlor, under sect. 47 of the Bankruptcy Act 1883, the trustee is not entitled to stand in the place of the beneficiaries under the avoided settlement:

Sanguinetti v. *Stuckey's Banking Company Limited*, 71 L. T. Rep. 872; (1895) 1 Ch. 176.

Creditors can only be allowed to take property belonging to a lunatic subject to proper provisions being made for his maintenance:

Re Winkle, 70 L. T. Rep. 710; (1894) 2 Ch. 519.

As regards the first point, it is stated in Williams on Bankruptcy (3rd edit. p. 5) that it is an open question whether a lunatic can be validly made a bankrupt. [LOPES, L.J.—Robson takes a different view (7th edit. p. 119). The authorities he gives for his opinion are *Anon.* (13 Ves. 590); and also *Ex parte Layton* (6 Ves. 433).] That is a case which is in our favour.

R. J. Parker in reply.—In cases relating to creditors, like *Re Plenderleith* (69 L. T. Rep. 325; (1893) 3 Ch. 332), where the court had control over a fund and a single creditor applied, the court would not deal with that fund without making provision for the lunatic. A charging order puts creditors on no better footing. But a trustee in bankruptcy is not in an analogous position to a creditor. By the Lunacy Act 1890 the court is empowered to deal with the property of a lunatic. I say that this is not property of the lunatic. It belongs to a bankrupt lunatic's trustee, and is no longer applicable for administration by the court in lunacy. What brings into operation the principle of *Re Plenderleith* (*ubi sup.*) is the fact that the court has control over particular property belonging to a lunatic, and in this case it had no control over the property until after the title of the trustee in bankruptcy accrued. The property was not then within the jurisdiction in lunacy at all. This case is therefore absolutely distinguishable from the cases of which *Re Plenderleith* is a type.

LINDLEY, L.J.—This is an application by the trustee in bankruptcy of a lunatic, Mr. Farnham, that certain articles of silver plate now deposited in court in this matter may be delivered out to him. The summons raises a question of some little difficulty. Before I allude to the legal aspect of the case I will state shortly those facts which give rise to the controversy. In Aug. 1893 Mr. Farnham was found lunatic by inquisition, and a committee has been appointed. In May 1894 he was adjudicated bankrupt, the act of bankruptcy being that the sheriff had seized and been in possession for twenty-one days, which is sufficient to constitute an act of bankruptcy under sect. 1 of the Bankruptcy Act 1890. It is not necessary for me to read that section. The next fact which is of importance is this, that in March 1895 the master in lunacy directed the plate which is in question to be brought into court, and on the 28th March, which was afterwards, an order was made in bankruptcy for delivery of that plate to the trustee, subject to the directions of the judge in lunacy. This summons has been taken out in order to obtain the sanction of the judge in lunacy for the delivery up of this plate. The committee of the lunatic is his wife, and at one period she set up a claim to this plate under an alleged gift by her husband to her, which she said was made in Dec. 1892 or Jan. 1893. She supported that claim by an affidavit comprising a memorandum, which, coupled with the alteration of the address on the chests wherein the plate was contained, looks like a gift from the husband to her. But it was pointed out, and she was advised, that, if it was a gift to her, being within two years of his bankruptcy, it was liable to be set aside under sect. 47 of the Bankruptcy Act 1883, and, consequently, she abandoned all claim to that. The point is an important one, and I shall have to allude to it again presently. It was because she abandoned all claim to it as a gift to her that she was advised that she ought, nevertheless, to assert, I do not say her right as committee to it, but to bring before the notice of the Bankruptcy Court the fact that the plate was under the control of the judge in lunacy, and could not be parted with without his order. Now the legal questions which arise are these: First of all, there is the broad question, and it is an important one, whether a person who has been found lunatic by inquisition can be adjudicated a bankrupt at all. That question is by no means so free from difficulty as at first sight appears. There is no doubt whatever that the 1st section of the Bankruptcy Act 1890 applies in terms to all debtors, and, as Mr. Buckmaster has pointed out, all debtors include not only lunatics but infants. But there may be a difficulty in holding that an infant could be adjudicated a bankrupt under that section, and a difficulty in holding that a lunatic could be so adjudicated. It appears that this doubt about the validity of adjudications in bankruptcy against lunatics is a very old one, and has not yet been altogether removed. I do not propose on the present occasion to solve that doubt. If it were necessary to do so, I should like to look a little

more closely than I have done into the course that legislation has taken about lunatics, and into the authorities. But I shall assume, for the purpose of the present decision, that Mr. Farnham has been validly adjudicated a bankrupt, and that his trustee has been validly appointed. Now, assuming that, Mr. Swinfen Eady says that everything follows in his favour, and that the court ought to direct this plate to be handed over to the trustee in bankruptcy. But it has been pointed out, and I think very properly, that inasmuch as this lunatic was adjudicated a bankrupt some time after he was found a lunatic by inquisition, the trustee in bankruptcy must take the property subject to the powers of the judge in lunacy conferred by the Lunacy Act 1890. Sects. 117 and 120 of the Lunacy Act 1890 vest in, or confer upon, the judge in lunacy various powers, among others power to apply the estate of a lunatic in discharge of his debts. Although I believe it is perfectly well settled that a lunatic can be adjudicated a bankrupt under the direction of the committee acting under the order of the judge in lunacy, yet there is a question whether he can be validly adjudicated apart from that direction. Now, supposing that the trustee takes subject to the statutory powers, the main point in Mr. Eady's argument is answered. And I think that Mr. Warmington was quite right in saying that, whatever may be true of the actual vesting of the property in the trustee, it does not follow that the trustee may take the property which is so vested in him except subject always to the jurisdiction which has accrued before the bankruptcy to the judge in lunacy under the inquisition. I think that that is a good answer to his argument so far as that goes. Then Mr. Eady said: "Well, but this property is not the bankrupt's property at all; you, the judge in lunacy, have nothing to do with it; it was the property of his wife." He added: "If you look at sect. 47 of the Bankruptcy Act 1883, it enacts that any settlement of property is void if it is made within two years of the bankruptcy." It was admitted on all hands, looking to the last words of that section, that any gift of property is void as against a trustee in bankruptcy. Then he said: "It was not void as between the husband and wife; and, therefore, although the trustee in bankruptcy is entitled to this property under sect. 47, he is entitled to say that it is not the husband's property but the wife's; and if it is the wife's, it never ought to have been handed over to the judge in lunacy, and it vests in the trustee in bankruptcy by a title which does not concern the judge in lunacy." That is ingenious; but when you come to look at the section, and consider the meaning of it, I think that that argument is unsound. In fact, it has been dealt with judicially, and condemned judicially, by Chitty, J. in the case of *Sanguinetti* v. *Stuckey's Banking Company* (71 L. T. Rep. 872; (1895) 1 Ch. 176). If the settlement is void as against the trustee in bankruptcy, it is void. That does not mean that the property, the subject of the settlement, vests in the trustee by a title which overrides both that of the donor and the donee. The settlement being void, the property reverts to the donor; and it is as the donor's property that it vests in the trustee in bankruptcy, and must be distributed. That was the view taken by Chitty, J. of this section in *Sanguinetti's* case (*ubi sup.*), and I think that that is right. Therefore the trustee can only take the plate in this case if it is the property of the donor, that is to say, the lunatic. Then, if it is the property of the lunatic, it is subject to the order, disposition, and jurisdiction of the judge in lunacy which had accrued before the adjudication. If that is so, we look and consider what is the proper mode of exercising the discretion which the court has as regards allowing the property of the lunatic to go to his creditors. First, will the court always do it? It is the province of the court to look after the lunatic and his interests. Now, we are told that in the present case, the state of affairs is such that it will be contrary to the benefit and interests of the lunatic if we allow this property to be distributed among his creditors. We are bound to protect him, and having seen our way to give a sufficient answer, and a proper answer, to all the arguments of the trustee, the conclusion we have arrived at is, that this summons ought to be dismissed, and dismissed with costs.

LOPES, L.J.—I am of the same opinion. One question arises which no doubt is a very important one; that is, whether the lunatic can be adjudicated a bankrupt. At the present moment that is rather in the nature of an open question. There is certainly no direct decision in regard to that. It is a very important matter, and a matter with regard to which I should like to give a great deal more consideration than I have given to it at present before expressing any opinion with regard to it. I propose, therefore, to leave that an open question as it has been left hitherto. But I will, for the purposes of this case, assume that a lunatic can be adjudicated a bankrupt. Then arises this point with regard to how far this plate has vested in the trustee in bankruptcy for the benefit of the creditors, or whether it is not subject to the disposition of the judge in lunacy. Now, the first and most important question of all to consider is with regard to certain dates. Mr. Farnham was found a lunatic on the 5th Aug. 1893. In Nov. 1893 judgment and execution were obtained against him. On the 19th May 1894 he was adjudicated a bankrupt. But it must be recollected that this adjudication in bankruptcy was after the time when Mr. Farnham was found to be a lunatic. Then the consideration arises whether or not the jurisdiction of the court in lunacy does not take effect. There is no doubt of this, I apprehend, that, subject to what I am about to say, the property of the bankrupt would have vested in the trustee in bankruptcy. But the trustee, in my judgment, took his title subject to the power contained in sect. 117 of the Lunacy Act 1890. The title of the trustee was acquired subsequently to the lunacy; and being acquired subsequently to the lunacy, in my judgment it cannot be enforced in bankruptcy under sect. 1 of the Act 1890. That being so, in my judgment, this plate is subject to be dealt with by this court according to its discretion. In favour of the trustee in bankruptcy another point was taken under sect. 47 of the Bankruptcy Act 1883. It was said that this property was the property of the wife, and that the gift, as it had been made within two years of the adjudication in bankruptcy, was void as against the trustee. But, if the gift was void, the property became re-vested in the donor, the donor being a lunatic; and this point is completely answered by *Sanguinetti* v. *Stuckey's Banking Company* (*ubi sup.*). What is said is this: The trustee in bankruptcy is

attempting to set up a settlement which he himself has set aside, which he cannot do; and that, therefore, this property never vested in the trustee in the same way as the other property did; and is, under sect. 117 of the Lunacy Act 1890, subject to be disposed of by the judge in lunacy. With that I agree. If that is so, how is it to be dealt with? There is abundance of authority—in point of fact it is I may say essential—that the matter that should first be considered in dealing with the property of the lunatic is, what is for his advantage? It appears here that there are very small funds indeed that can be applied to his maintenance; and that, without the fund in court, in all probability he will become a pauper. Under those circumstances I am of opinion that it is the duty of this court to have this fund so disposed of that it shall be applied towards the maintenance of the lunatic. I think that the argument of Mr. Warmington was right, and therefore that this application should be dismissed with costs.

RIGBY, L.J.—I am of the same opinion. I am not myself satisfied that there can be an adjudication in bankruptcy against a lunatic otherwise than through the judge in lunacy directing the committee, in the name of the lunatic, to commit an act of bankruptcy. There are reasons which show that it is difficult to see how an adjudication in bankruptcy can operate however it is brought about. How can a lunatic commit an act of bankruptcy? That is one question that has to be answered. Again, how can the jurisdiction of the Court of Bankruptcy be set up without the consent of the judge in lunacy; of course, as against the jurisdiction and the administration of the judge in lunacy? By the prerogative of the Crown, which has been exercised for centuries, through the Commissioners in Lunacy, the care of the lunatic, and the disposition of his estate, is vested in the Commissioners in Lunacy. During the centuries in which that jurisdiction has been exercised certain rules have been laid down. Among them is a rule which appears in the first instance harsh, that, notwithstanding the just claims of creditors, the lunatic must be taken care of first. In other words, the rule is to the effect that the lunatic must have proper maintenance provided for him before the creditors can take a single penny. That, I repeat, is the law as it has been administered by the Commissioners in Lunacy for a very long time indeed. I do not determine that question. It is a very important one. It has been in doubt, and it will remain in doubt until it is expressly raised in a case which requires decision. It appears to me that without in the least purporting to decide that there can be an adjudication in bankruptcy against a lunatic, and that there has been such an adjudication in this case—assuming that he committed an act of bankruptcy by allowing goods of his to remain in the hands of the sheriff, and that everything has gone in due order—yet that adjudication cannot in any way oust the jurisdiction of the judge in lunacy, or interfere with any principle which has been established as regards that jurisdiction. So that, if there be a reasonable case for doubting that the lunatic could be properly provided for except by applying some portion of this property for his maintenance, that would be a complete answer to this application, subject only to the argument brought forward by Mr. Swinfen Eady. I refer to the argument that the plate in question was not the property of the lunatic at all, but that it was the property of his wife, to whom he had given it before the lunacy, and before the bankruptcy, but within two years of the adjudication in bankruptcy. That gift, Mr. Swinfen Eady urged, was perfectly good between husband and wife; but, although the gift was a gift which he assumed to remain good, the property of the wife was subject to the bankrupt's debts, and vested in the trustee in bankruptcy. That depends on the proper construction of sect. 47 of the Bankruptcy Act of 1883. Such a settlement as this is assumed to be, and admitted now by the wife to have been, subject to the provisions of the section, which provide that such a settlement shall be void—void as against the trustee in bankruptcy. He can take nothing under a void settlement. What then is the alternative? It is quite plain that the Act intended that the property should come to the trustee, but not as the property of the beneficiaries under the settlement, but as though the settlement never had existed; that is to say, it passes as the property of the bankrupt, the lunatic. That being so, I think it is perfectly plain that the jurisdiction of the judges in lunacy over all this property exists, and cannot be ousted by an adjudication in bankruptcy, even if it be properly made. Therefore the ground of the application fails, and the application should be dismissed with costs.

Application dismissed.

Solicitors for the applicant, *Field, Roscoe,* and *Co.*, agents for *Deane* and *Hands*, Loughborough.

Solicitors for the respondent, *Prior, Church,* and *Adams.*

Tuesday, July 30.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

THE EARL OF SHREWSBURY v. THE WIRRAL RAILWAYS COMMITTEE. (a)

APPEAL FROM THE CHANCERY DIVISION.

Arbitration—Award—Compensation for compulsory purchase—Costs of reference—Umpire's fees—Taxation of costs—Lands Clauses Consolidation Act 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 34, 35—*Lands Clauses Consolidation Act* 1869 (32 *&* 33 *Vict. c.* 18), *s.* 1.

An umpire having made an award in an arbitration under the Lands Clauses Consolidation Act 1845, *the landowner, whose lands were being acquired by a railway company, took up the award and paid the umpire's fees. These fees were included in the bill of costs of the reference which came before a taxing master. The taxing master wholly disallowed them, as not being costs properly incurred by the landowner under sect.* 34 *of the Act. The railway company paid the bill so taxed, but declined to repay to the landowner the amount of the umpire's fees.*

Held, that the method which, if pursued, would have enabled the landowner to compel the railway company to take up the award, under sect. 35 *of the Lands Clauses Consolidation Act* 1845, *not having been followed by the landowner, there was no obligation on the part of the railway company to reimburse him the amount of the*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

umpire's fees, which was a mere voluntary payment not recoverable by action.

Held also, that the bill having been taxed and the costs disallowed, the master's decision in the taxation could not be reviewed.

Decision of Romer, J. (72 *L. T. Rep.* 895) *affirmed.*

This action was brought by the Earl of Shrewsbury to recover the amount paid by him on taking up the award of an umpire, made under an arbitration pursuant to the Lands Clauses Consolidation Act 1845.

The defendants, who had power to construct certain railways in the county of Chester under a special Act of Parliament, gave notice to the plaintiff, on the 4th July 1892, that they required to purchase a portion of his lands, and were willing to treat with him as to compensation. No agreement was, however, come to between the parties.

On the 21st Sept. 1893 the plaintiff gave notice to the defendants of his wish to have the amount settled by arbitration in manner prescribed by the Lands Clauses Consolidation Acts and claimed compensation amounting to 21,700*l.* The highest amount offered by the defendants for purchase money and compensation was 9500*l.*

Arbitrators were appointed on each side, and the arbitrators appointed an umpire. On the arbitrators disagreeing, the umpire made his award on the 11th July 1894, giving the plaintiff 11,865*l.* as purchase money and compensation.

On the 14th July 1894 the plaintiff took up the award, paying to the umpire the sum of 410*l.* 4*s.* 6*d.* in respect of his fees.

The costs incidental to the arbitration and award were taxed by one of the taxing masters under sect. 1 of the Lands Clauses Consolidation Act 1869. The sum of 410*l.* 4*s.* 6*d.* was included in this bill for the plaintiff's costs as brought in for taxation, and was disallowed by the master. The rest of the taxed costs of the arbitration amounted to 739*l.* 14*s.* 6*d.*, and were paid by the defendants. The sum of 11,865*l.* was also paid into court by them in respect of the purchase.

The defendants refused to repay to the plaintiff, on his demand, the umpire's fees, on the ground that the sum of 410*l.* 4*s.* 6*d.* had been properly disallowed, and that they, having paid to the plaintiff all the taxed costs incidental to the arbitration and award, he was not entitled to be paid anything further in respect thereof.

In June 1895 the action came on for trial before Romer, J., when his Lordship decided (72 L. T. Rep. 895) that, having regard to sect. 35 of the Lands Clauses Consolidation Act 1845, the plaintiff was not entitled, as against the defendants, to take up the award; and that the umpire's fees having been disallowed by the taxing master, whose decision could not be reviewed, they could not now be recovered by the plaintiff in an action against the defendants.

From that decision the plaintiff now appealed.

Witt, Q.C. and *T. L. Wilkinson* for the appellant.—Sect. 35 of the Lands Clauses Consolidation Act 1845 does not deprive the plaintiff of his rights under the 34th section. He was entitled, therefore, to take up the award in the ordinary way on payment of the umpire's fees, and can recover them from the defendant company. Under sect. 34 all the costs of and incidental to the arbitration shall be paid by the promoters of the railway, unless a less sum than that offered by the company has been awarded. The costs of the award are part of the costs of the reference to arbitration:

Re An Arbitration between Walker and Sons and Brown, 9 Q. B. Div. 434; 51 L. J. 424, Q. B.;

Re An Arbitration between the Autothreptic Steam Boiler Company Limited and Townsend, Hook, and Co., 59 L. T. Rep. 632; 21 Q. B. Div. 182.

Sect. 35 is silent as to how the umpire's fees are to be paid. As to what are costs of the arbitration, see

Holliday v. *Mayor, &c., of Wakefield*, 59 L. T. Rep. 248, at p. 251; 20 Q. B. Div. 699, at p. 720;

Re Wraithby, L. Rep. 1 Ex. 54;

Re Owen and The London and North-Western Railway Company, 17 L. T. Rep. 210; L. Rep. 3 Q. B. 54.

Then the question arises whether, assuming that the plaintiff was right in taking up the award and paying the umpire's fees, has the reference to taxation and the taxing master's decision operated to bar him in respect of his present claim? As regards that question, we submit that the taxing master had no jurisdiction to consider whether the umpire's fees were properly inserted in the bill of costs. He had only to consider the amount. He had no power to go into the question of liability at all; that is not his function. As a matter of fact the taxing master never did consider this amount at all; he declined to do so. When he affected to decide the question of liability as between the parties, he went outside his function, which was limited to the question of amount. Taxation is not a condition precedent to the right to sue for the costs of an arbitration. The form of action appears from

Sharpe v. *The Metropolitan District Railway Company*, 40 L. T. Rep 416; 4 Q. B. Div. 645; on app., 5 App. Cas. 425.

The plaintiff has paid a sum of money which the defendants were bound to pay. The taxing master, as we say, consented to the withdrawal of these fees from the bill of costs, and therefore the plaintiff is entitled to make this claim now.

Cozens-Hardy, Q.C. and *Macnaghten* for the respondents.—The very point arising in this case was discussed by Cotton, L.J. in

Sharpe v. *The Metropolitan District Railway Company*, 40 L. T. Rep. 416; 4 Q. B. Div. 645, at p. 656.

The point was also considered in

Re The Sandbach Charity Trustees and the North Staffordshire Railway Company, 37 L. T. Rep. 391; 3 Q. B. Div. 1.

These costs have been taxed, and the view taken by Romer, J. is right. This is an attempt to get a review of the taxation. The taxation having been completed there is no appeal. The plaintiff could only proceed by way of an application for a *mandamus* or *certiorari*. We say that this point disposes of the whole case, although Romer, J. rested his decision on the first point.

Witt, Q.C. replied.

Lindley, L.J.—This is a curious action, and it is one which, looking at it from a merely moral point of view apart from legal principles, one would like to have decided in the plaintiff's favour.

But I do not see my way to do so. The case arises in this way: The defendants took some land belonging to the plaintiff under the Lands Clauses Consolidation Act 1845. There was an arbitration, and a reference to an umpire. The umpire made an award giving the plaintiff, it is true, less than he asked for—that is immaterial—but giving the plaintiff a great deal more, or substantially more, than the defendants had offered him for the land which they wanted. Under those circumstances it became the duty of the defendants, under the statute, to pay the costs of and incidental to the arbitration. That, I take it, included the expenses of the award—the umpire's fees. There is a method (I will read the sections presently) pointed out by the statute which, if pursued, would have enabled the plaintiff to compel the defendants to take up that award, pay all those costs, and give him a copy of it. That was the plaintiff's right before he paid anything. He was under no obligation himself to pay anything; he had a right under the statute to compel the defendants to pay the whole of the costs. But he did not pursue his rights, he did not follow the provisions of the statute at all. He had no right himself to go and take up that award. But notwithstanding that he went to the arbitrator and said, "If you will give me that award I will pay you 400*l*." Now he wants to make the defendants repay that sum of 400*l*. How is he to do it? I confess, looking at it from that point of view, it appears to me that there is no obligation on the part of the defendants to reimburse him that money. It is paid for a convenience to himself, and a convenience which he had no right to obtain, but which he did obtain under the arrangement to which I have alluded. Now, if we look at the sections we shall see exactly how the matter stands. I refer to sects. 34 and 35 of the Lands Clauses Consolidation Act 1845. Sect. 34 says: All the costs of the arbitration—the exact words are, "any such arbitration," but I need not comment upon the term "any such;" it includes this case—and incident thereto—I think that Mr. Witt has given us authority for saying that that phrase covers the umpire's costs and his fees—to be settled by the arbitrators, shall be borne by the promoters of the undertaking. Then there comes a proviso which does not apply. Therefore we have got this, that under sect. 34 of the statute, in the events which have happened, it was the duty of the defendants to pay all the costs of the arbitration and incident thereto. Now sect. 35 says this: "The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times on demand produce the said award," and so on. What is the effect of those two sections? The effect of those two sections is to my mind tolerably simple and tolerably plain. The obligation imposed upon the defendants to pay the costs is not limited or qualified, or taken away, by sect. 35. But the combined effect of those two sections appears to be this, that the costs which the defendants are to pay under sect. 34 are to be regarded as their own costs, which they must pay in order to perform the obligations imposed upon them by sect. 35. That will become important when we deal with the question of taxation. But I am looking now at what I consider to be the broader point—whether there is any obligation on the part of the defendants to pay the plaintiff. Under the circumstances, and for the reasons which I have given, I can find none. But then it is put in this way: These are the plaintiff's costs, and inasmuch as they are his costs, and the defendants are bound to pay them, and as the plaintiff has had to pay them, the defendants are bound to reimburse him those costs. Now, if we look at it in that way, these costs have been laid before the taxing master, who was the proper officer to tax and reduce them, if necessary, and he, in the exercise of his jurisdiction, has struck them out. Whether there is or is not any method of compelling him to review that taxation, I do not know. It is unnecessary for us to consider that point. He certainly is not in the position of an ordinary taxing master. That is settled by the decision to which we have been referred, of *Re The Sandbach Charity Trustees and the North Staffordshire Railway Company* (37 L. T. Rep. 391; 3 Q. B. Div. 1). That there is no method of compelling him to review his taxation similar to that which obtains in an ordinary taxation is also obvious from a discussion in *Sharpe* v. *The Metropolitan District Railway Company* (40 L. T. Rep. 416; 4 Q. B. Div. 645; 5 App. Cas. 425). The point decided in that case was of a different character. The point decided there was, that a person could bring an action under this statute—the Lands Clauses Consolidation Act 1845—for his costs without going to the taxing master at all. But the discussion in that case shows that the taxing master is not to be treated as an ordinary taxing master in an action, but as having a jurisdiction imposed or conferred upon him by the statute, and which, treating him as an inferior court, he can be compelled to perform either by *mandamus* or *certiorari*, when those are the proper remedies. If you look at it as a taxation of costs, then it does appear to me that the taxing master's decision, in this proceeding at all events, is incapable of review, and is against the plaintiff. But I prefer to rest my judgment upon the broader base that, although the plaintiff might have compelled the defendants to pay all this money in the discharge of their duty, which they have not done, he has disentitled himself from saying that they are under any obligation to him to repay him a sum of money which he chose to pay to get a document which he had no right to get. That is the broad ground of my decision. The appeal will, therefore, be dismissed with costs.

Lopes, L.J.—I feel very sorry for the plaintiff in this case, and, speaking for myself, if I could possibly have seen my way to help him, I would have been very glad to avail myself of it; but I fear that I can see none. The real truth of the case, is that the plaintiff went the wrong way to work. He had the whole matter in his own hands if he had been careful to follow the statute. He ought to have gone under sect. 35. By that I mean that he ought to have held his hand, and left it to the railway company to take up this award. If they had not taken it up in a reasonable time, he might have applied for a writ of *mandamus* to compel them to take it up. They would then have taken it up; they would then have paid these fees, and there would have been no difficulty whatever with regard to

this matter. But most unfortunately the plaintiff has not followed the statute. He went to the umpire and he obtained his award, and paid some 400*l.* That was a voluntary payment. According to the statute he ought not to have paid it. The question now is, can he in point of law recover? I think that he cannot. The effect of sects. 34 and 35 appears to me to be this, that they made the costs of the arbitration the costs of the company. But in this case we have the plaintiff paying costs which in point of fact are the costs of the company—voluntarily paying the costs of the company—and then seeking to recover them back. I do not see how he can do that. It seems to me very much the same as the case which was put by my brother Rigby during the argument—I mean, as if the plaintiff had voluntarily paid the costs of some of the valuers during the arbitration, and then had sought to recover them back from the defendants. I think on that ground alone this appeal fails. But it appears to me that there is another ground on which it also fails. It seems to me that, really when this matter came before the master, it was a question of costs, and the attempt which is now being made is an attempt to review his taxation. I know it is an action, but practically it is an attempt to review the taxation of the master. The master, so far as I understand the evidence, heard and considered this question of the attendance on the umpire and the umpire's fees. When he had heard and considered it he decided that he ought not to allow those matters, and he disallowed them. If that is so, this case comes distinctly within the authority of the two cases which have been cited to us—*Re Owen and The London and North-Western Railway Company* (17 L. T. Rep. 210; L. Rep. 3 Q. B. 54) and *Re The Sandbach Charity Trustees and The North Staffordshire Railway Company* (*ubi sup.*). I understand these cases to come to this, that if the master allows costs to one of the parties where the statute does not give them, or disallows them where the statute does give them—then, under sect. 1 of the Lands Clauses Consolidation Act 1869, the court has no power to interfere with a master's taxation on a motion to review, because the master is not acting in the matter *ex officio* as the officer of the court, but as a person named by the Act. It seems to me that the position of the master is very much the same as that of an arbitrator. He has complete power and control over matters with which he has to deal. Even if the arbitrator decides on a matter of law wrongly the award cannot be set aside. Neither do I think that here anything which the master has done, even if he has done it wrongly, can be set aside. On both grounds, therefore, I think that the appeal fails.

RIGBY, L.J.—I am of the same opinion. I cannot help regretting it, because I see that by a mere mistake the plaintiff has paid a sum of money which he cannot recover. It could not be argued that this money was paid at the request of the defendants, and was recoverable on that score; and, consequently, the appellant frankly admitted that that could not be so. Then it was said that it was a statutory debt. Let us examine that. What by the statute is given as a debt from the railway company to him? Clearly nothing more than the amount of his costs in the arbitration, and if he chooses voluntarily to pay part of the costs of the railway company he does not make them part of his costs. Sects. 34 and 35 seem to me quite clearly to make the costs of the award costs in the arbitration of the railway company, throwing no obligation whatsoever upon the landowner to pay any part of those costs. Now the plaintiff, probably misled by the arbitrator sending to him to announce that the award was ready for him to take up, chose to take it up. He did wrongly. He had no right to do so. I do not mean to say that it was a wrong that would do any great harm to anyone. But he had no right to get the award or to obtain possession of the document at all, and the sum paid by him was money paid in order that he might have what the statute did not intend him to have. Then, in regard to the taxation part of the question, if these are costs, on the assumption that they were costs of the plaintiff, the master is the proper person to deal with them. No review of that taxation can take place. The only remedy, if remedy there be, would be either by a *mandamus* against him to consider that particular question and to tax a particular sum, or by *certiorari*. I do not say that such a remedy exists. But, at any rate, there is no remedy by way of review, and no right of action directly against the company. It appears to me, therefore, that the decision of the learned judge in the court below is quite right, and ought to be supported, and the appeal dismissed, with costs.

Appeal dismissed.

Solicitors for the appellant, *Hadden-Woodward, McLeod*, and *Blyth*.

Solicitors for the respondents, *Cunliffes* and *Davenport*, agents for *James Burton Pollitt*, Manchester.

July 30, 31, *and Aug.* 1.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

Re ENGLAND; STEWARD *v.* ENGLAND. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Statute of Limitations—Covenant in settlement—Money charged on land—Devise in fee to tenant for life under settlement—Unity of possession—Presumption of payment of interest—Real Property Limitation Act 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

By an indenture of settlement A. covenanted with the trustees that his executors would, within twelve months after his death, pay to the trustees 4000*l. and interest; and thereby charged the principal and interest on certain real estate. By his will A. specifically devised the same real estate in fee to the person who was tenant for life of the* 4000*l. under the settlement.*

In 1871 *A. died, and the tenant for life under the settlement went into possession of the real estate as owner in fee, and no interest on the* 4000*l. was in fact paid to the trustees of the settlement.*

The real estate, which was primarily liable, having become insufficient to satisfy the charge, an originating summons was taken out, raising the question whether the trustees of the settlement were entitled to have the charge satisfied out of the personal estate so far as the real estate was insufficient.

It was admitted that the Statute of Limitations

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

(37 & 38 *Vict. c.* 57) *had run in favour of the personal estate, unless the circumstance that the tenant for life under the settlement was in possession of the real estate as owner in fee had the effect of preventing the statute from running.*

Held, that the receipt of the rents and profits by the devisee in fee could not be regarded as a payment of interest such as would prevent the statute from running so as to bar the right of action on the covenant against the residuary personal estate, he being under no personal liability to pay the charge.

Sutton *v.* Sutton (48 *L. T. Rep.* 95; 22 *Ch. Div.* 511) *considered and applied.*

Decision of Kekewich, J. (72 *L. T. Rep.* 681) *affirmed.*

BY an indenture, dated the 20th Sept. 1870, William England, in contemplation of the marriage of his son, William George England, covenanted with the trustees named in the deed for the payment to them on or before the expiration of twelve calendar months after his (the covenantor's) death, of the sum of 4000*l.* with interest from the death at 4 per cent. per annum, and declared that certain property called the Hindringham Estate, should be and remain charged with the 4000*l.* and interest.

By an indenture of even date, being the settlement made on the marriage of William George England, it was declared that the trustees should stand possessed of the said sum of 4000*l.* and interest upon trust for investment, and to pay the income to William England during his life, and after his death to William George England during his life, and after the death of the survivor upon the usual trusts in favour of the wife of William George England during her life, and after her death of the issue of the marriage.

By his will, dated the 1st Nov. 1870, William England appointed William George England, James E. Fraser, and William Peckover executors and trustees thereof, and devised the Hindringham estate to William George England, his heirs and assigns, subject nevertheless to the 4000*l.* and interest charged thereon. And after devising to his trustees certain other specified real estate upon trust to raise thereout the sum of 1500*l.* to be deemed part of his residuary estate, and subject thereto upon certain trusts in favour of another son of the testator, and the wife and children of such son, the testator devised and bequeathed to his trustees all the residue of his real and personal estate upon trust for sale and conversion as therein mentioned, and directed that the trustees should out of the moneys arising therefrom pay the testator's debts, &c., and a legacy of 200*l.* to his wife, and should stand possessed of the ultimate residue upon certain trusts in favour of the testator's three daughters and their husbands or children, if any.

The testator died on the 1st June 1871, and on the 2nd Sept. 1871 his will was duly proved by William George England and James E. Fraser alone, William Peckover having renounced probate and by deed disclaimed the trusts of the will.

Immediately after the testator's death William George England went into possession of the Hindringham estate under the devise in his favour, and had since remained in possession or in receipt of the rents and profits thereof, and had had the sole control and management of it. James Edward Fraser had not at any time dealt with that estate.

The 4000*l.* had never been raised, and no payment of interest thereon had been made, unless such payment could be presumed from the receipt of rent and profits by William George England as above mentioned.

Owing to depreciation in the value of land it was considered doubtful whether the Hindringham estate was now worth the 4000*l.* charged upon it, and the question arose whether the residuary personal estate of the testator could be resorted to for payment.

An originating summons was accordingly taken out by Charles R. Steward, the sole surviving trustee of the indenture of the 20th Sept. 1870, on behalf of himself and all other creditors, if any, of William England, as plaintiff, against William George England, his wife and children, and James E. Fraser and the testator's three daughters, asking (*inter alia*) that it might be determined whether the 4000*l.* ought to be realised, and whether the residuary personal estate of the testator was liable to any extent to make good the 4000*l.* to the plaintiff.

On the hearing of the summons before Kekewich, J., on the 4th April 1895, the question was argued whether there had in law been any such payment of interest by William George England as would operate to prevent sect. 8 of the Real Property Limitation Act 1874 from running so as to bar the right of action for the 4000*l.* under the covenant contained in the indenture of the 20th Sept. 1870 as against the residuary personal estate of the testator. It was not disputed that, as against the Hindringham estate itself, the charge was still subsisting.

It was decided by Kekewich, J. (72 L. T. Rep. 681) that no presumption of payment of interest by the son, on the ground of any duty on his part to keep down the interest, could be made, and that, even if such payment could be presumed, it would not operate so as to prevent the Statute of Limitations from running in favour of the testator's personal estate.

From that decision the plaintiff now appealed.

Ingpen and *L. S. Bristowe* for the appellant.—Although no interest has been actually paid on the 4000*l.* charge for more than twelve years, we submit that the covenant by the settlor is still enforceable. Our contention gives rise to two questions: first, whether it will be presumed that a mortgagor has paid interest on the mortgage debt in his character of mortgagor; secondly, if so, whether, having regard to that fact, the persons entitled to the residuary estate can set up the Statute of Limitations. The cases on the first point are as follows:

Raffety v. *King*, 1 Keen, 601, 616;
Burrell v. *Lord Egremont*, 7 Beav. 205, 235;
Topham v. *Booth*, 57 L. T. Rep. 170; 35 Ch. Div. 607.

The court will presume that that has been done which ought to have been done. If, therefore, the devisee in fee ought to have paid the interest on the 4000*l.* charge, the court will presume that he did so, and the case must be treated as if the interest had been actually paid. A person who occupies dual capacities will be presumed to have performed the duties of both capacities. Thus,

where a person entitled to a debt secured by a covenant and charge is also the person entitled to the property charged, the receipt by him of the rents and profits is to be treated as payment to him of the interest on the debt, so as to keep alive within sect. 8 of the Real Property Limitation Act 1874—the section substituted for sect. 40 of the old Statute of Limitations (3 & 4 Will. 4, c. 27)—the right of action on the covenant as against the covenantor's estate. There are three principles laid down in *Burrell* v. *Lord Egremont* (7 Beav. 205, at p. 236), and this case is within all of them. As regards one of them, it is not material whether the mortgagor is tenant for life or tenant in fee. Then, as to the second question, there is a conflict of decision between *Roddam* v. *Morley* (1 De G. & J. 1)—which is an authority that payment by any person liable to pay preserves the right of action in its integrity—and *Coope* v. *Cresswell* (15 L. T. Rep. 427; L. Rep. 2 Ch. App. 112). [Lindley, L.J.—I have always understood that *Roddam* v. *Morley* (*ubi sup.*) was a good decision.] Yes, it has been followed in numerous subsequent cases, and although *Coope* v. *Cresswell* (*ubi sup.*) has not been actually overruled, yet *Roddam* v. *Morley* (*ubi sup.*) has been followed notwithstanding the decision of the Lord Chancellor in *Coope* v. *Cresswell* (*ubi sup.*). That case was decided on the authority of *Dickenson* v. *Teasdale* (1 De G. J. & Sm. 52) under the Act 3 & 4 Will. 4, c. 27, not following *Roddam* v. *Morley* (*ubi sup.*). There are three cases in which *Roddam* v. *Morley* (*ubi sup.*) has been followed:

Pears v. *Laing*, 24 L. T. Rep. 19; L. Rep. 12 Eq. 41;

Re Hollingshead; Hollingshead v. *Webster*, 58 L. T. Rep. 758; 37 Ch. Div. 651;

Re Frisby; Allison v. *Frisby*, 61 L. T. Rep. 632; 43 Ch. Div. 106.

Re Frisby (*ubi sup.*) turned on the Real Property Limitation Act 1874, which in terms is the same as 3 & 4 Will. 4, c. 27. That case shows that the court will not extend the principle of *Sutton* v. *Sutton* (48 L. T. Rep. 95; 22 Ch. Div. 511). Payment of interest by the tenant for life of a settled equity of redemption is sufficient to keep alive the right of action on the covenant of the settlor within 3 & 4 Will. 4, c. 42, sect. 5:

Dibb v. *Walker*, 68 L. T. Rep. 610; (1893) 2 Ch. 429.

[Lindley, L.J., referred to *Forsyth* v. *Bristowe*, (8 Ex. 716) and *Barclay* v. *Owen* (60 L. T. Rep. 220).] *Forsyth* v. *Bristowe* (*ubi sup.*) proceeds on much the same ground as *Re Frisby* (*ubi sup.*). The real principle which underlies the cases of *Roddam* v. *Morley* (*ubi sup.*), *Pears* v. *Laing* (*ubi sup.*), and *Dibb* v. *Walker* (*ubi sup.*) is, that where the liability of the mortgagee and covenantee becomes subdivided, either through the equity of redemption being assigned or otherwise, payment by any one of the group of persons who have a share of the liability keeps the debt alive against all the persons liable. That is not the principle established in *Coope* v. *Cresswell* (*ubi sup.*). The view there was, that the payment only binds the person who makes it; and that authority is distinguishable in principle from the present case.

Warmington, Q.C. and *Badcock* for the respondents, James E. Fraser and the residuary legatees.—The appellant's claim is barred by sect. 8 of the Real Property Limitation Act 1874. In no case has there been a presumption of payment of interest, where, as in the present case, the person who is tenant for life of a mortgage debt is also tenant in fee simple of the mortgaged estate, and so receives the rents and profits of it. We submit that *Coope* v. *Cresswell* (*ubi sup.*) cannot be departed from. There the question was, whether payment or acknowledgment by the owner of the personal estate of the covenantor operated to keep the right of action alive against the real estate of the covenantor. True, it is not this case; it is the converse of the case here. It was held, following *Dickenson* v. *Teasdale* (*ubi sup.*), that such payment did not so operate, and that the right of action was barred by the Statute of Limitations (3 & 4 Will. 4, c. 42). There is no reason why that principle should not be applied to this case. The foundation of the cases cited on behalf of the appellant is that, where the person who is to receive and to pay is a tenant for life, he is under a duty or obligation to keep down the interest of the charge on the inheritance for the benefit of the remaindermen; and payment of interest is, therefore, presumed from his receipt of income. That is pointed out by Lord Langdale in *Burrell* v. *Earl of Egremont* (7 Beav. 205, at p. 237). But that does not apply here. The devisee in fee, being entitled to the devised estate absolutely, is under no obligation whatever to persons coming after him. Apart from the statute, it is against justice that the act or omission of one person should affect the liability of another. The appellant cannot find any case which exactly suits his purpose, either for his first or his second point. *Roddam* v. *Morley* (*ubi sup.*) does not carry him far enough. He is driven to say that *Roddam* v. *Morley* (*ubi sup.*) and *Coope* v. *Cresswell* (*ubi sup.*)—both of them decisions of the Court of Appeal—cannot stand together. The appellant cannot bring his case exactly within *Roddam* v. *Morley* (*ubi sup.*), and cannot get out of *Coope* v. *Cresswell* (*ubi sup.*). There is no analogy between the present case and the case of principal and surety. *Sutton* v. *Sutton* (*ubi sup.*) has been mentioned with approval in other cases, and was followed in

Fearnside v. *Flint*, 48 L. T. Rep. 154; 22 Ch. Div. 579.

They referred also to

Fordham v. *Wallis*, 10 Hare, 217, 226;

Re Morley; Morley v. *Saunders*, L. Rep. 8 Eq. 594;

Blake v. *Gale*, 55 L. T. Rep. 234; 32 Ch. Div. 571.

Ingpen in reply.—[Lindley, L.J.—If *Sutton* v. *Sutton* (*ubi sup.*) is a right decision, then the statute to be applied here is the Real Property Limitation Act 1874, which amended 3 & 4 Will. 4, c. 27.] I say that it should be 3 & 4 Will. 4, c. 42. [Lindley, L.J.—Is that consistent with *Sutton* v. *Sutton* (*ubi sup.*).] I submit that *Sutton* v. *Sutton* (*ubi sup.*) is not in point here. That case, and also *Fearnside* v. *Flint* (*ubi sup.*) were commented on and distinguished in

Re Powers; Lindsell v. *Phillips*, 53 L. T. Rep. 647; 30 Ch. Div. 291.

Lindley, L.J.—This case is a little peculiar, and involves a point that, so far as I know, has never actually arisen before, and is not governed by any of the numerous authorities to which our attention has been directed. The appeal is

against a declaration made by Kekewich, J., by which he declared that no part of the residuary personal estate of the testator, William England, was liable for the sum of 4000*l.* by the indenture of settlement covenanted to be paid by the testator, or any part thereof, or to make good any deficiency in respect of the charge of 4000*l.* in case the real estates were of insufficient security for the same. I will not go through the facts of the case further than is necessary to suggest how the questions of law arise. It appears that on the 20th Sept. 1870 the testator made a settlement by which he covenanted to pay 4000*l.* twelve months after his death. The person entitled to sue upon that covenant is a Mr. Steward, who is the trustee of the settlement. By the same settlement, certain real estates belonging to the settlor were charged with the payment of that 4000*l.* The settlor died in June 1871, leaving a will by which he devised the real estates so charged with that 4000*l.* to Capt. England in fee, and Capt. England was himself the tenant for life, or the beneficiary entitled to interest on that 4000*l.* for his life. After his death that beneficial interest went to his wife. The residue of the testator's property was devised to executors upon trust to sell and to pay the proceeds to his daughters and their children. Nothing turns upon that—I mean nothing turns on the limitations of the residuary estate. The executors were Capt. England and a gentleman of the name of Fraser. The position of affairs is this: After the testator's death there was clearly a right to sue upon that covenant for the 4000*l.*—a right on behalf of the trustee as it were to sue the executors twelve months after the testator's death. When that sum became payable there was a right on the part of the same trustee to take proceedings to have that charge raised out of the real estates—that is obvious. Capt. England, the devisee of the estates so charged, was liable, not to pay the charge, but was liable, to the amount of the value of the estates, to pay it under the statute of 3 Will. & M. c. 14, or the statute of 1 Will. 4, c. 47, which has replaced that Act. It is important to observe that under the statute he has not paid the sums. He is liable to account for the value of the estates, and I do not know if it has been decided whether the value of the estates is to be taken when proceedings are brought, or at the death of the testator. But it would seem wrong that the value at the death should be the proper value if the payment is not enforced for long afterwards. He is not liable to pay the money, but to account for the assets. What took place was this: Capt. England entered into possession of the estates devised to him in fee, and, inasmuch as he was beneficially entitled to the interest of the 4000*l.* charged on those estates, no payment would be made by him to the trustee of the interest on that 4000*l.* Of course, if he had paid it, it would have come back to him. It would have been returned to him by the first cheque he received. He is entitled to the interest, and what is very important to bear in mind is this, that by no procedure could he be made to pay the interest on that sum of 4000*l.* He was entitled to receive it himself, and neither he nor his executors could ever be compelled to pay one farthing. He was not liable to pay it. If anybody else had a beneficial interest in it, of course he would; but there was not anybody else beneficially interested in the interest, and therefore he was not liable to pay it. As regards the capital, he being only tenant for life, the estates, of course, were liable, and, as I have already said, he was liable under the statute to the value of the estates. For more than twelve years nothing has been done, and now three summonses have been taken out which have been consolidated, and it has been ascertained, or at all events it is apprehended, that the estates on which this sum of 4000*l.* is charged are not, or may not be, sufficient to raise that sum. The question therefore arises, whether the personal estate of the testator, who was also the settlor and the covenantor, is or is not liable to pay that 4000*l.* Kekewich, J. has held that it is not, and hence the appeal to us. We must at the outset consider what the position of affairs is as regards the Statute of Limitations. In the first place, what is the statute, if any, applicable to the case? We must try it in this way: Suppose that the action was brought by the trustee, Mr. Steward, against the legal personal representatives of the covenantor. They would plead the Statute of Limitations. Now, what is the governing statute? There are two possible statutes. The possible statutes are the unrepealed statute of 3 & 4 Will. 4, c. 42, and the Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), which amended 3 & 4 of Will. 4, c. 27. The point as to which statute is applicable appears to me to be decided by the case of *Sutton* v. *Sutton* (48 L. T. Rep. 95; 22 Ch. Div. 511). The case of *Sutton* v. *Sutton* (*ubi sup.*) determines this, that when any action, suit, or other proceeding is brought not only to recover any sum of money payable out of land, but is brought against the legal personal representative of the covenantor, whether the covenant is contained in a deed or—as in the case before Fry, J. of *Sutton* v. *Sutton* (*ubi sup.*)—in collateral documents, the statute which governs is now the 37 & 38 Vict. c. 57. s. 8. To that Act therefore, and to that alone, we must have recourse. I cannot read sect. 8 of that Act without seeing that the *ratio decidendi*, and the point actually decided in *Sutton* v. *Sutton* (*ubi sup.*) is that which I have mentioned. Although it is very true that in *Sutton* v. *Sutton* (*ubi sup.*) the mortgage was no bar so far as the remedy was concerned, the point determined was, that the Act of Parliament to which attention had to be called was sect. 8 of 37 & 38 Vict. c. 57. Now let us read sect. 8. That section says: "No action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity"—I will leave out "or any legacy" because that is not applicable here—"but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." Then comes a proviso, which I will read presently. In the present case there was a person existing who was capable of giving a discharge or release for the 4000*l.*, that person being the trustee of the charge—Mr. Steward. There was no difficulty, therefore, in his bringing an "action, suit, or proceeding" to recover that sum as the person properly entitled to do it—properly entitled to maintain an action at law. And unless the words which I am about to read apply, his action against the legal personal representative would be barred

by the lapse of twelve years. Now there comes this proviso: "Unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent. . . ." Now we have to ask ourselves this: Has that been done? Has there been any part payment of the principal money, or of the interest, or any acknowledgment given in writing "by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent?" If we ask that question, that is a question of fact, and it admits of but one answer, and that answer is, "No; there has been no payment in fact, and no acknowledgment in fact." As regards the principal sum, it is not contended that there has been, but it is said that, although there has been no payment in fact, there has been that which is equivalent to a payment. It is put in this way: It is said that Capt. England having been devisee of the estates, and also tenant for life of the charge upon them, must be treated as having paid himself the interest; that is to say, to have paid the trustee, and got the money back again. One must be careful before one substitutes what I would call a "fiction" for a fact. Let us see what the answer at law would be. I apprehend the Statute of Limitations would be relied upon as a defence, and there having been no payment in fact, and no acknowledgment in writing, there would be a complete answer. Now, let us see what the suggested answer to that difficulty is, and how it is to be got over. Mr. Ingpen has argued this case with very great skill and ability, but it seems to me that the difficulty is one that cannot be got over, and for this reason: we are dealing with interest, because no one supposes that there has been any payment of principal, or anything equivalent to a payment of principal. Capt. England was never liable to pay one farthing of the interest. That is the cardinal point to keep one's mind on. He was entitled to receive the interest, but was not liable himself to pay it. If I said that the right to receive the interest had been in someone else, it would have been a different matter. He never was liable, and therefore, if you are treating of a constructive or fictitious payment of interest to himself, you cannot get it, as there was not any payment of interest by any person liable. The whole thing is a fallacy. That really seems to me to get rid of the whole of the authorities that have been cited. I quite concede this, that, if proceedings had been taken against Capt. England to raise this 4000*l.* out of the land, he could not have set up the Statute of Limitations, because he has been enjoying all the devise and all the charge. It does not, however, at all follow, because he is open to that personal objection, that the same objection can be made available against other persons. And there is not a single case in the books which goes the length of saying that it can. There are cases—I am not proposing to criticise them—which go to show, or tend to show, that, if he had to pay interest, that interest might avail against the legal personal representatives. *Re Frisby; Allison* v. *Frisby* (61 L. T. Rep. 632; 43 Ch. Div. 106) is most important in that respect, but n that case there was a person liable in iact to pay interest, and in this case there fas been no payment, in fact, of a shilling h interest, and no person is liable to pay a shilling; that is the peculiarity of this case. Now, bearing that in mind, it appears to me that we may make a clean sweep of all the cases that have been referred to. There is not one of them applicable, it appears to me, under the circumstances of this case. I think, therefore, that this appeal ought to be dismissed, with costs.

LOPES, L.J.—I do not propose to follow the points that have been taken in the judgment of my brother Lindley. I am satisfied to say that I found my decision upon this, that there has been no payment of interest in this case by anybody liable to pay. Capt. England was not liable to pay a penny. He was tenant for life of this charge, and devisee in fee simple of the lands, and he was entitled to put every penny of this interest into his own pocket. That to my mind would be a complete answer to the case, and I think that the learned judge in the court below was perfectly right when he held that the statute was a bar as regarded the personal estate.

RIGBY, L.J.—I am of the same opinion, and I will add nothing except as to the liability of Capt. England to pay interest. The statute relating to fraudulent devises (3 Will. & M. c. 14) placed devisees in the same position as the heir-at-law, but under that statute—I do not quite remember whether by express words or by judicial decision—it has been laid down that the heir-at-law cannot be made accountable for any interest that is received by him before the issue of the writ. If he takes it and puts it into his pocket, it belongs to him absolutely and entirely. And, as devisees are placed on exactly the same footing as the heir-at-law, there is no power to recover from them. That interest would be left out of the account altogether; they would be chargeable only to the extent of the value of the land. For the interest which they had received before the issuing of the writ they would not be liable at all. I agree, and it is plain, therefore, to me that Capt. England never was liable, and, giving full effect to all the decisions, including that of *Re Frisby* (*ubi sup.*), there has been no payment within the meaning of sect. 8 of the Act of 1874. Sect. 8 of the Act of 1874 has been decided by this court to be a section which applies in such a case as the present. I have not the slightest doubt that that decision is absolutely in accordance with the plain provisions of the Act when they are looked into. In any event, of course, we could not consider whether it was right or wrong. We accept it, and, for my part, I accept it with full conviction that it was absolutely right. The appeal must be dismissed with costs.

Ingpen.—This being an application by a trustee under a settlement, and Kekewich, J. having seemed to invite the trustee to bring this appeal—it being a very critical point which has been under consideration—I ask the court to allow the trustee his costs out of his own settlement moneys.

LINDLEY, L.J.—There is great difficulty in our acceding to a request of that kind. I think, per-

sonally, I would, if I thought it was right; but it would be very like our indorsing what looks like a piece of negligence on the part of the trustee. I think the only thing that we can do is to dismiss the appeal with costs, and leave you to do the best you can to arrange it out of the estate.

Appeal dismissed.

Solicitors for the appellant, *Rhodes* and *Son*.

Solicitors for the respondents, *S. W. Johnson* and *Son*.

June 27 *and July* 9.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

FULLER *v.* BLACKPOOL WINTER GARDENS LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Copyright—Musical composition—Dramatic piece—Sole right of representation—Infringement—The Dramatic Copyright Act 1833 (3 *&* 4 *Will.* 4, *c.* 15)—*The Copyright Act* 1842 (5 *&* 6 *Vict. c.* 45), ss. 2, 20, 21—*The Copyright* (*Musical Compositions*) *Act* 1882 (45 *&* 46 *Vict. c.* 40), *s.* 2.

The plaintiff was the proprietor of the exclusive right of performing and representing a song called "Daisy Bell." When this song was published by the owner of the copyright, there was printed upon each copy, with the consent of the plaintiff, a notice that "This song can be sung without fee or licence except in music halls." The defendants bought a copy, and the song was sung on many occasions at their hall, which was not a music hall. Thereupon the plaintiff sued them for penalties under 3 *&* 4 *Will.* 4, *c.* 15.

Held (*dismissing the appeal*), *that the song was a "musical composition," and that the plaintiff could not recover penalties by reason of the provisions of sect.* 2 *of* 45 *&* 46 *Vict. c.* 40.

THIS was an appeal by the plaintiff from the judgment of Kennedy, J., at the trial without a jury in Middlesex.

The plaintiff was the assignee of the sole right of performing and representing "Daisy Bell," and sued the defendants to recover penalties for infringements of her sole right of performing and representing it. This song was printed and published with a note printed on the outside, as follows: "This song can be sung in public without fee or licence, except in music halls."

The defendants purchased a copy, and made preparations to have it sung or performed in a pantomime at their place of public entertainment, which was not a music hall.

The plaintiff hearing of this, a letter was written on her behalf to the defendants, saying that they had no right to have "Daisy Bell" sung as part of their entertainment. The defendants replied that their place of entertainment was not a music hall, and that they had a right to have "Daisy Bell" sung there.

The plaintiff was accustomed to sing the song in the costume of a bicyclist, and to accompany the song with dramatic action. A portrait of the plaintiff in that costume appeared on the cover of each copy.

The plaintiff alleged that she had not authorised the notice which was printed on each copy of the song, but Kennedy, J., at the trial, found that it had been printed with her authority.

The defendants caused the song to be sung at their hall on many occasions, and this action was brought to recover a penalty for each occasion.

The learned judge at the trial held that "Daisy Bell" was a "dramatic piece," but that a written licence to perform it had been given to the defendants, which could not be revoked. He accordingly gave judgment for the defendants.

The plaintiff appealed.

Rufus Isaacs for the appellant.—If the note printed upon each copy of the song amounted to a licence to any person who bought a copy to sing or perform "Daisy Bell" in any place of public entertainment other than a music hall, that licence was revocable, and was in this case revoked by the plaintiff before performance by the defendants. The licence was revocable, and was revocable at any time; it was not an authority coupled with an interest; no person who bought the song with this licence attached could transfer the licence to anyone else. If a licence is not coupled with an interest, it can be revoked at will, though money has been paid for, or expense incurred in consequence of, the licence. In such case there may perhaps be an action to recover the money paid or expenses:

Wood v. *Leadbitter*, 13 M. & W. 838;
Heap v. *Hartley*, 61 L. T. Rep. 538; 42 Ch. Div. 461;
Taplin v. *Florence*, 10 C. B. 744;
Adams v. *Andrews*, 15 Q. B. 284;
Ward v. *Livesey*, 5 Patent Office Reports, 106.

T. E. Scrutton, for the respondents.—The defendants bought this song in order to have it sung at their place of entertainment, and the licence was printed upon it; money was expended upon the faith of that, and the licence was, therefore, not revocable. This was not, however, a licence at all. The notice was printed upon the song in consequence of the provisions of sect. 1 of the Copyright (Musical Compositions) Act 1882 (45 & 46 Vict. c. 40). That section provides that the proprietor of the copyright in a musical composition "who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance" must print on each copy a notice that such right is reserved. In this case the only right reserved by notice is the right to perform in music halls. Therefore there is no effectual reservation of any other right, as required by the Act, and the plaintiff cannot recover. This notice is either entirely ineffectual, or is good only in respect of music halls. This Act, in effect, provides that, if the prescribed notice is not printed, then no right is reserved. The learned judge at the trial held that this Act did not prevent an action for infringement being brought if the notice was not printed, because the Act did not so provide. That construction would make the Act nugatory. The learned judge further held that the Act did not apply to this song, because it was a "dramatic piece." Assuming it to be a dramatic piece, there was a licence to perform which was not revocable, and was not in fact revoked. This licence was not revocable:

Plimmer v. *Mayor of Wellington*, 51 L. T. Rep. 475; L. Rep. 9 App. Cas. 699.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

The ground of the judgment of Kennedy, J. was, that this was a "dramatic piece," and that there had been a consent in writing, not revoked, to its performance, within sect. 2 of the Dramatic Copyright Act 1833 (3 & 4 Will. 4, c. 15). A written consent given under that Act is irrevocable. This was not a "dramatic piece" at all, but a musical composition only, and the provisions of the Act of 1882 are applicable:

Wall v. *Taylor*, 47 L. T. Rep. 47; 11 Q. B. Div. 102.

He referred also to 51 & 52 Vict. c. 17.

Rufus Isaacs in reply.—This was a dramatic piece. Sect. 2 of the Copyright Act 1842 (5 & 6 Vict. c. 45) defines a "dramatic piece" to mean and include "every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment." This song, performed with dramatic action and in costume, is a "dramatic piece" within that definition:

Russell v. *Smith*, 12 Q. B. 217;
Roberts v. *Bignell*, 3 Times L. Rep. 552;
Clark v. *Bishop*, 25 L. T. Rep. 908.

The Act of 1882 does not take away the right of exclusive performance and representation if the prescribed notice is not given. *Cur. adv. vult.*

July 9.—Lord Esher, M.R.—In this case the plaintiff became the owner of the sole right of representation of "Daisy Bell." The plaintiff says that "Daisy Bell" is a "dramatic piece," and that the defendants have performed or sung that "dramatic piece" in Blackpool at a place of public entertainment in a pantomime. The plaintiff says that it, being a "dramatic piece," was performed or sung without any consent in writing from her, and that the defendants became liable to pay penalties to her. The action is brought to recover penalties. If it is a "dramatic piece" within the meaning of the statute 3 & 4 Will. 4, c. 15, and the plaintiff did not give her consent in writing, the defendants are liable. At the trial, Kennedy, J., held that "Daisy Bell" was a dramatic piece, but that the plaintiff had consented to the performance by the defendants, and gave judgment for the defendants. I agree with the decision of Kennedy, J., but not upon the same grounds. I think that judgment ought to be given for the defendants, because this is not a "dramatic piece" within the meaning of the Act of Parliament. In my opinion it is a "musical composition," because it is a song. Other Acts of Parliament regulate the rights of the parties if this is a "musical composition"; those are the statutes 5 & 6 Vict. c. 45 and 45 & 46 Vict. c. 40. Now it cannot be doubted but that this is a song; it is to be sung by one person. If it is a song, then it is a "musical composition." Is it a "dramatic piece?" It is not enough to say that it is dramatic, in my opinion. It must be a "dramatic piece" within the meaning of the Act of Parliament. Therefore the description of what is dramatic, given by Lord Denman in *Russell* v. *Smith* (*ubi sup.*), is of no assistance in deciding this case. The question is whether this is a "dramatic piece" within the meaning of 3 & 4 Will. 4, c. 15, s. 1, which provides that the author of "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment" shall have the sole liberty of representing the same at any place of dramatic entertainment. Now, how ought we to construe such words, where there are particular words followed by general words? The general words must be construed to mean something of the same kind as the particular words "tragedy, comedy, play, opera, farce." In ordinary language these latter have come to be known as particular things which are acted at theatres. If the general words are to be construed as referring to things *ejusdem generis* as the particular things, they cannot include a song which is not in any way like those particular things which are mentioned. Then came the statute 5 & 6 Vict. c. 45, which was necessary in order to extend the term "dramatic piece" to "musical compositions." In the statute 3 & 4 Will. 4, c. 15, therefore, "musical compositions," merely as such, were not within the words "dramatic piece." The later Act extends to "musical compositions" the rights given by the earlier Act in respect of "dramatic pieces." It was found that that worked mischief, and the statute 45 & 46 Vict. c. 40, was passed to remedy that mischief. That statute provides that, in the case of musical compositions, if the owner of the sole right of public representation or performance "shall desire to retain the same," he shall before publication give the owner of the copyright notice to print on each copy "a notice to the effect that the right of public representation or performance is reserved." Unless that is done, therefore, the right of public representation is not reserved, so as to enable the owner to recover penalties. Then comes the question whether one can define what is, and what is not, a "dramatic piece," and what is, and what is not, a "musical composition;" and whether there are "musical compositions" which are also "dramatic pieces." Now, an opera is a musical composition, but I cannot help thinking that some operas are dramatic pieces. But operas are excluded from the statute 51 & 52 Vict. c. 17, relating to the recovery of penalties in respect of musical compositions, because operas may be dramatic pieces. But, because a musical composition may be a dramatic piece, it does not follow that every musical composition is a dramatic piece. To be a "dramatic piece" a musical composition must have the properties of a dramatic piece as described in the statute 3 & 4 Will. 4, c. 15; that is, it must be of the same kind as a "tragedy, comedy, play, opera, farce." Though some musical compositions may have those attributes, every musical composition cannot have them. Whether a particular subject-matter is only a musical composition, or whether it is a musical composition having the attributes of a "dramatic piece," is a question of fact in every case. The question is, therefore, one of fact in each case, and is a question for the judgment and opinion of persons of ordinary sense, that is, for the jury if there is one, or for the judge if there is no jury. Take. then, this "Daisy Bell." What attribute of a "dramatic piece," within the meaning of the Act of Parliament, has it? It is said that the singer sang it in a dramatic way, because she sang it in a boy's clothes. Did that make it a dramatic piece? If it were a dramatic piece because she sang it in that way, it would not be so if another person sang it in the ordinary way. We cannot, therefore, consider the way in which one person sings the song. The question must be considered as at the time when the song is

written and first published. I can well understand that a piece, made to be performed by only one person, may be a dramatic piece, as, for instance, "Manfred," which has really only one character. That I would call a "dramatic piece," though done by one person only. It is always a question of fact in each case. The question is, what is the thing which is done by one person? If the thing is a song, and merely a song, then it is not a dramatic piece, but only a musical composition; it requires nothing but singing. It is not necessary to say that a song, which is to be sung by one person, may not be a dramatic piece; we have only to decide as to this song. The question must be considered as at the time when the song is published. At that time this was a song and nothing else. The plaintiff dealt with it as being a musical composition, because she considered it necessary to print a notice on every copy of it. She did not print a notice that the right of public representation was reserved, but only a notice that it was not to be sung at music halls without her consent. She did not, therefore, reserve the sole right of public representation except in respect of music halls. The defendants did not sing "Daisy Bell" at a music hall. The plaintiff cannot, therefore, recover penalties. Then it is said that the plaintiff revoked the leave which she had given. Whether, after a song has been published without a reservation of rights, the owner of the rights in the song can revoke that at any time, it is not necessary to say. I am inclined to think that he cannot revoke. If he can revoke, he cannot do so, under the statute, without printing other copies with the notice of reservation upon them, and calling in the first copies as far as possible. Then there would be copies of two kinds: one kind with the reservation of rights, and the other without. In this case, the plaintiff never did really revoke at all. It is said that the music of this song is a musical composition, and the words a dramatic piece. That is an absurd contention. The music and the words are written to be performed together. This, therefore, is a musical composition only, and has not been so dealt with as to enable the plaintiff to recover penalties. The judgment for the defendants is therefore right, though not upon the grounds upon which it was given. This appeal therefore fails, and must be dismissed.

KAY, L.J. read the following judgment:—This action was brought to recover 624*l.*, being 312 amounts of 2*l.* each, from the defendant company and their manager for 156 occasions on which the song "Daisy Bell" was sung at the defendants' place of entertainment. The plaintiff claims as proprietor of the sole right of singing and representing this song. The song has been printed and published, both words and music. Upon the outside are printed the words "This song can be sung in public without fee, or licence, except in music halls." This was done with the plaintiff's consent. The defendants' place of entertainment is not a music hall, and is not licensed as such. The song was sung in a burlesque which was being performed there. Sometime in 1893 a letter was written on behalf of the plaintiff to the defendants' manager, which is not produced, saying that the defendants had no right to have this song sung as part of their entertainment. The answer was, that the defendants had purchased the song with the words which I have quoted upon it; that their place of entertainment was not a music hall; and, therefore, the defendants had a right to have it sung. The plaintiff was accustomed to sing the song in the costume of a boy cyclist, and a photograph of the plaintiff in that costume was outside the printed song. The plaintiff was accustomed, it is said, to accompany the song with dramatic action, though the words do not seem to afford much scope for this. If the song is to be treated as a "musical composition" under 45 & 46 Vict. c. 40, sect. 2 of that statute, which it is said applies to this case because the copyright belongs not to the plaintiff but to the author, it requires the plaintiff to give to the owner of the copyright, before publication, notice to print upon every copy that the right of public representation is reserved. No such notice was given, nor was anything printed to that effect, except the reservation of the right to sing the song in music halls. But it is argued, and the learned judge has felt himself bound by authority to hold, that it was a "dramatic piece" within 3 & 4 Will. 4, c. 15, 5 & 6 Vict. c. 45, and 51 & 52 Vict. c. 17. The first of these statutes gives to the author of "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment," the sole liberty of representing the same, and any other person representing any such production at a place of dramatic entertainment, without the consent in writing of the author or proprietor, is liable, for each such representation, to pay 40*s.* The statute 5 & 6 Vict. c. 45, s. 20, extends the benefit of the former Act to musical compositions, and gives to the owner of the right of representation the remedies given in the former Act; and, by sect. 2, "dramatic piece" is declared to include "every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment." The statute 51 & 52 Vict. c. 17, enabled a court to give less than 40*s.* if justice required it. I cannot read this series of statutes in any other sense than that if, in the case of a musical composition, the notice required by 45 & 46 Vict. c. 40, s. 2, is not given and printed upon the published copies, no penalty or damages can be recovered because the right of public representation is not reserved; and there being no right there can be no remedy. If it be a "musical composition" which can be called a "dramatic piece," it seems to me that the notice should still be given. The reason seems plain. When a song with music is printed, every one who buys it has a right to suppose he may sing it anywhere, in a private house, or in a place of public entertainment, unless there is a notice on the song to the contrary. No one buying a tragedy or comedy would suppose himself at liberty to represent it; he would buy it only to read. In *Russell* v. *Smith* (*ubi sup.*) a song called "The Ship on Fire" was held to be a "dramatic piece," and a person who sang it at a place of public entertainment was held liable for penalties. The action was to recover 40*s.* for representing and performing the song at Crosby Hall, and one of the questions argued was, that the song was not a "musical composition" within sect. 20 of 5 & 6 Vict. c. 45, but that the "musical compositions" intended to be protected by that Act were only those composed for performance with "dramatic pieces." The court did not decide the question

whether the Act was to be so restricted, because they considered that the song was a "dramatic piece" within the interpretation clause, sect. 2. In *Clark* v. *Bishop* (*ubi sup.*) a song was held to be a "dramatic piece," when its only value was derived from the singing and acting of it in character. In *Wall* v. *Taylor* (*ubi sup.*) the question was whether the proprietor of a musical composition could maintain a claim for the 40*s.* penalty when it was sung at a place which was not a place of dramatic entertainment, and it was held that he could, Cotton, L.J. dissenting. In *Roberts* v. *Bignell* (*ubi sup.*) it was held that a song called "Oh Jenny Dear," set to music, not of the proprietor's own authorship, was not a musical composition, but a "dramatic piece," and that a mere verbal permission to sing it was an ineffectual gift, so that the proprietor notwithstanding such permission could recover the 40*s.* penalty. I have not found any other report of this last case. I can scarcely believe that this report is accurate. If it was decided that, because the words of the song were dramatic, the music was not a "musical composition," I respectfully differ from that decision. All these decisions, except the last two, were before the statute 45 & 46 Vict. c. 40. No case has decided that a song which is a "dramatic piece" is not also a "musical composition," unless *Roberts* v. *Bignell* (*ubi sup.*) did so. The words "musical composition" must refer to the music, not the words, of the song, and the music without the words could hardly be called a "dramatic piece." But, even if it was, it is impossible to say that it is not a "musical composition," and, if it be, then, when the song and music are printed and published, the owner of the right of representation must reserve it by a notice printed upon each copy. Otherwise, as I read the statutes, the right does not exist after such publication. This seems to dispose of the case. The plaintiff was evidently aware of the necessity of printing a notice upon each copy, because she has caused this to be done; but the only reservation made by that notice is of the right to sing the song in music halls, and this the defendants have not infringed. She has recently caused a reservation to be printed on copies sold, in larger terms. It was argued that the notice printed on each copy was a licence to sing the song anywhere except in a music hall; that such licence was revocable; and that it was revoked. There was no revocation or attempt to revoke. The objection raised was, that the plaintiff never authorised the limited reservation which was actually printed. This was disproved; she did authorise it. But I do not agree that the printed notice was a licence. It was evidently intended to be a reservation in compliance with 45 & 46 Vict. c. 40. This point seems not to have been argued before the learned judge. The appeal appears to be founded upon a suggestion made by him at the end of his judgment. The learned judge raises the question, and answers it by saying that, even if it were a licence, it could not be revoked against any person who had bought the song and made arrangements to perform it in a place which was not a music hall. If it was a licence, I should not be prepared to differ from the learned judge; but, for the reasons I have given, I think that the point does not arise. I agree that there should be judgment for the defendants, though I respectfully differ from some of the reasons given by the judge in the court below.

Smith, L.J., read the following judgment:—This action is brought by the plaintiff, who has acquired by assignment from the author the sole right of singing a song called "Daisy Bell," and is founded upon the Act of 1833 (3 & 4 Will. 4, c. 15) and the Copyright Act of 1842 (5 & 6 Vict. c. 45), the conjoint effect of which Acts upon the point in hand is that, if any person without the consent in writing of the person who has the sole right of representing either a dramatic piece or a musical composition does so, he is liable to a penalty for each representation of not less than 40*s.* and double costs. It was found by Kennedy, J., at the trial—and against this finding there is no appeal—that, in spite of the plaintiff's assertion upon oath to the contrary, the song "Daisy Bell" was published to the world with her consent in writing to its being sung anywhere excepting at music halls, the inscription upon each copy, of which 5000 were published, being, "This song may be sung in public, without fee or licence, except at music halls," and it was shown that the infringement complained of by the plaintiff was the singing or causing to be sung by the defendants the song within the terms of the consent given, namely, elsewhere than at music halls, and Kennedy, J. gave judgment for the defendants. This, which was the great issue in the cause, having been found against the plaintiff, she now appeals to this court, and by her counsel argues—though the point was not taken before Kennedy, J., and though it must now be admitted that consent in writing had in fact been given by the plaintiff to the defendants' singing the song as and when they did—that she nevertheless was entitled to have judgment entered for her because, as she now alleges, she had revoked her consent, as by law she was entitled to do, before the defendants sang or caused to be sung the song which is the subject-matter of complaint, and that in these circumstances they had done so without the plaintiff's consent in writing. To this the defendants made answer that the plaintiff was wrong in her facts, and that she never did revoke her consent, for that the position the plaintiff had taken up was, not that she revoked her consent, but that she had never given any consent at all, the consent printed upon the songs having been placed thereon, as she said, without her permission, which has been proved not to be the truth. It appears to me that this answer of the defendants as to the facts is correct. It is one thing to withdraw a consent given, and quite another thing to assert that there never was any consent given at all; for, in the one case, a person is in the wrong if he continues the representation after the consent is lawfully withdrawn; and, in the other, he is in the right in contesting, as the defendants did, the false assertion that no consent had ever been given at all. As it is established that the plaintiff never revoked her consent, which she had in fact given, it is wholly unnecessary to consider the question which was argued before us, whether the consent given was in the circumstances revocable or irrevocable, for this is purely an academical point. But, even if the plaintiff could have revoked her consent, and had done so, there is a further answer to this action, which is this: In the year 1882 the Copyright (Musical Com-

positions) Act 1882 (45 & 46 Vict. c. 40) was passed. It is true that it is a remarkable piece of drafting when looked into, but it recites that it was expedient to amend the law relative to copyright in musical compositions, and to protect the public from vexatious proceedings for the recovery of penalties for the unauthorised performance of the same; and it, amongst other things, enacts that, if the owner of the right of public representation or performance of any musical composition shall desire to retain the same (which is the plaintiff's position), he shall, before any publication of any copy of such musical composition, give to the owner of the copyright therein notice in writing to print upon every copy of such musical composition a notice to the effect that the right of public representation is reserved; and, by sect. 3, a penalty is imposed upon the owner of the copyright if he does not obey, and print legibly and conspicuously upon every copy that the right of public representation or performance is reserved. The practice this Act was passed to put a stop to was this, and it had become notorious: Certain blackmailers (clients as well as solicitors) were repeatedly in our courts with actions for penalties and double costs against performers, who had no idea that what they were doing was an infringement of anyone's copyright. The *modus operandi* was this: A person with a copyright was obtained. That person and a solicitor then waited until they had marked down a sufficient number of singings of a song by some poor innocent performer, and they then commenced and prosecuted their action against him or her as the case might be. The defendant, though absolutely unconscious of having done any wrong, was inevitably condemned, if proof of his or her having sung the song was forthcoming, in penalties and double costs without a possibility of escaping a hostile verdict with its attendant consequences. To meet this grave oppression—for it was nothing less—this Act, as its preamble recites, was passed. It will be seen that this Act does not enact what is to happen if the owner does not have printed upon every copy of a musical composition a notice that the right of public representation is reserved, and the question arises, bearing in mind the object with which the Act was unquestionably passed, what is the meaning of the words "If the owner of the right of public performance of any musical composition shall desire to retain the same he shall print upon every copy a notice that the right of public representation is reserved"? Do they mean that he shall retain the right and be able to sue whether he prints the notice or not; or do they mean that he shall only retain the right and be able to sue if he carries out the enactment and prints and gives notice to the world of the reservation? The latter, in my judgment, is the true reading of this enactment; and if it were construed otherwise, as regards this most important matter, it might just as well never have been placed on the Statute-book. But it is said by the plaintiff that this song "Daisy Bell" is, besides being a musical composition to which the Act of 1882 applies (and this cannot be denied), a dramatic piece, and that, being a dramatic piece, she is entitled to the penalties and damages and costs recoverable under the Act of 1833 (3 & 4 Will. 4, c. 15), irrespective of the provisions of the Act of 1882. I do not think this point is tenable. Why is it said that this song is to be held to be a dramatic piece, for *primâ facie* it is nothing of the sort? It is said that by the interpretation section of the Copyright Act (sect. 2 of 5 & 6 Vict. c. 45) it is enacted that the words dramatic piece shall be construed to mean and include "every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment," and that this song when sung comes within the words "other scenic, musical, or dramatic entertainment." If this be so, every song must be held to be a dramatic piece, which is absurd. The words "other scenic, musical, or dramatic entertainment" appear to apply to the whole concert or performance, and not to single detached pieces sung therein, and this was the view of Brett, M.R., in *Wall* v. *Taylor* (*ubi sup.*), where that learned judge said the clause is not applicable to each particular composition, but to the whole concert. Cases were then cited to show that certain songs had been held to be dramatic pieces. The first of these was the case of *Russell* v. *Smith* (*ubi sup.*), where in the year 1848 Lord Denman and the Queen's Bench held that a song called the "Ship on Fire," although sung by a performer in plain clothes at a piano and without any scenery, was a dramatic piece, the *ratio decidendi* being that, as the song moved terror and pity and sympathy by presenting danger and despair, and joy and maternal and conjugal affection, and would produce the emotions which are the purpose of the regular drama, it was therefore a dramatic piece. Then the case of *Clark* v. *Bishop* (*ubi sup.*) was cited, where a song called "Come to Peckham Rye" was held to be a dramatic piece, the performer, as Kelly, C.B. said, "by his powers of singing, acting, and characterisation, had made the song a thing of value, not as a song merely, but as acted by him in character, and so a dramatic piece." And lastly the case of *Roberts* v. *Bignell* (*ubi sup.*), in which a song called "Oh! Jenny Dear," was held by Day and Wills, JJ. to be a dramatic piece "presented as it was in the particular instance." It is not necessary to determine whether each of these cases was rightly decided, or whether the reasons given in each for holding the song to be a dramatic piece are satisfactory. Every case must depend upon its own attendant circumstances. In each case it is a question of fact. I think that, to constitute a song a dramatic piece, it must be such a song as, for its proper representation, acting and possibly scenery form a necessary ingredient, and that if neither of these be a requisite to the efficient representation of the song, it is not a dramatic piece. It is an entire misnomer to call a mere common, ordinary music-hall song, which requires neither acting nor scenery for its production, a dramatic piece, for it is in truth nothing of the kind. In my judgment, as a matter of fact, this song "Daisy Bell" is not a dramatic piece. If it were, every boy in the street who sang it would be liable to be proceeded against for having performed a dramatic piece without the written consent of the author, which is wholly untenable. No case was made as to the character of the entertainment at the Blackpool Winter Gardens at which "Daisy Bell" was sung. The point made before us was, that the court was bound to hold that, if a person sang "Daisy Bell," no

matter how or where, he was liable to penalties and double costs, because it was a dramatic piece which he had performed. This is not so, and cannot be so. In my judgment the plaintiff's case fails upon both of the grounds above mentioned, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Smith* and *Gofton*.
Solicitor for the respondents, *W. H. Hudson*.

July 10 *and* 11.

(Before Lord ESHER, M.R., KAY and SMITH L.JJ.)

MEUX *v.* THE GREAT EASTERN RAILWAY COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Railway company—Luggage brought to station by passenger—Property of third person—Duty of railway company—Negligent act of company's servant—Liability of company to owner of property.

A servant brought to the station of the defendant railway company as his personal luggage a box containing liveries, the property of his master, but provided for the servant's use, and took a ticket for himself. The liveries were injured by the negligent act of the defendants' servant.

Held (reversing the judgment of Mathew, J.), that the master was entitled to recover damages from the defendants for the injury to his property caused by the negligent act of the defendants' servant.

THIS was an appeal by the plaintiff from the judgment of Mathew, J., at the trial without a jury in Middlesex.

The plaintiff brought this action against the defendant railway company to recover damages for injury to certain liveries belonging to the plaintiff caused by the negligent acts of the defendants' servants.

For the purposes of this action the following facts were admitted by the defendants:—That the liveries were the property of the plaintiff; that such property was handed in to the custody of the defendants' servants by F. Harrer, C. Slade, and J. Wilson, three servants of the plaintiff, or by one of them, at Waltham Cross station, on the 5th June 1894, to be carried by the defendants by the 3.40 p.m. train for Liverpool-street, as passengers' luggage; that such property was overturned in front of the said train, and the same was damaged, and became useless to the plaintiff; that the said F. Harrer, C. Slade, and J. Wilson were passengers by the said 3.40 p.m. train from Waltham Cross to Liverpool-street, on the 5th June 1894, and were travelling as the servants and upon the request of and at the expense of the plaintiff. These liveries were provided for the use of these servants of the plaintiff.

The action was tried before Mathew, J. without a jury.

J. Alderson Foote for the plaintiff.

Jelf, Q.C. and *F. H. Coller* for the defendants.

MATHEW, J.—I think this case is a perfectly clear one without reference to the copious authorities, with the whole of which body of authority I entirely concur. I do not propose to discuss the cases, because it would be pedantry to do so. The first question is, whether there was any contract between the plaintiff and the defendants, the railway company, in respect of the property in question. It is agreed that the property in question were liveries belonging to the plaintiff; and she supplied her servants with money to take tickets and proceed by the railway. The contract made by the railway company was clearly a personal contract with those to whom the tickets were issued, and that contract was upon the terms that each passenger should be entitled to carry a certain quantity of personal luggage. That is the only contract entered into by the company, and it is confined to the individuals to whom the tickets are issued. The plaintiff now says that the undisclosed principal may come forward, and that the undisclosed principal in this case is Lady Meux who found the money for the tickets, and whose property was confided to the care of the servants. But the principle as regards an undisclosed principal does not apply in this case, because the contract made by the railway company was a personal contract with the servant in each case; that is to say, an undertaking to carry the servant and his luggage. Then there is an alternative view of the matter put forward by the plaintiff, which it is endeavoured to support by copious citation of authority, namely, that where goods are lawfully upon the premises of a railway company, and it is shown that the servants of the company have been guilty of negligence, there may be a right of action in respect of those goods. The answer to that is, that these goods were not lawfully on these premises. They were there as the property of Lady Meux, and were being carried under the apprehension of the railway company that they belonged to the servants, who were the passengers on that occasion, and to nobody else. If such an action would lie, then possibly in every case A. could have his goods carried by B., and could subsequently sue on the ground that the contract was one to the benefit of which he was entitled to have recourse; he could say that the goods were properly there, and lawfully on the premises of the railway company, under the impression that they belonged to B., the passenger, and that he, A., was entitled to sue in respect of that. But the plain answer would be, that they were not lawfully on the premises as the property of A., but only as the property of B., and A.'s action would fail. My judgment must be for the defendants.

Judgment for the defendants.

The plaintiff appealed.

J. Alderson Foote for the appellant.—The defendants are liable to the plaintiff for the damage to her goods, because the damage was caused by the wrongful act of the defendants' servant towards the goods while they were lawfully on the defendants' premises and in their possession. If goods are in the possession of a railway company, and they do an injurious act to those goods, the owner of the goods has a right of action against the company, though there is no contract between him and the company:

Martin v. *Great Indian Peninsula Railway Company*, 17 L. T. Rep. 349; L. Rep. 3 Ex. 9;

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Austin v. *Great Western Railway Company*, 16 L. T. Rep. 320; L. Rep. 2 Q. B. 442;
Mears v. *London and South-Western Railway Company*, 6 L. T. Rep. 190; 11 C. B. N. S. 850;
Marshall v. *York, Newcastle, and Berwick Railway Company*, 11 C. B. 655;
Becher v. *Great Eastern Railway Company*, 22 L. T. Rep. 299; L. Rep. 5 Q. B. 241;
Alton v. *Midland Railway Company*, 19 C. B. N. S. 213;
Hayn v. *Culliford*, 40 L. T. Rep. 536; 4 C. P. Div. 182.

Where the injury is caused by a misfeasance, the person injured has a right of action for the tort, entirely independent of any contract:

Foulkes v. *Metropolitan District Railway Company*, 42 L. T. Rep. 345; 4 C. P. Div. 267; 5 Id. 157;
Hooper v. *London and North-Western Railway Company*, 43 L. T. Rep. 570; 50 L. J. 103, Q. B.;
Taylor v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 71 L. T. Rep. 596; (1895) 1 Q. B. 134;
Kelly v. *Metropolitan Railway Company*, 72 L. T. Rep. 551; (1895) 1 Q. B. 944.

Jelf. Q.C. and *F. H. Coller* for the respondents. —This claim is founded on contract, and was treated by Mathew, J. as a case of tort arising upon a contract. There was no contract between the plaintiff and the defendants, and therefore the plaintiff cannot sue upon any contract. The only tort which can be relied upon is one arising out of the contractual relation between the servant of the plaintiff and the defendants, and solely arising out of that contractual relation. The plaintiff, not being a party to that contract, cannot sue in respect of the tort arising out of it:

Alton v. *Midland Railway Company*, 19 C. B. N. S. 213.

This luggage was not lawfully upon the defendants' premises as the property of the plaintiff, but only, if at all, as the property of her servant who was the passenger. In *Hayn* v. *Culliford* (*ubi sup.*) the action was for a tort where there was no contract at all. The defendants owed no duty of any kind to the plaintiff. The mere fact of the plaintiff's property being at the station cast no duty upon the defendants towards the plaintiff. The duty of the railway company is in respect of a passenger's luggage only:

Great Northern Railway Company v. *Shepherd*, 21 L. J. 114, Ex.

If anyone could sue for this damage, it would be the servant for the damage done to him as bailee of the goods. There was no evidence of negligence on the part of the defendants' servants.

Lord ESHER, M.R.—In this case the plaintiff has brought an action against the railway company, upon the ground that her property was in the portmanteau, of which the servants of the railway company took possession, and dealt with in this way: One of the defendants' servants took it in order to put it into the train, and was carrying it along the station for that purpose. That was an active proceeding. The servant carried the luggage badly and carelessly, and so carelessly that it fell from the platform on to the line, and was injured. It seems to me that that was an active act on the part of the servant, and not a mere nonfeasance. It is suggested that there is no evidence of negligence. What happened in this case was unusual, and, in the absence of explanation, that is evidence to show that there was negligence. We ought to assume, therefore, that the act was done negligently. That is misfeasance, and not merely nonfeasance. The plaintiff says that, therefore, she has a right to sue. The answer of the railway company is, that the portmanteau was brought by a servant of the plaintiff, who took a ticket for himself to travel, and gave the portmanteau to a porter as his personal luggage, to be carried as personal luggage; that there was, therefore, a contract to carry it as personal luggage made with the servant alone, and with him personally and not on behalf of the plaintiff, who therefore was not a party to the contract; and that, if there was a breach of that contract, the plaintiff cannot sue. I think that that is quite true, because the portmanteau was taken as personal luggage, and accepted as personal luggage, and the contract with regard to it was made only with the servant personally. In my view that is so, because the portmanteau was taken to be carried as personal luggage. If it was not taken as personal luggage, but as other luggage, then the servant would have made a contract for its carriage on behalf of his mistress. This is often the case when a servant is sent in advance with a load of his master's luggage. If that luggage is paid for, and is not taken as personal luggage, then the servant makes a contract for his master, and, if there is any breach of that contract, under such circumstances, the master may sue in respect of any such breach. But if the servant takes his master's luggage as if it were his own personal luggage, then there is a contract with him alone, and he does not make any contract on behalf of his master, and the master cannot sue in respect of anything when the right to sue depends upon that contract. If, therefore, there was merely an omission to carry with sufficient care, or to deliver such luggage, amounting to a breach of the contract, the master cannot sue in respect of such breach. Now, does the fact that the master cannot sue upon the contract deprive him of a right which he would have had if there had been no contract at all? I think not. The existence of a contract with another person, as with the servant, cannot deprive the master of a right which he would otherwise have. When, therefore, is a person entitled to sue for such an act as was committed here, when no contract at all has been made with him? Is there not such a right existing in a person whose property is given into the possession of another person, or is put into such a position with regard to that other person that, if he does an act to the injury of the property, it must be wrongful? And is there anything in the existence of a contract to deprive him of that right? If luggage is taken to a train without the knowledge of the railway company, surreptitiously, then the company is not bound to take any notice of it, and the company is not liable for injury to it if the company does not know it is there. If it is placed openly on the company's premises to be carried, the company knows it is there and allows it to be there, and it must be a wrongful act on the part of the company to do any negligent or wrongful act to it, as, for instance, to throw it out. If the railway company takes up such

luggage and carries it, the company must do so with reasonable care. Under such circumstances, the company is liable if there is no contract, or a contract made with someone other than the owner, if they negligently injure the luggage. What authority is there to the contrary? I entirely agree with the judgment of Bramwell, L.J., in *Hayn* v. *Culliford* (*ubi sup.*), where he says: "If then there is a contract between the plaintiffs and the defendants, the defendants are liable. So also if there is not. For, if so, the case is this: The goods were lawfully with the defendants' licence in their ship, and they tortiously so dealt with them that the goods were injured. It was found as a fact that the loading of the oxide was negligent. It was, therefore, wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say, intentionally, that it would injure the plaintiff's goods, it is clear they would be liable. But what difference does it make that they did it ignorantly? It may be asked where is the duty of care? I answer, that duty exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of, it is a misfeasance, an act and wrongful." He uses the word "lawfully" to contrast it with the word "tortiously." but the proposition would have been equally good without it, for the goods were there with the defendants' licence. That is a sound doctrine, and seems to me to be stated also in *Foulkes* v. *Metropolitan District Railway Company* (*ubi sup.*) by Bramwell, L.J., who there says: "But, further, though the contract were with the South-Western, the plaintiff is entitled to recover from these defendants. In that case there would be no duty of contract, and, consequently, no cause of action for a nonfeasance. But there would be that duty which the law imposes on all, namely, to do no act to injure another." There, again, the distinction is drawn between an omission and a wrongful act or misfeasance. In both cases it is said that the right of the person injured is independent of contract, and arises from a breach of the duty imposed by the fact of dealing actively with the property. If the railway company so deals with the property as to injure it they are liable. Those are authorities for the proposition which I have stated, and principle goes with those authorities. As to the case of *Alton* v. *The Midland Railway Company* (*ubi sup.*), I think that that case does not touch this matter at all; it was decided on demurrer, and therefore decides only the point which was raised and argued. I think that it does not contradict at all what I have said as to the right of action in such a case as this. This right is not dependent upon contract, and is not taken away by the contract made with the servant. I am of opinion that the judgment of Mathew, J. was wrong, and that this appeal must be allowed.

KAY, L.J.—This action is brought by the plaintiff to recover damages for injury done to her property by the Great Eastern Railway Company. That property consisted of liveries belonging to her, and then in the possession of her servant, who was about to be a passenger in a train on the defendants' railway. The plaintiff was a passenger by that train, and it seems that the servant took these liveries as his own personal luggage. Undoubtedly these liveries were the property of the plaintiff. The liveries were damaged, and the plaintiff sues in respect of her property in the liveries. The damage was done through a servant of the defendants negligently dropping the portmanteau, which contained them, on to the railway line. That was an *act* of the defendants' servant, an act of commission, and an active interference with the luggage which was negligent and improper. There is no doubt here that the act complained of was not merely an act of omission or nonperformance, but was one of active commission. The law applicable to such facts is all summed up in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (*ubi sup.*). That was an action for personal injuries, and the general doctrine is thus stated in that case by Lindley, L.J.: "It appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon the following reasons. That which caused the injury was not an act of omission, it was not a mere nonfeasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All that the plaintiff would have to prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case." Smith, L.J. said: "It is not disputed that, as a matter of pleading, a plaintiff, for a cause of action such as the present, may declare in either contract or tort, but this is not the governing consideration. It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained while there by reason of the active negligence of the company's servants, whether he has a contract with the company or not; and he need not allege or prove any contract at all; he need only allege and prove that he was lawfully where he was, and was then injured by the active negligence of the company's servants, for this is sufficient to show a breach of that duty on the part of the defendants which is implied by law." The question there was, whether the action was one of tort, upon a question of costs, and it was treated as an action of tort, entirely independent of contract; that is, as an action for damages for an active tort. Here these goods were lawfully on the premises of the defendant company. The portmanteau was accepted as the personal luggage of the servant to be carried as such. It is impossible, therefore, to say that it was not lawfully upon the premises. The railway company could not have refused to carry it as passenger's luggage. This case is different from a case where the luggage belongs entirely to someone other than the passenger. The servant of the plaintiff was a bailee of the goods, and the luggage was consequently lawfully upon the defendants' premises. I express no opinion upon the question whether, if the goods were not the goods of the servant at all, but belonged entirely to someone else, they would be lawfully upon the defendants' premises. Whether the railway company could, under such circumstances, after accepting them as passenger's luggage, injure them and then say that they were not passenger's luggage, I need not say. There

are indeed some authorities that they would not be liable. These goods were lawfully upon the premises, and were injured by a negligent act, and the authorities are clear that the owner is entitled to sue in respect of that tort, because the railway company owed a duty to the owner not to damage the goods by any act. Mathew, J., therefore, came to a wrong conclusion upon the facts of this case, and the appeal must succeed.

SMITH, L.J.—I am of opinion that the judgment of Mathew, J. cannot be supported. He held that the plaintiff was not entitled to bring the action. The facts of the case are short and simple. The liveries were the property of the plaintiff, and were brought by her servant to the defendants' station as personal luggage belonging to him. The liveries were to be worn by him. By the active negligence of the defendants' servants those liveries were injured; it was not a case of mere nonfeasance. I am not going to decide whether the plaintiff's servant could recover damages, because of the case of *Claridge* v. *The South Staffordshire Tramway Company* (66 L. T. Rep. 655; (1892) 1 Q. B. 422), which may some day require further consideration. If the servant could have sued, he could have sued either upon contract or for a tort wholly independent of contract. Then arises the question, whether the plaintiff can sue. She has suffered damage because her property was destroyed while lawfully upon the premises of the defendant company. It is said that she cannot sue because there was no contract between her and the defendants. I agree that she cannot sue upon contract; but I say that she has an action of tort wholly independent of any contract, her goods having been lawfully upon the defendants' premises, and there injured by the negligent act of commission of the defendants' servant. The answer given to that is, that she cannot sue because there was a contract between her servant and the defendants. In my opinion, *Alton* v. *The Midland Railway Company* (*ubi sup.*) did not decide anything to the contrary of what I have stated to be the law. I tried, in *Taylor* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (*ubi sup.*), to explain that case. In *Alton* v. *The Midland Railway Company* (*ubi sup.*) the plea was that the plaintiff was not a party to the contract. There was a demurrer to that plea. The sole point was, whether the master could take advantage of the contract made with his servant, and recover damages from the railway company. In my opinion, that case is no authority for the proposition that the plaintiff cannot sue irrespective of any contract. The cases of *Hayn* v. *Culliford* (*ubi sup.*), *Marshall* v. *York, Berwick, and Newcastle Railway Company* (*ubi sup.*), *Taylor* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (*ubi sup.*), and *Kelly* v. *The Metropolitan Railway Company* (*ubi sup.*), are all authorities in favour of the right to sue. It is impossible, therefore, to say that the plaintiff is not entitled to recover, and this appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Upton* and *Britton*.
Solicitor for the respondents, *E. Moore*.

July 13 *and* 30.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

BAYNES AND CO. *v.* LLOYD AND SON. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Landlord and tenant—Lease—Implied covenant for title, or for quiet enjoyment—Determination of lessor's interest during term—Eviction of lessee.

If, in a lease by deed not containing any express covenant for title, or for quiet enjoyment, and not using the word "demise," there is to be implied a covenant for title or for quiet enjoyment, no action can be maintained upon the implied covenant if the lessor's interest determines during the term, and the lessee is thereupon evicted.

Quære, *whether any such covenant can be implied.*

THIS was an appeal by the plaintiffs from the judgment of Lord Russell, C.J., at the trial without a jury in Middlesex.

The plaintiffs brought this action against the defendants to recover damages for breach of a warranty of title, and in the alternative for breach of a covenant for quiet enjoyment, alleged to be implied in a lease.

The defendants were possessed of certain premises for a term of years which would expire on the 29th Sept. 1893.

By a lease under seal, dated the 31st March 1885, the defendants demised the said premises to the plaintiffs for a term of ten and a half years from the 25th March 1885.

The operative words of the lease were: "The landlords agree to let and the tenants agree to take." The lease did not contain any express covenant for title, or for quiet enjoyment.

After the expiration of the defendants' term on the 29th Sept. 1893, the superior landlord evicted the plaintiffs, who thereby lost the benefit of about two years of the term granted to them by the defendants.

At the trial, Lord Russell, C.J. gave judgment for the defendants.

The plaintiffs appealed.

English Harrison and *Leck* for the appellants.

Swinfen Eady, Q.C. and *H. Sutton* for the respondents.

Cur. adv. vult.

July 30.—The judgment of the Court was read by

KAY, L.J.—The plaintiffs sue in this action for damages for eviction from part of a house of which they were tenants to the defendants. The tenancy was created by a lease under seal, dated 3rd March 1885. The operative words of that lease were: the defendants "agree to let." The term was ten and a half years from the 25th March 1885. The defendants had only a leasehold interest, which expired on 29th Sept. 1893. The superior landlords, after that date, evicted the plaintiffs. The lease to the plaintiffs did not contain any express covenant for title, or for quiet enjoyment, nor was the word "demise" used in it. The plaintiffs insist that there should be implied a covenant for title, or, at least, for quiet enjoyment, and that such covenants, or one of them, was broken by the eviction by title paramount. These facts raise the following questions:

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

(1.) Can any covenant be implied in this case? (2.) If any, is such covenant for title, or only for quiet enjoyment? (3.) Is such implied covenant an absolute covenant, or is it the ordinary limited covenant? (4.) Whatever it was, did it not come to an end with the determination of the lessors' estate? With reference to the first question, the law is thus stated in Sheppard's Touchstone, at p. 165: "If one make a lease for years by the words 'demise' or 'grant,' and there is not contained in the lease any express covenant for the quiet enjoyment of the land, in this case the law doth supply a covenant for the quiet enjoying of it against the lessor, and all that come in under him by title during the term: . . . But where there is an express covenant in the deed for the quiet enjoying of the land, there the law will not make this implied covenant." The learned author goes on to say that, in the case of a lease for life reserving rent, the law creates a warranty against all men, and this notwithstanding a warranty expressed in the deed. *Nokes's case* (4 Rep. 80) is to the same effect. In this statement of the law three things are noticeable: (1) That the implication arises, not from the mere relation of landlord and tenant, but from the use of the words "demise or grant;" (2) that the covenant implied is for quiet enjoyment, not a covenant for title; and (3) that it is a limited covenant "against the lessor and all that come in under him by title." At p. 272 it is said that the most usual and proper words for making a lease are "demise, grant, and to farm let," but that other words, "whatever will amount to a grant," such as "give, betake, or the like," will make the lease; but it is not said that there is any implication of a covenant from any of these other words. In Comyn's Digest, Covenant, A. 4, it is stated that, in a lease for years, covenant lies upon the word "demisi" or "concessi," and covenant for rent on the word "reddendo" rent. In Viner's Abridgment, Covenant, F.: "Action of covenant lies upon the word demise or grant in an indenture of lease, though there are no other words comprehending a warranty in them." In Bacon's Abridgment, Covenant, B.: "There are some words which of themselves import no express covenant, yet being made use of in certain contracts they amount to such, and are therefore called covenants in law, and will as effectually bind the parties as if expressed in the most explicit terms; as, if a man makes a lease for years of land by the words concessi or demisi, these import a covenant." In *Nokes's case* (4 Rep. 80) it is said there is a covenant in law on the words "demise, grant, &c." All these citations are inconsistent with the view that a covenant can be implied from the mere relation of landlord and tenant, or from any words coustituting that relation other than the particular words referred to, and this state of the law seems to be recognised by the 8 & 9 Vict. c. 106, which, in sect. 4, provides that the words "give" or "grant" in a deed shall not in future imply any covenant at law, but does not take away that effect from the word "demise" in a lease for years. On the other hand, is cited a dictum of Parke. B., in *Hart* v. *Windsor* (12 M. & W. 68, 85): "It is clear that, from the word 'demise' in a lease under seal, the law implies a covenant, in a lease not under seal a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term, and the word 'let,' or any equivalent words (Sheppard's Touchstone, 272) which constitute a lease, have no doubt the same effect, but not more (Sheppard's Touchstone, 165, 167)." This dictum was cited in the judgment in *Mostyn* v. *West Mostyn Coal Company* (34 L. T. Rep. 325; 1 C. P. Div. 145). This statement of the law professes to be founded upon Sheppard's Touchstone; but in that book it is not said that the covenant is implied from any words sufficient to make a lease, only from certain words; nor does the implied covenant, according to that authority, extend to an eviction by title paramount, but is only the ordinary limited covenant for quiet enjoyment. In *Bandy* v. *Cartwright* (8 Ex. 913) the lease was by parol; it was held that a covenant for quiet enjoyment during the term could be implied, and further that such covenant was broken by a distress for a rent-charge, granted before the parol demise by a predecessor in title of the lessor, under whom he claimed by purchase. The reason for this decision is not given in the report. Probably, this parol lease was made by the word demise, or, in the absence of evidence, that was assumed to be the case. That decision was followed in *Hall* v. *City of London Brewery Company* (2 B. & S. 737). The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease. But supposing any covenant could be implied, according to Sheppard's Touchstone it is a covenant for quiet enjoyment only. This is also stated to be the law by Lord Eldon in *Iggulden* v. *May* (9 Ves. 325). In *Holder* v. *Taylor* (Hob. 12) a lease for years was made by the word *demisi* and the lessee brought an action of covenant against the lessor because, at the date of the lease, the lessor was not seised of the land, but a stranger. The lessee had not been ejected, but the court was of opinion that the action would lie, "for the breach of the covenant was in that the lessor had taken upon him to demise that which he could not, for the word demise imports a power of letting. . . . But, if it were an express covenant for quiet enjoyment, there perhaps it were otherwise." The case is very shortly reported, and the words quoted seem, in the former sentence, to intimate that the implied covenant is a covenant for title, but this is contradicted by the last words referring to an express covenant for quiet enjoyment as rebutting the implication. In *Burnett* v. *Lynch* (5 B. & C. 589, 609) it was said by Littledale, J. that the word demise "imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term." But he does not cite any authority for this. In *Line* v. *Stephenson* (4 Bing. N. C. 678; 5 Bing. N. C. 183), it is admitted, somewhat doubtfully, by Tindal, C.J., that the word demise may import a covenant for title as well as for quiet enjoyment; but it is put by Alderson, B., that it is a fallacy to say it would import two covenants; it imports one of which either want of title or eviction would be a breach. The case of *Stranks* v. *St. John* (16 L. T. Rep. 283; L. Rep. 2 C. P. 376) was referred to, in which there was an agreement in writing to let for seven years. This, by

8 & 9 Vict. c. 106, could not be a lease for seven years, because it was not a deed. It was therefore treated as an agreement to grant a lease by deed, under which the intended lessee would be entitled to investigate the lessor's title, if he had not waived that right. The action seems to have been brought by the lessor on an implied contract to make a good title, the breach alleged being that the lessor never had any right or title to let for the term. Willes, J., said, in his judgment, that a lease for years is really only a sale of land for that period, and all sales of land imply a stipulation that the vendor has a good title. But it is clear law that no action will lie against a vendor for damages for contracting to sell land to which he has not a good title (*Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, 31 L. T. Rep. 387; L. Rep. 7 H. L. 158, 210), except perhaps to recover the expenses to which the purchaser has been put in investigating such title. The case was tried on demurrer, and is not of any value in the present discussion. Then is the covenant absolute or limited? In *Andrew's case* (Leonard, 104) it was held to be limited, and that upon the covenant implied from the word "demise" an action would lie, if the lessor himself entered upon the lessee, but not if a stranger entered. This is consistent with the statement in Sheppard's Touchstone. On the other hand, in *Holder* v. *Taylor* (Hob. 12), the implied covenant seems to have been treated as an absolute covenant, broken by the fact that the lessor had no title at the date of the lease. This seems also to have been held, as already noticed, in *Bandy* v. *Cartwright* (8 Ex. 913). Sufficient citations have been made to show that, upon the first three questions, there is considerable conflict of authority. Upon the fourth question there is more uniformity. It seems to be settled that, if the lessor's interest determines during the term, and the lessee is thereupon evicted, no action can be maintained upon the implied covenant. In *Swan* v. *Stransham* (Dyer, 257*a*) the lease was made by tenant for life by deed using the words grant and demise. The lessor died during the term, and the remainderman entered and evicted the lessee. The action was brought upon the implied covenant; but it was held that the executors of the tenant for life should not be charged with this covenant in law because the covenant ends and determines with the estate of the lessor, and if it had been a covenant in fact expressed, or warranty of the term expressed, it would be otherwise. This was followed in *Adams* v. *Gibney* (6 Bing. 656). This is different to the ordinary limitation of an express covenant for title which, according to the Conveyancing and Law of Property Act 1881, is worded thus: "Notwithstanding anything by the lessor or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered." Such a limitation would prevent the lessor being liable for the want of title, in *Holder* v. *Taylor* (Hob. 12), or the interruption in *Bandy* v. *Cartwright* (8 Exch. 913), both of which were by title paramount, and would not have been a breach of a covenant so limited. In this case the Lord Chief Justice has followed the decisions in *Swan* v. *Stransham* (Dyer, 257*a*) and *Adams* v. *Gibney* (6 Bing. 656), which seem fully to support his judgment. The appeal must be dismissed. *Appeal dismissed.*

Solicitors for the appellants, *Lowless* and *Co.* Solicitor for the respondent, *Fishers.*

Aug. 1 *and* 2.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

ROBINS AND CO. *v.* GRAY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Innkeeper—Lien—Goods of traveller—Property of stranger—Knowledge of innkeeper.

An innkeeper has a lien upon all goods which are brought by a guest to the inn as his baggage, and are received as such by the innkeeper, though the goods are not, to the knowledge of the innkeeper, the property of the guest.

THIS was an appeal by the plaintiff from the judgment of Wills, J. at the trial without a jury in Middlesex.

The plaintiffs sued the defendant for detinue of certain sewing machines.

The defendant was an innkeeper.

In April 1894, one Green, a commercial traveller in the employment of the plaintiffs, who obtained orders and sold goods upon commission for them, went to stay at the defendant's inn for the purposes of his business. He stayed at the inn until the end of July.

The plaintiffs from time to time sent sewing machines and other articles to Green, at the defendant's inn, for the purpose of being sold to customers in the district.

Green became indebted to the defendant in respect of his board and lodging, and the defendant claimed to have a lien upon the sewing machines which had been sent to Green by the plaintiffs, and were at the inn.

The defendant had been told by the plaintiffs that the goods were their goods, before the sewing machines in question were sent to the inn, and before the debt in question was incurred.

At the trial before Wills, J., without a jury in Middlesex, the learned judge gave judgment for the defendant.

The plaintiff appealed.

Arthur Powell and *Guy Granet* for the appellants.—An innkeeper has no lien upon goods brought to the inn by a guest, which are the property of another, if he knows that they are not the property of the guest. An innkeeper has a lien upon the goods of his guest, because he is bound to take them in and keep them safely. Therefore, he has no lien if the goods do not belong to the guest, and he knows it, because then he need not take them in:

Johnson v. *Hill*, 3 Stark. 172;
Turrill v. *Crawley*, 13 Q. B. 197.

The innkeeper has a lien only upon goods which the guest brings "as his own":

Broadwood v. *Granara*, 10 Exch. 417.

If the innkeeper knows the goods do not belong to the guest, they are not brought as the goods of the guest:

Threfall v. *Borwick*, 32 L. T. Rep. 95; L. Rep. 10 Q. B. 210;

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Mulliner v. *Florence*, 38 L. T. Rep. 167; L. Rep. 3 Q. B. Div. 484;
Gordon v. *Silber*, 63 L. T. Rep. 283; L. Rep. 25 Q. B. Div. 491.

In all the above cases the question of the ownership of the goods and of the knowledge of the innkeeper was considered to be material. In *Robinson* v. *Walter* (3 Bulstr. 269), which case the defendant relies upon, it was only said that an innkeeper has a lien upon the horse of a stranger for the keep of the horse, and not for the debt of the person who brought the horse to the inn.

W. E. Hume Williams, for the respondent, was not called upon to argue.

Lord Esher, M.R.—I have had no doubt about this case from the beginning. I decline to disturb a well-known and very large business, which has been carried on for centuries, upon any new discovery as to the rights of innkeepers. The rights, duties, and liabilities of innkeepers are founded, not upon any bailment, pledge, or contract, but upon the custom of the realm with regard to innkeepers, and upon no other law. What are the liabilities of an innkeeper? If a traveller comes to an inn, and brings his luggage with him—I do not mean merely personal luggage—the innkeeper is bound to take in both him and the luggage which he brings with him. The innkeeper cannot discriminate and say that he will take in the traveller but not the luggage. Up to this time it has never been suggested that he can so discriminate, and refuse to take in the luggage. If the traveller brought with him something unusual and unreasonable, such as a tiger or a quantity of dynamite, the innkeeper would not be bound to take in either him or his luggage. The custom of the realm is that, unless there is good reason to the contrary, the innkeeper must take in a traveller and the goods which he brings with him. He is not bound to inquire as to the goods, nor is the guest bound to answer any such inquiries. If, upon being asked, the guest says that the goods are not his property, but that he is bringing them with him as his luggage, and insists upon their being taken in, the innkeeper is bound to take them in. If the goods are of such a kind or of such quantity that the innkeeper is not bound to take them in, but the guest asks him to take them in as his travelling luggage and the innkeeper consents, then they are taken in under the custom of the realm. If the goods are taken in under the custom of the realm, the liability of the innkeeper is to keep them safely, and if they are lost or stolen, unless by the fault of the guest, the innkeeper is liable. In respect of this obligation to receive, and the liability for safe keeping, the innkeeper has a lien upon the goods for the expenses of the guest and of keeping the goods. Not by virtue of any contract or bailment, but by virtue of the custom of the realm, the innkeeper has a lien as against the true owner of the goods, and not as against the guest only. That has been the law of England for centuries. From some of the expressions of judges, and questions left to juries, in some cases, which I think were immaterial, it has been argued that if the goods do not belong to the guest, and the innkeeper knows it, he may refuse to take in the goods, or may take them in not as being luggage of the guest. That cannot be so. If such goods are taken in, the guest is entitled to deal with them in the inn as if they were his own, and they are not in the exclusive possession of the innkeeper. Is there any case in the books where it has been held that, where goods are brought by a traveller as his luggage, and taken in by the innkeeper as the luggage of the guest, though the innkeeper knew they were not the guest's property, the innkeeper has no lien and no liability? There is not a single case of that kind. That, I think, is conclusive. It has been argued that *Broadwood* v. *Granara* (*ubi sup.*) was such a case. But that case decides only that, if a guest brings goods as his own, they are to be treated as his own. By the expression "as his own" is meant brought and received as if they were his own luggage. In *Broadwood* v. *Granara* (*ubi sup.*) the piano was not brought to the inn as luggage at all, but only to be used by the guest while he stayed at the inn. It was not offered to, or taken by, the innkeeper as an innkeeper. That case was decided expressly upon the ground that in such a transaction the law of innkeeper and guest did not apply. That case, therefore, is not in point here, where the goods were brought and received as if they were the baggage of the traveller. The law rests simply on the custom of the realm as to goods brought by a guest to an inn as luggage with which he is travelling, and the question of ownership is utterly immaterial, and the knowledge of the innkeeper does not signify at all. The decision of Wills, J. was right, and the appeal must be dismissed.

Kay, L.J.—I am of the same opinion. The plaintiffs are the owners of some sewing machines, in respect of which they have brought this action of detinue. The defendant is an innkeeper; the goods in question came into his possession as the goods of a guest, and he says that he has a lien upon them for the amount of the guest's bill. To that it is answered that he knew that the goods were not the guest's but belonged to the plaintiffs. The question is, whether that is a good answer. The facts are shortly these: A traveller of the plaintiffs took some sewing machines with him, and went to the defendant's inn; while he was there other sewing machines were sent to him to sell, that is, for the same purpose as he had taken the other machines with him. These sewing machines were detained by the innkeeper, who says that he has a lien upon them. I agree entirely with the opinion of Wills, J. that it makes no difference that these machines were sent to the guest while he was at the inn. They were received by the innkeeper in just the same way as any luggage brought by a traveller, that is, as the goods of the guest. I do not mean as the property of the guest, for the innkeeper knew that they were not. I mean as goods of the guest, as intended in all the cases. There is not one case in the books where it is denied that an innkeeper has a lien upon the goods of a commercial traveller brought to an inn. That business has been carried on for a very long time, and is a very extensive business. All inns receive commercial travellers. Yet it has never been denied in any case that an innkeeper has a lien upon goods brought by a commercial traveller, though an innkeeper must know that they are not the property of the commercial traveller. Is there a single case in the books in which it has been denied that an innkeeper is liable for the safe custody of the goods,

because he knew that they were not the property of the traveller? There is not one. It is clear, therefore, that if a commercial traveller takes goods with him to an inn, which it is known are not his property, and the innkeeper takes him in with those goods which are the ordinary luggage of a commercial traveller, the innkeeper is liable for their safe custody in the same way as for the personal luggage of the commercial traveller, and that he has a lien upon them in the same way. The only point now raised is, whether the right of lien is defeated by the innkeeper's knowledge that the goods are not the property of the traveller. How does the innkeeper's lien arise? In *Robinson* v. *Walter* (*ubi sup.*) it is said that it arises from the general custom of the realm. There is, in that case, a distinct statement that this law of lien is founded upon the general custom of the land, and that an innkeeper is not bound to inquire to whom the goods, coming to the inn with a guest, actually belong, and that he is bound to receive them. Then, in the case of *Broadwood* v. *Granara* (*ubi sup.*), where the guest hired a piano for temporary use, and the innkeeper knew that was so, and allowed it to be brought to the inn for the temporary use of the guest, it was held that he had no lien. The ground of that decision is stated by all the judges thus: Pollock, C.B., says that "this is a case of goods, not brought to the inn by a traveller as his goods, either upon his coming to, or whilst staying at, the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that person. I shall not inquire whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose;" and Parke, B. says that, "it is not necessary to advert to the cases upon the subject of an innkeeper's lien, because this is not the case of goods brought by a guest to an inn in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It, therefore, seems to me that there is no pretence for saying that the defendant has any lien. The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn." As suggested by the Master of the Rolls, suppose that jewels are sent to a guest at an inn on approval, is it possible to say that the innkeeper has a lien in such a case? I think not, for the goods are sent to the guest for a special temporary purpose, and the innkeeper knows that, and therefore does not receive them as goods which a guest as a traveller would take about as his goods. Here the case is precisely the contrary. Here the goods were received into the inn as the sort of goods that this guest would take with him when travelling and an innkeeper would receive. We should effect a complete revolution in the custom of the land, if we were to hold that an innkeeper had no lien in such a case as this. I think that the innkeeper's right of lien does extend to such a case as this, and that the judgment of Wills, J. was right.

SMITH, L.J. — In this case a commercial traveller in the employ of the plaintiffs went to the defendant's inn, and took with him such goods as a commercial traveller would usually carry with him, and as an innkeeper would be bound to receive and take care of. Commercial travellers usually travel about the country with their employers' goods. What is the obligation of an innkeeper? He is bound to take in a commercial traveller with his baggage, and he is bound absolutely to keep the baggage safe. This obligation is imposed on the innkeeper by the custom of the realm. In consequence of that obligation a lien is given to the innkeeper by the custom of the realm. I cannot express that better than in the words of Lopes, L.J. in *Gordon* v. *Silber* (*ubi sup.*), where he says: "The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails in this respect. As compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title." I adopt that as good law, and believe it to be an accurate statement of the law. This point is now taken, that that statement of the law is correct, but does not apply if that which is brought by the guest to an inn as his baggage is not his property, but the property of his master, and that is known to the innkeeper. Is there any case which supports that contention? It is said that *Broadwood* v. *Granara* (*ubi sup.*) does. That case does not decide that point at all, because the property there in question was not brought to the inn by the guest as his luggage at all, but only for temporary use. The innkeeper therefore had no lien in that case, because he was not bound to receive the goods. Here all the goods were brought and received as baggage of the commercial traveller, which the innkeeper was bound to receive. The only question is, what is the custom of the realm? The law of pledge has nothing whatever to do with the question. It is true that, in some of the cases, the judges speak about the knowledge of the innkeeper; but there is not one decision upon that question. It is mentioned only because in those cases there was no knowledge. There is no authority to the effect that the lien which an innkeeper has by the custom of the realm is abrogated by the fact that the goods are not the property of the guest and that the innkeeper knows it. Suppose half the goods brought by a guest are his property and half are not, and the innkeeper knows it. I think that the innkeeper is bound to receive them all, and is subject to the same obligations as to all. I think that the judgment of Wills, J., was right, and must be affirmed.

Appeal dismissed.

Solicitor for the appellants, *W. Wilkins.*

Solicitors for the respondent, *Collyer-Bristow* and *Russell*, for *F. Hall*, Folkestone.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

May 22 *and July* 31.

(Before Lord RUSSELL, C.J. and CHARLES, J.)

ATTORNEY-GENERAL *v.* WENDT. (*a*)

Inland revenue—Duty on accounts—Personal and moveable "property"—Annuity to widow of deceased partner out of proceeds of business—Customs and Inland Revenue Act 1881 (44 *Vict. c.* 12), *s.* 38, *sub-sect.* 2 (*c.*)—*Customs and Inland Revenue Act* 1889 (52 *Vict. c.* 7), *s.* 11.

Under a covenant in a contract of copartnery the widow of one of the two partners became entitled, on the death of her husband, to be paid an annuity by the surviving partner out of the profits (if any) of the business—which, however, the surviving partner was not bound to carry on.

Held, that the annuity was "property" which "passed" to the widow under a voluntary settlement within the meaning of sect. 38, *sub-sect.* 2 (*c*) *of the Customs and Inland Revenue Act* 1881, *and sect.* 11 *of the Act of* 1889, *and was therefore chargeable with account duty.*

THIS was an information by the Attorney-General.

The facts as set out in the judgment of the court were as follows:

By a partnership deed of the 28th June 1886 Ernest Emil Wendt and William Arnold covenanted to enter into a partnership during their joint lives. The capital was to be 2000*l.*, contributed as follows, 1250*l.* brought in by Wendt and 750*l.* brought in by Arnold. The net profits were to be divided during the first five years in the proportion of seven-tenths to Wendt, and three-tenths to Arnold, and afterwards in the proportion of three-fifths and two-fifths respectively. Power was given in article 29 of the deed to Wendt to nominate his son to succeed to a proportion of his share not exceeding one-half, and in the case of such nomination it was provided that after the death of Wendt, Arnold and the son should each be entitled to a half share during their joint lives. Article 30 provided for the contingency (which occurred) of the son not being nominated, and authorised the executors or administrators of Wendt, in certain events which have since happened to sell his share to Arnold, "subject to the annuity hereinafter mentioned, such annuity being payable out of the gross profits of the business."

Article 34 provided that,

Upon the death of E. E. Wendt, W. Arnold, before he shall be entitled to divide and receive any share of the profits consequent upon such decease, shall execute and deliver to the executors and administrators of E. E. Wendt a bond in a sufficient penalty to pay the wife of E. E. Wendt out of the profits of the business a clear annuity of 700*l.*; and the same shall be paid and borne by and out of profits alone, and before any division of profits, provided always that if the profits to be divided in any year shall be less than 2300*l.* the annuity shall abate proportionately—that is to say, for every 100*l.* of divisible profits the annuity shall abate 20*l.*

Ernest Emil Wendt died on the 30th Nov. 1892, and W. Arnold had since bought E. E. Wendts' share in the business, and was still carrying the business on. The defendant, the widow, had from time to time received the annuity mentioned in article 34 out of the profits, and a bond had been executed by W. Arnold to secure its payment.

This information sought to have it declared that the annuity was property passing under a voluntary settlement such as to be liable to account duty under sect. 38, sub-sect. 2 (*c*) of the Customs and Inland Revenue Act 1881 (44 Vict. c. 12) and sect. 11 of the Customs and Inland Revenue Act 1889 (52 Vict. c. 7).

Sir *R. Reid* (A.-G.) and *Vaughan Hawkins* for the Crown.

E. Ford for the defendant.

The arguments of counsel sufficiently appear from the judgment.

July 31.—Lord RUSSELL, C.J. delivered the written judgment of the Court.—[After stating the facts as above set forth the learned judge continued:] In this case the Commissioners of Inland Revenue seek to charge the defendant, the widow of Ernest Emil Wendt, deceased, with account duty under the Customs and Inland Revenue Act 1881, s. 38, sub-sect. 2 (*c*), and the Customs and Inland Revenue Act 1889, s. 11. in respect of an annuity of 700*l.* payable to her on the death of Ernest Emil Wendt, under a deed of partnership between him and William Arnold, dated the 24th June 1886. Sect. 38, sub-sect. 2 (*c*), of the Act of 1881 (44 Vict. c. 12) enacts that personal and movable property liable to account duty shall be (amongst other property) "any property passing under any past or future voluntary settlement made by any person dying on or after the 1st June 1881, by any deed or other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property." Sect. 11 of the Act of 1889 (52 Vict. c. 7) enacts that sub-sect. 2 of sect. 38 of the Act of 1881 should be amended as follows: "The description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property' whenever the same occurs, included the proceeds of the sale thereof." The first question to be determined is, whether this annuity was given out of the estate of the testator. It was said that it was not, because it was payable out of the profit made after Wendt's death by Arnold in a business he was not bound in any way to carry on. We cannot assent to this view of the case. We think the annuity out of the profits of the business was, beyond all question, a part of Wendt's personal estate, of which he could dispose. He might, had he thought fit, have left his share in the business to trustees upon trust to pay the profit to his widow during her life. A gift of that kind would have been perfectly legitimate, and if he had made it he would in fact

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

have been dealing with the subsequent profits of the business for her benefit. But if he could give the subsequent profits to her, it follows that he could give her a share of those profits in the form of an annuity payable out of them. These profits and the annuity payable out of them were in truth the fruits of his interest in the business which had belonged to him. In *Thorley* v. *Massam* (64 L. T. Rep. 515; (1891) 2 Ch. at p. 627), Kay, L.J., in dealing with a similar question points out the undoubted power of a testator to dispose in favour of a legatee of the subsequent profits of a business, and that an annuity payable thereout is only a part of those profits. He puts the illustration of a testator owning an orchard of fruit trees: "Suppose he had said that he gave all the fruit of those trees for ten years after his death to A. He could have done that. The fruit would not have been existing in his lifetime, but nevertheless he would have had power to dispose of it, and in that sense it would have been his because it would have been the fruit of his estate: that which at the time of his death he could dispose of, giving a limited interest in it." Assuming then that this annuity was given out of the testator's estate, the next question is whether it was property passing under a voluntary settlement made by deed not taking effect as a will whereby a life interest in such property or an interest for any other period determinable by reference to death is reserved either expressly or by implication to the settlor: (44 Vict. c. 12, s. 38, sub-sect. 2 (*c.*) Now, as we have said, we regard this annuity as part of the testator's personal estate. It was, therefore, his "property"—a right to receive 700*l.* per annum from the profits of the business. By the partnership deed this, in our judgment, "passed" to the wife as soon as she became a widow. W. Arnold could have been compelled by the executors of E. E. Wendt to pay it. That she was a volunteer is clear, and by the Act of 1889 the settlement is none the less voluntary, though it be contained in a deed made for valuable consideration between the settlor and any other person. We adopt the observations of the court in *Attorney-General* v. *Chapman* (75 L. T. Rep. 119; (1891) 2 Q. B. 526), as to the meaning of the words "passed under" in this Act of Parliament. It is "not a phrase of art such as "devise," "grant," "estate in fee," and the like: but a phrase of a comprehensive nature which may be fairly used in respect not only of dispositions which are effected by the words of the instrument creating them, but of those which are effected by the subsequent execution of a power created by the instrument in question." The annuity, therefore, was "property," and property which "passed" under a voluntary settlement; and the only remaining question is, whether the settlor had reserved an interest in it within the meaning of sect. 38, sub-sect. 2 (*c.*) of the Act of 1881. We are of opinion that he did so. He reserved his whole interest in the business and the profits thereof, including this annuity, over which, as over the other profits arising from his interest in the business, he had during his lifetime entire control. It was further suggested that as the deceased was only entitled to three-fifths of the profits, the duty, if payable at all, was only payable on three-fifths of the annuity. But this contention seems to us to be untenable. The testator controlled the whole 700*l.* per annum, and what was the exact proportion of profit received by him as compared with his copartner is, we think, wholly immaterial. The conclusion, therefore, at which we arrive is that the Crown is entitled to the judgment of the court.

Solicitors: *Solicitor of Inland Revenue*; *Stokes, Saunders*, and *Stokes*.

May 22 *and Aug.* 3.

(Before Lord RUSSELL, C.J. and CHARLES, J.)

ATTORNEY-GENERAL *v.* LORD SUDELEY.(*a*)

Inland revenue—Will—Probate—Asset consisting of right to sue here for value of property situated abroad.

A. G. T. died domiciled in England, and by his will bequeathed to F. L. T. one-fourth of his residuary estate, part of which consisted of money invested in New Zealand. Before this money had been realised and the residuary estate distributed, F. L. T. died.

Held, that the right of F. L. T.'s executors to one-fourth of the property in New Zealand was not an asset in England, and therefore need not be included in the account of her estate for probate.

THIS was an information by the Attorney-General against the executors of Frances Louisa Tollemache, to charge them with duty upon certain property situated in New Zealand, which had been bequeathed to her by her husband. The facts of the case and the arguments of counsel sufficiently appear from the judgment.

Sir *R. Reid* and *Vaughan Hawkins* for the Crown.

Channell, Q.C. and *Bremner* for the defendant.

Cur. adv. vult.

Aug. 3.—The written judgment of the Court was delivered by

Lord RUSSELL, C.J.—This information sought to charge the executors of Frances Louisa Tollemache, with duty upon certain property in New Zealand, which had been bequeathed to her as part of the residuary estate of Algernon Gray Tollemache, her husband. He died on the 16th Jan. 1892, domiciled in England, and at the time of his death he possessed a large personal estate, including sums amounting to upwards of 400,000*l.* invested on mortgage of real estate in New Zealand. By his will dated the 31st Jan. 1874, after bequeathing certain specific legacies to his wife Frances Louisa Tollemache, and to others, he devised and bequeathed the residue of his real and personal estate to trustees upon trust to distribute it as provided in the will, and in six codicils thereto subsequently executed, and at the time of his death his wife became absolutely entitled by virtue of these testamentary dispositions to one-fourth of the residue. The executors and trustees of A. G. Tollemache proceeded to administer his personal estate, and pay probate duty upon it, excluding therefrom the personal property in New Zealand. Before the residue had been distributed, and whilst the estate was in course of being administered, Frances L. Tollemache died, leaving the defendants to this information her executors, and bequeathing to them

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

her personal estate upon trust for sale and conversion. The defendants proved her will in May 1893. They included as part of her estate the share of the residue of A. G. Tollemache's estate, exclusive of the New Zealand mortgages, which they claimed to leave entirely out of account. The estimated value of Mrs. Tollemache's fourth of the New Zealand property was upwards of 111,000*l.*, and it was upon this sum that the Crown now sought to recover duty. Whilst admitting that the executors of A. G. Tollemache had rightly excluded the New Zealand property from their return, it was contended that the share of Frances L. Tollemache in the whole of the personal estate of A. G. Tollemache (including the money invested in New Zealand mortgages), was an asset of her estate recoverable by her executors in England *virtute officii*, and that they ought therefore to take probate of that asset here, and pay duty on the full value thereof, notwithstanding that some of the assets of A. G. Tollemache (those already mentioned) were not locally situate in this country. The claim of the Crown was mainly rested upon the authority of the case of *In the Goods of Ewing* (44 L. T. Rep. 278; 6 Prob. Div. 19). There William Ewing died possessed of property of small value in England, and entitled under the will of John Orr Ewing to large assets in Scotland, which were being duly administered in that country by his executors who had availed themselves of the provisions of the 21 & 22 Vict. c. 56, which enables the executors of a domiciled Scotchman to include in the inventory of his effects all his property wherever situate in the United Kingdom. The will of William Ewing was proved in Scotland only. A legatee under the will having applied in England for a grant of administration of William Ewing's estate in England, the court declined to accede to the application on the ground that the grant was unnecessary, it not having been shown that the executors were not doing their duty. It will thus be seen that in expressing the opinion presently mentioned the president, Sir James Hannen, was not pronouncing judgment on a point which it was necessary to decide. He says: [His Lordship read from the judgment of Sir J. Hannen, on p. 22, of 6 Prob. Div. beginning, "The main ground on which this application has been based" . . to "have his estate duly administered" on p. 24, and continued:] Now applying these dicta to the present case it was on the part of the Crown submitted that they established the proposition contended for by the Crown. Algernon Gray Tollemache's executors were it was said in the same position towards Frances Louisa Tollemache's executors as was occupied by John Orr Ewing's executors, and just as *In the Goods of Ewing's* case, William Ewing's executors' asset was the right to sue for his legacy in Scotland, so here the asset of Frances L. Tollemache's executors was the right to sue the executors of Algernon G. Tollemache in England. With great respect for any dictum of that very learned judge, Sir James Hannen, we cannot accept this as a correct statement of the law. Moreover that case differs in one material particular from the present. In *Ewing's* case the executors of William Ewing could not only have sued the executors of John Orr Ewing for his share, but could have recovered it without any probate under the 21 & 22 Vict. c. 56. In the present case it is true that the executors of Frances Louisa Tollemache could claim an account in any action here against the executors of A. G. Tollemache, but they could not recover her share in the New Zealand estate without recourse being had on their behalf by the executors of A. G. Tollemache to the courts of New Zealand to clothe themselves with the legal title to the residuary estate which it was their duty to distribute. The New Zealand estate remained a foreign asset in the hands of the executors of A. G. Tollemache, as trustees for the executors of Frances Louisa Tollemache, as to her share in it, and at the time of her death it was not within the jurisdiction of the English courts. Her executors could not have recovered it here *virtute officii*; it was no portion of her estate in England, and the general rule of law appears to be applicable by which the amount of probate duty is to be regulated not by the value of all the assets which an executor or an administrator may ultimately administer by virtue of the will and letters of administration, but by the value of such part as is at the death of the deceased within the jurisdiction of the court by which the probate is granted: (see Williams on Executors, 9th edit., vol. 1, p. 542.) The reason of the rule is that probate duty only attaches on assets within the jurisdiction of the Ordinary at the time of the testator's death, which he would formerly have had himself in case of intestacy, and which must therefore be so situated that he could have disposed of them *in pios usus*. Thus, it has been held that no probate duty is payable upon the produce of the sale of French Rentes standing in the testator's name at the time of his death, although afterwards brought to England and received by the executor: (see *Attorney-General* v. *Dimond*, 1 Cr. & J. p. 356.) It was pointed out by the Court of Exchequer in that case that probate duty could not have been granted in respect of these Rentes because at the time of the death of the testator they were in a foreign country, and consequently out of the jurisdiction of the Spiritual Court, and the distinction was drawn between the liability to probate and to legacy duty, and it was pointed out that it is not the administration of assets which renders probate duty payable, but the local situation of the assets at the testator's death. In *Attorney-General* v. *Hope* (2 Cl. & Fin. p. 84) the same principle was applied to United States stocks, the Lord Chancellor stating in the course of his judgment that he had made inquiries "of very learned authorities, two very competent authorities, one the learned judge of the Prerogative Court, and the other the King's Advocate, and that they both confirmed the view he took of the Ordinary's office, a view which limited the scope of the Ordinary's jurisdiction to goods of a deceased person within the diocese at the time of the death." Facts similar to those in the present case, raising the same points or similar points, must have been of frequent occurrence, and the absence of any authority except the dictum referred to, tells strongly against the present contention of the Crown, for there is no ground for saying that duty has been usually paid here in such circumstances as the present. We are, therefore, of opinion that the share of Frances L. Tollemache, in the mortgage securities in New Zealand is not an asset of her estate in England, and that her executors are not compellable to take

probate in respect thereof. They have, it may be observed, already paid administration duty on the estimated value of the share in the colony where it is locally situate. The mere right to sue the executors of Algernon Tollemache in this country for an account and for payment of the share does not in our judgment alter the character of the asset. It remains a foreign asset of which the executors could not possess themselves without the intervention of the Colonial court. Our judgment, for these reasons, is for the defendants with costs.

Solicitors: for the Crown, *Solicitor of Inland Revenue*; for the defendants, *J. A. Bertram.*

House of Lords.

May 3, 6, *June* 18, 24, *and July* 24.

(Before the LORD CHANCELLOR (Herschell) (*a*). Lords WATSON, MACNAGHTEN, and SHAND.)

CHAMBER COLLIERY COMPANY *v.* ROCHDALE CANAL COMPANY. (*b*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Canal—Mines adjacent to canal—Right of support—Compensation for not working mines—Injury to canal—Conveyance of minerals under lands adjacent to canal—Construction.

By a private Act of Parliament, by which the respondents were empowered to make a canal, it was provided that if the owner of a mine should work so near the canal as in the opinion of the proprietors of the canal to endanger it, or in the opinion of the mine-owner to endanger the further working of the mine, the party whose property was endangered might initiate proceedings for restraining the further working of the mine, and for assessing compensation for the coal to be left for the support of the canal.

The appellants, who were the owners of coal adjacent to the respondents' canal, gave notice that they were in a position to work it, and that in their judgment such working would injure the canal, and that they were willing to treat for compensation for such coal as was proper to be left for the security of the canal. The matter was referred to an arbitrator, who found that there was no reasonable ground for supposing that the further working of the mine would injure the mine, or that it would interfere with the navigation of the canal, but that it might cause a subsidence, which would necessitate some repairs to the canal in the course of the next few years.

Held, that, no danger to the mine being apprehended, the appellants were not in a position to initiate proceedings for compensation under the Act.

Knowles *v.* Lancashire and Yorkshire Railway Company (61 *L. T. Rep.* 91; 14 *App. Cas.* 248) *distinguished.*

Judgment of the Court of Appeal affirmed.

Where a conveyance conveyed certain lands together with the mines and minerals "under the said lands," and the lands were intersected by a canal, which did not pass by the conveyance:

Held, that, in the absence of express words, the minerals under the canal did not pass.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Kay and Smith, L.JJ.) reported in 71 L. T. Rep. 535; and (1894) 2 Q. B. 632, who had reversed a decision of the Divisional Court (Cave and Wills, JJ.) setting aside the award of a special referee.

The facts are fully set out in the judgment of their Lordships, where the sections of the respondents' special Act also appear.

Sir *R. Webster*, Q.C., *Clare*, and *Tweedale*, appeared for the appellants, and argued that the statute never contemplated an award of this nature, but only that a jury should find as a fact what amount of coal ought to be left to support the canal, and that was all that the arbitrator had to do, to decide what amount of coal ought to be left, and its value. The offer made by the canal company is quite inadequate. The canal company cannot bind their successors, or third parties, to acquiesce in workings by the appellants which are forbidden by the Act of Parliament. The words of the sections are identical with those which were considered in the cases of

Cromford Canal Company v. *Cutts*, 12 L. T. Rep. O. S. 235: 5 Railway Cas. 442; and

Knowles v. *Lancashire and Yorkshire Railway Company*, 61 L. T. Rep. 91; 14 App. Cas. 248.

It was decided, in the case of *Rochdale Canal Company* v. *Radcliffe* (18 Q. B. 287), that this canal was constructed for the public benefit, and no arrangement made by the company can get rid of the right of the public. See

Ayr Harbour Trustees v. *Oswald*, 8 App. Cas. 623;

Staffordshire Canal Company v. *Birmingham Canal Company*, 11 L. T. Rep. 647; L. Rep. 1 H. L. 254;

Mulliner v. *Midland Railway Company*, 40 L. T. Rep. 121; 11 Ch. Div. 611;

Benfieldside Local Board v. *Consett Iron Company*, 38 L. T. Rep. 530; 3 Ex. Div. 54;

Spencer v. *London and Birmingham Railway Company*, 8 Sim. 193.

Sir *H. James*, Q.C., *J. Walton*, Q.C., and *MacSwinney*, for the respondents, contended that this case did not fall within the statute at all. The arbitrator has found that there is no prospect of danger to the mine from the further workings, and the appellants have no *locus standi*. The coal under the canal does not belong to them. *Knowles'* case (*ubi sup.*) and the *Cromford Canal* case (*ubi sup.*) are distinguishable.

Sir *R. Webster*, Q.C., in reply, referred to *Elliott* v. *North-Eastern Railway Company* (10 H. of L. Cas. 333) and *London and North-Western Railway Company* v. *Evans* (67 L. T. Rep. 630; (1893) 1 Ch. 16), and on the question of the title to the coal under the canal to *Doe d. Pring* v. *Pearsey* (7 B. & C. 304), and *Micklethwait* v. *Newlay Bridge Company* (55 L. T. Rep. 336; 33 Ch. Div. 133), and on the question of costs to *Reg.* v. *Biram* (17 Q. B. 969).

At the conclusion of the arguments, their Lordships took time to consider their judgment.

July 24.—Their Lordships gave judgment as follows:

Lord HERSCHELL.—My Lords: The appellants are owners of mines lying under land adja-

(*a*) Before the arguments were concluded Lord Herschell resigned the office of Lord Chancellor.

(*b*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

cent to the Rochdale Canal, of which the respondents are the proprietors. The appellants also allege that they are the owners of minerals lying under a portion of the canal. The canal was made under the powers conferred by an Act of Parliament passed in 1794. Sect. 39 of that Act provided that nothing therein contained should extend to prejudice or affect the rights of the owner of any lands in or through which the canal, cuts, or reservoirs, or any towing paths, wharfs, &c., should be made, to the mines and minerals lying within or under the lands to be set out or made use of under the Act, but that all such mines or minerals should be reserved to the owner of such lands, and that it should be lawful for him, subject to the conditions and restrictions therein contained, to work, get, and carry away such mines and minerals, "not thereby injuring, prejudicing, or obstructing the said canal, cuts, and reservoirs, towing paths, wharfs, quays, trenches, sluices, watercourses, or other conveniences aforesaid, or any of them." The 40th section is as follows: "Provided also that, if the owner or worker of any coal or other mine or mines shall, in pursuing or working such mine, work near to or under the said canal, cuts, and reservoirs, or any of them, so as in the opinion of the said company of proprietors to endanger or damage the same, or in the opinion of the owner or worker, owners or workers, of the said mine or mines, to endanger or damage the further working thereof, then it shall be lawful for the said company of proprietors to treat and agree with such owner or worker for all such coals and other minerals as may be near or under the said canal, cuts, and reservoirs, or any of them as shall be thought proper to be left for the security or preservation of the said canal, cuts, and reservoirs, or any of them; and in case the said company of proprietors, and such owner or worker of such mine or mines, shall disagree touching the satisfaction to be made for such coal or other minerals, then it shall be lawful for the said commissioners, at the request of the said company of proprietors, or of such owner or worker of such mine or mines, to cause a jury to be summoned and impanelled in the matter herein directed, who shall—and they are hereby authorised and required—by such ways and means as aforesaid to assess and determine what satisfaction such owner or worker of such mine or mines ought to have and receive from the said company of proprietors, on being restrained from working such mine or mines, and upon payment or satisfaction made to such owner or worker of such mine or mines by the said company of proprietors according to the verdict or judgment of such jury, such owner or worker of such mine or mines shall be, and is hereby, perpetually restrained from working such mine or mines within the limits for which satisfaction shall be by the said jury adjudged and declared to extend." In December 1890 the appellants gave the respondents notice that they were in a position to work and get the mines and minerals shown on an annexed plan, and in pursuance of working such mines and minerals would work near the canal, and that they were of opinion that the further working and pursuing such mines would endanger and damage the canal within the meaning of the statute, and, further, that they were ready and willing to treat and agree with the company for all such coals and minerals under the canal as should be proper to be left for the security and preservation thereof, and that in case they and the proprietors of the canal should fail to agree as to the amount of satisfaction payable for the said coals and minerals, then the colliery company would require the proprietors of the canal to take all such steps as might be necessary and proper for the purpose of having such satisfaction ascertained. The respondents declined to treat for the coal, or to take any steps for the purpose of having the compensation payable to the appellants in respect of the coal being left unworked ascertained. The appellants thereupon brought this action, claiming to having it declared that the appellants were entitled to have ascertained what portions of the mine specified in their notice ought, having regard to the 39th and 40th sections of the Act of 1794, to be left by them, and what compensation was payable to them in respect of the said portions of the mine. They further claimed that the portions of the mine so to be left, and the amount of compensation so payable, might be ascertained and declared, and that the defendants might be ordered to pay to the appellants the amount of such compensation when ascertained. The action was referred to an arbitrator, who found that there was no reasonable ground for apprehending that the working of the mines near and under the canal would cause damage to the mines or to the further working thereof by percolation of water from the canal to the mines, but that the effect of working the mines within the pillars set out by him in broken red lines on a plan annexed to the award would be to cause a subsidence of the canal between the parts marked thereon A and C. He further found that such subsidence would not interfere with the navigation of the canal, but would necessitate repairs from time to time during a period of from eight to ten years to the towing-path and banks of the canal, and probably to the bridges at A and B on the plan, and that the cost of such repairs would be substantial, but would not be likely to exceed in the whole 1000*l.* or 1200*l.* He was of opinion that the appellants on leaving unworked the pillars set out in broken red lines upon the plan were entitled to be paid compensation by the defendants for the adjacent support so afforded, and assessed such compensation at 12,688*l.* Both parties appealed to the Queen's Bench Division against the award of the arbitrator, the appellants insisting that they were entitled to a further sum as compensation in respect of the coal under the canal, which the arbitrator had, erroneously, as they alleged, found not to be their property, the respondents maintaining that they were not liable to pay any of the compensation assessed, or that it ought, at all events, to be reduced by a sum of 1150*l.* mentioned in the award. The Divisional Court were of opinion that the appellants were the owners of the coal under the canal which they claimed as theirs, and also that they were entitled to the compensation assessed by the arbitrator, subject to the deduction of the sum of 1150*l.* I defer dealing with the subordinate points for the present, and shall confine myself to a consideration of the main question in controversy, which arises upon those parts of the award to which I have called attention. The respondents appealed against the judgment of the Divisional Court.

The Court of Appeal, on the respondents undertaking by their counsel that they would not object to the working of the coal under or near the canal between the points marked A and C on the plan referred to in the award, and that they would at their own expense repair any damage that might be done to the canal or banks or towing-path by reason of such working, and that they would not make any claim on the colliery company in respect of such damage, ordered that the appeal should be allowed, and that the order of the Queen's Bench Division should be discharged, and the award of the arbitrator set aside. The main question to be determined is the effect of sects. 39 and 40 of the Act of 1794. Precisely similar sections in another canal Act came under the consideration of this house in the case of *Knowles* v. *Lancashire and Yorkshire Railway Company* (61 L. T. Rep. 91; 14 App. Cas. 248). The appellants contend that the judgment in that case established that even although the mines under or adjacent to the canal would not suffer from the working of minerals in its neighbourhood, yet if, as was found to be the fact in the present case, the canal or towing-path would be prejudicially affected in case the minerals were worked out, so much of them must be left as was necessary for the support of the canal and towing-path, and that the appellants were entitled under the Act to receive compensation in respect of the coal which would thus remain unworked. In the Court of Appeal the respondents do not seem to have much insisted that there was a distinction between the rights of the parties according as the coal proposed to be worked lay under or adjacent to the canal. In the argument at the Bar of your Lordship's house this distinction was made a prominent point in the respondents' argument. Admittedly, the greater part of the coal which has given rise to the dispute lies adjacent to and not under the canal. Whether the appellants own any coal under the canal is a matter in controversy which I shall consider hereafter. Meantime, I shall address myself only to the part of the case relating to the coal between the points A and B on the plan, none of which is under the canal. It appears clear that section 39 has no application to this coal, that section being in terms confined to the subjacent minerals. As regards these, there is a clear statutory prohibition of any such working of them as will injure or prejudice the canal or towing-path, and there is, therefore, a statutory liability imposed if these minerals are so worked as prejudicially to affect the canal or any of the accompanying works belonging to the proprietors. As regards the working of minerals adjacent to the canal, there is no corresponding prohibition or liability. In the case of *Knowles* v. *the Lancashire and Yorkshire Railway Company* the plaintiff's claim was for working coal under and near the canal and works whereby they had been injured. The defendants, before they worked the coal forming the subjacent and adjacent support of the canal, gave the plaintiffs notice that they were going to work it, and nothing was thereupon done by the plaintiffs. The contention on behalf of the defendants was that, as the plaintiffs did not proceed under the section corresponding to section 40, to have compensation for leaving the coal necessary for the support of the canal ascertained, they had no right to complain that the defendants had so worked as to injure the canal. This House affirmed the judgment pronounced in the courts below in favour of the plaintiffs. In the argument on behalf of the defendants in this House no distinction was drawn between subjacent and adjacent coal. It may probably have been the case that if the subjacent coal had been left, the working of the adjacent coal would have caused no subsidence. But, however that may be, the judgment of this house was rested entirely upon the express provisions of section 37 in the Act then under consideration, which corresponds with section 39 of the statute of 1794. The Lord Chancellor (Halsbury) pointed out that the plain words of the 37th section made the mine-owner liable if he caused injury to the canal, and that no reason for cutting down the plain meaning of the words could be derived from the enactment contained in the succeeding section. Lord Macnaghten took the same view. After referring to the words of section 37 he says:—"If these words are to have their ordinary meaning it cannot be disputed that the order under appeal is right. The appellants, however, contend that their meaning must be cut down and qualified." After discussing their arguments he proceeded thus:—"The condition on which the statute allows mines to be worked must be borne in mind. The section is framed on the supposition that the mine-owner keeps in view his statutory liability, and it is to be observed that in his case the damage and danger spoken of in the section are not damage and danger to the mine, but 'damage and danger to the further working of the mine.' It seems to me that the meaning of the section is this—the proprietors of the canal may apply to the commissioners if they apprehend damage or danger to the canal. On the other hand, when the working of a mine has reached a point at which the mine-owner finds that, having regard to the proximity of the canal and his statutory liability, he cannot work further without some danger, or cannot work further to the same advantage as he could have done if the canal were not there, then it is open to him to initiate proceedings, and he is entitled to receive satisfaction for such minerals as shall be thought proper to be left for the security of the canal or the mine." It is to be observed that, in the opinion of the noble and learned Lord, sects. 37 and 38 (in this Act 39 & 40) were to be read together, and that his judgment as to the liability of the mine-owner, and the right which he has to insist that the amount of compensation payable to him for the coal necessary for the support of the canal should be ascertained, is based on the statutory liability created by the earlier section. In a case, therefore, like the present, in which sect. 39 is inapplicable, and where there is no statutory liability in relation to the working of the coal, the entire reasoning of this House in the case of *Knowles* v. *The Lancashire and Yorkshire Railway Company* is equally inapplicable. What I have said with reference to *Knowles'* case applies also to the case before Lord Cottenham (*Crawford Canal Company* v. *Cutts*, 12 L. T. Rep. O. S. 235; 5 Railway Cas. 442). If your Lordships were now considering the question of subjacent coal, it might be a serious question whether the right which the appellants would have, according to the authority I have been discussing, to take proceedings for the purpose of obtaining an assessment

of the compensation, could be abrogated by a waiver on the part of the canal proprietors of the statutory prohibition contained in the 39th section and of the liability thereby imposed, and whether there was any legal power on their part, by undertaking or otherwise, to give effectual authority to the colliery proprietor to work his mines in a manner prohibited by the statute, and discharged from the liability which it imposes. In the present case, however, where your Lordships are dealing with the case of adjacent minerals, the 40th section is the only one which has to be considered. That section is not limited, like the 39th, to the subjacent minerals. It deals also with those adjacent. In the case of the latter, however, there is, as I have pointed out, no statutory prohibition of their being so worked as to affect the canal prejudicially. What, then, are the rights of the parties under the 40th section? That section is somewhat clumsily drawn, but I think that its meaning is tolerably clear. Either the canal proprietors or the mine-owners can initiate proceedings under that section if, in the opinion of the former, the working of the mine is likely to endanger the canal, or if, in the opinion of the mine-owner, it is likely to endanger or damage the further working of his mine. If such proceedings are initiated, and the parties are unable to agree, a jury is to determine the extent to which the working of the mines must be perpetually restrained for the security or preservation of the canal. In the case before your Lordships the canal proprietors have not invoked the operation of sect. 40. They are content to allow the appellants to work their adjacent minerals as they please. The appellants, on the other hand, claim the right to insist on receiving satisfaction, and being restrained from working some portion of their mines. The arbitrator found, as it must now be taken, correctly, that there was no reasonable ground for apprehending any damage to the mines from working within the area in controversy. Indeed, in the notice of Dec. 1890, to which I have already referred, the colliery company only stated that they were of opinion that the further working and pursuing of such mines would endanger and damage the canal within the meaning of the Act of Parliament. They did not allege that it would endanger or damage the further working of the mines. It is difficult, therefore, to see how they bring themselves within the 40th section. I should be unwilling to lay much stress on this if I were satisfied that the facts of the case would bring them within it, but I am unable to see that this is so. The further working of their mines is not endangered even in the broad sense which Lord Macnaghten gave to those words, inasmuch as they would be under no statutory liability if, owing to their working of the mines, the canal was affected. What right have they, then, under sect. 40, to institute proceedings and to insist that the canal proprietors shall, against their will, purchase sufficient coal to afford to their canal complete immunity from damage, when they are of opinion that it will be much more to their interests to suffer the comparatively trifling damage which seems probable, and which will not interfere with the navigation of the canal, than to bear the enormous cost of buying the coal required for rendering the canal secure from disturbance? It seems to me that the facts found by the arbitrator deprive the appellants of any *locus standi* under the 40th section. So far, then, as regards the adjacent coal between the points A and B, I think the appellants' case fails, and that the order of the Court of Appeal, if it erred at all, was unduly favourable to them. If the appellants could establish that they were the owners of the coal under the canal between the points marked B and C on the plan, they would bring themselves within the case of *Knowles* v. *The Lancashire and Yorkshire Railway Company*, and an entirely different question would arise. I proceed, therefore, to inquire whether the Queen's Bench Division rightly decided that the appellants had made out their title to this coal. In the view which the Court of Appeal took it was unnecessary for them to express any opinion upon this point. It depends upon the construction of a conveyance of the 1st Oct. 1866. The subject of the grant is thus described: "All and singular the messuages, lands, and hereditaments situate in the township of Chadderton respectively comprised in the schedule hereunder written." It seems abundantly clear, therefore, that nothing passed which was not comprised in that schedule. The schedule has three columns, the first headed "Number on plan," the second, "Names of fields;" the third, "Quantity." It contains a description of a number of meadows, gardens, &c., all of them (except two small pieces of nursery ground said to be in hand) being described as in the occupation of persons named. The acreage of each hereditament is given, the total acreage being stated as 188 acres, 2 roods, 5 perches. The following words are then added: "Together with all mines and minerals under the said lands or any part or parts thereof. All which lands intended to be comprised in this schedule are delineated in the map or plan drawn on the last skin of the above written indenture, and copied from the Tithe apportionment plan, and are therein coloured yellow, and numbered with numbers respectively corresponding with the numbers in the first column of this schedule, and in the book of reference to the said Tithe apportionment plan." It appears clear that no mines are conveyed except such as are under lands conveyed. The only description of the mines and minerals is that they are "under the said lands or any part or parts thereof." Where the surface is conveyed the mines are conveyed, not otherwise. There is, of course, no pretence for saying that any part of the canal was conveyed or intended to be conveyed. But then it is said that the lands intended to be comprised in the schedule are described as delineated on the plan and therein coloured yellow, and it is true that the yellow tinting extends over the entire plot, including the portion of the canal running through it. The description, however, does not stop there; it continues "and numbered with numbers respectively corresponding with the numbers in the first column of this schedule." It is clear that the canal does not come within this category; and this being so, I can see no justification for saying that it is comprised in the schedule. The learned counsel asked whether if the coal under the canal did not pass the coal under a highway running through the land, which was equally undescribed and unnumbered, remained in the grantor. The cases do not seem to me to be identical. If the soil in the highway was in the owner of the closes on either side of

it, it might well pass by a conveyance of those closes without specific description. The arbitrator has found that the land occupied by the canal passed to and is the property of the respondents. Wills, J. felt great difficulty in saying that the coal under the canal passed by the terms of the conveyance, but he thought it never could have been intended by the vendors to reserve it, that the deed would be at once rectified on the application of the grantees, and that the coal must therefore be regarded in equity as their property. I cannot adopt this view. I think it may very probably have been omitted from the conveyance by an oversight. Again, it is not improbable that the parties never thought about it, and that there was no intention either to convey or to reserve it. But with nothing before the court except the conveyance, with no evidence of the circumstances of the transaction, and not even the agreement which led up to the conveyance, I think it is impossible to found on a mere speculation as to the intention of the parties a declaration that the appellants are in equity entitled to this coal. To set such a precedent might lead in many cases to grave injustice. For these reasons, I think the appellants have not made out their title to any coal under the canal. In view of the conclusions at which I have arrived, it is unnecessary to say anything with reference to the other questions discussed in the arguments at the bar. I think that the judgment appealed from must be affirmed, and the appeal dismissed, with costs.

Lord WATSON.—My Lords: The most important question raised in this appeal relates to the construction of sects. 39 and 40 of the special Act 34 Geo. 3, c. lxxviii., by which the respondents were incorporated and their undertaking authorised. The Act did not require that the respondents should, for the purpose of constructing the canal with its accessory works, purchase any interest in the subjacent or adjacent mineral strata; and these two clauses were introduced in order to give mutual protection to the respondents, and to the owners of these strata, in the event of their mineral workings being carried so far as to threaten either danger to the canal or injury to the mines. The clauses are in the form which appears to have been in common use in statutes authorising similar undertakings towards the end of last century. They are, for all practical purposes, identical with sects. 34 and 35 of 29 Geo. 3, c. lxxiv., which were considered by Lord Cottenham in *Cromford Canal Company* v. *Cutts* (12 L. T. Rep. O. S. 235; 5 Rail. Cas. 442), and also with sects. 37 and 38 of 31 Geo. 3, c. lxviii., which were before this House in *Knowles and Sons* v. *Lancashire and Yorkshire Railway Company* (61 L. T. Rep. 91; 14 App. Cas. 248). The appellants brought this suit under the two clauses in question, and they pray that it may be ascertained what portions of their mines, worked near or under the Rochdale Canal, ought to be left unworked by them, for the security and preservation of the canal, and of their mines, and also what compensation is payable to them in respect of their leaving such portions unworked. They allege that they are owners of coal seams subjacent, as well as adjacent, to the canal; and that their workings cannot be carried farther in the direction of the canal without doing injury to it, as well as to their mines. The canal, whilst in the vicinity of the respondents' mineral field, first runs northwards in a nearly straight line, from a point marked A on the plan used in the argument before us, to a point marked B, from which it runs in an easterly direction to a point marked C. It was admitted that, between A and B, the respondents are not owners of the subjacent minerals; and that, for the greater part of the distance between these points, their mineral seams are adjacent to, and for the remainder of the distance approach very near to, but do not immediately adjoin, the canal. It was also admitted that, between B and C, the respondents own the adjacent minerals on both sides of the canal; but it was matter of controversy whether, between these points, the subjacent minerals did or did not belong to them. The case was, by consent of the parties, referred for trial to Mr. Gully, Q.C., who was to have all the powers of a judge of the High Court of Justice, including power to direct judgment to be entered, or to deal otherwise with the whole action. After hearing evidence, the referee found, *inter alia*, (1) that the minerals below the canal, between the points B and C, did not belong to the appellants; (2) that there was no reasonable ground for apprehending that their workings either near to or even under the canal would cause damage to their mines, or to the further working thereof, by the percolation of water from the canal to the mines; (3) that any subsidence caused by further workings of the minerals would not interfere with the navigation of the canal, but would necessitate repairs from time to time, during a period of eight or ten years, to the towing paths and banks of the canal, and also to two bridges over it, but that the cost of those repairs would not exceed 1200*l.*; and (4) that, in order to prevent such subsidence, it was necessary to fix a limit, which he defined, excluding from the appellants' workings minerals belonging to them, of which he estimated the value to them at 12,688*l.* The learned referee accordingly directed that judgment for that sum should be entered for the appellants, and that, upon payment or satisfaction, they should be perpetually restrained from working beyond the limit which he had laid down. Although neither point appears to me to be material for the purposes of this appeal, I may notice that the learned referee, in estimating the value of the minerals for which compensation was payable, deducted the sum of 650*l.* as the value of part of them required for the support of certain cottages which had been erected more than twenty years before the present action was brought. There were other buildings supported by the excluded minerals which he valued at 1150*l.*; but he did not deduct that sum, because he was of opinion that the working of those minerals before a prescriptive right of support was acquired, had been prevented by the existence of the canal. The case then came before a divisional court, when Cave and Wills, JJ. differed from the referee on two points. They held, in the first place, that the appellants are owners of the minerals below the canal between B and C; and, in the second place, that the said sum of 1150*l.* ought to have been deducted in assessing compensation; and they remitted the case to the referee in order that he might vary his award in accordance with these findings. The case next went to the Court of Appeal, where the respondents gave a judicial undertaking that

they would not object to the working of the coal under or near the canal between the points A and C; that they would at their own expense repair any damage which might be done to the canal or to the banks or towing paths thereof by reason of such working, and that they would not make any claim upon the appellants in respect of such damage, and also that they would pay to the appellants any damage which they had suffered by leaving any coal belonging to them under or near the canal between the points A and C from the 30th Dec. 1890 to the 24th Jan. 1893, but without prejudice to the question whether the coal under the canal between the points B and C belongs to the appellants. In respect of that undertaking the Court of Appeal dismissed the action, and remitted to the referee to assess the amount of the damages, if any, which the appellants had thereby agreed to pay. The present appeal is against that order. My Lords, it seems to me, and it was practically conceded by their counsel, that the appellants cannot prevail, unless they succeed in showing that they are in a position to claim the remedies provided by sect. 40 of the respondents' special Act. If they are entitled to these remedies, then, in my opinion, the judgment of the Appeal Court has given them considerably less than their statutory rights. In order to ascertain whether they are or are not possessed of these rights, it is necessary to consider and determine these two points—(1) whether the appellants are the owners of the minerals below the canal between the points B and C; and (2) if they are not, whether the provisions of the special Act confer upon a proprietor of mineral seams adjacent to the canal any right to use the remedies specified in sect. 40? I find nothing in the opinions expressed by the learned judges of the Appeal Court to indicate their dissatisfaction with the finding of the Divisional Court, that the minerals below the canal between B and C belong to the appellants. And it appears to have been assumed by the referee, as well as by the Divisional and Appeal Courts, that, in so far as the remedies thereby provided are concerned, the statute makes no distinction between proprietors of subjacent and proprietors of adjacent minerals. The alleged right of the appellants to the minerals below the canal between B and C depends upon the terms of a conveyance of the land on the north of the canal, dated the 1st Oct. 1886, to three persons of the name of Lees, whose interest the appellants have acquired. The lands conveyed were part of the Chadderton estate, and it is an undoubted fact that, at the date of the conveyance, the minerals below the canal between B and C were the property of the vendor. But I do not think that the conveyance gives the appellants any title to the minerals underlying the canal. Its language is strictly limited to the lands sold, which now belong to the appellants, and to the minerals immediately below them. The appellants were accordingly driven to maintain that they have an equitable title to these subjacent minerals, derived from the obvious intention of the vendor that they should pass to the purchasers along with the subjects expressly conveyed. I agree with your Lordships in thinking that the argument rests upon the merest speculation, and that there is no trustworthy evidence of any such intention. The question therefore comes to be whether the appellants, as the owners of mines adjacent to, but not underlying the canal, have a good title to insist in the conclusions of the present action. It was argued for the appellants that the construction of these statutory clauses, in their application to the case of an adjacent mine-owner, has been definitely settled by the decision in *Cromford Canal Company* v. *Cutts* (*ubi sup.*) which was followed in *Knowles and Son* v. *Lancashire and Yorkshire Railway Company* (*ubi sup.*). I was at one time very much disposed to accept the argument, but a closer examination of those two cases has led me to reject it. Both cases appear to me to establish the principle that a mine-owner, who is expressly debarred from working his minerals to the injury, prejudice, or obstruction of the canal and its cuts, reservoirs, towing paths, and other works and conveniences, can have his remedy under the second of these sections, if the continuance of his working will be attended with such injury, prejudice, or obstruction, although he cannot establish that it will occasion any detriment to his mine. The noble and learned Lords who affirmed that principle did so upon the ground that the statute had cast upon the mine-owner a positive obligation not to work so as to injure the canal, or any of the works connected with it—an obligation which, in my opinion, could neither be waived by the owners of the canal, nor dispensed with by a court of justice. The facts presented to the court were, that the mine-owner was proprietor of the minerals subjacent as well as adjacent to the canal, and had worked out both. In these circumstances, I think that the observations of the noble and learned Lords, when fairly construed, must be taken to refer to such workings as were in violation of the mine-owner's statutory obligation to give support. One inference is, in my opinion, clearly derivable from their observations, viz., that a mine-owner who is under no statutory obligation to give support is not entitled to pursue the remedy afforded by the provisions of the second section. The prohibition against mine-owners working so as to injure, prejudice, or obstruct the canal and its works is contained in the first of the clauses under consideration. Sect. 39 commences with the declaration that nothing in the Act contained shall defeat, prejudice, or affect the right of mine-owners "to the mines and minerals lying and being within or under" the lands to be used by the respondents for the purposes of their undertaking, and that all such mines and minerals ars reserved to them. It then proceeds to enact that "it shall be lawful" for such mine-owners "(subject to the conditions and restrictions herein contained) to work, get, drain, take, and carry away, to his or her own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said canal, cuts, &c." The mines and minerals thus referred to, to which alone the prohibition against working to the injury, prejudice, or obstruction of the canal attaches, are the mines and minerals "lying and being within or under" the lands to be set out and used by the canal company for the purposes of the Act. It is clear that the statutory prohibition does not apply to mines and minerals which are adjacent to the canal or its works. I am therefore of opinion that the respondents' counsel were right in their contention that the

Act leaves the appellants at liberty to work their adjacent minerals, even though their workings may result in injury to the canal or its works. I do not doubt that it would be within the power of the respondents, if so advised, to stop their workings, upon their showing that these workings would be injurious to their undertaking, and upon their making due compensation as provided by sect. 40. I am also of opinion that the appellants would have been entitled to take proceedings under that section, could they have shown that the effect of working up to the edge of the canal would be to let the water of the canal into their mines. But, having failed to establish that fact, and being under no obligation to give support to the canal, they are not, in my opinion, entitled to maintain the present action. For these reasons I have come to the conclusion that the judgment of the Court of Appeal must be affirmed.

Lord MACNAGHTEN.—[His Lordship stated the facts and proceedings, and continued:] If I were bound to accept the premises on which the Court of Appeal proceeded, I should, I think, have some difficulty in assenting to the conclusion at which they arrived. When the case was before the Court of Appeal it was taken for granted that getting minerals to the injury or prejudice of the canal was equally forbidden by the Act of 1794, whether the mines were subjacent or adjacent. At any rate the attention of the court does not appear to have been called to any distinction between the two cases. The learned Master of the Rolls begins his judgment by describing the appellants as "owners of mines near and under the canal." And there are other passages in the judgments delivered in the Court of Appeal to the same effect. As regards the damages which the arbitrator apprehended as the result of further working, their Lordships did not consider them imaginary or unsubstantial. But, comparing the estimated value of the coal which the appellants were to be restrained from working with the estimated amount of the probable repairs, they seem to have thought it unreasonable to enforce the provisions of the Act and to give the appellants the complete indemnity to which otherwise they would have been held entitled. There was, I think, great force in the argument on the part of the appellants that the court had no power to dispense with the restrictions and provisions of the Act of Parliament, and that, if the working which the respondents proposed to sanction was really unlawful, it was not competent for them to bind themselves or their successors to permit it, and that at any rate no permission or connivance or sanction on the part of the canal company could relieve the appellants from claims by third persons who might be injured in consequence of the appellants working in contravention of the Act of Parliament. These points, as it seems to me, would have been worthy of consideration if the appellants had been met upon the ground on which they were prepared to take their stand. But the learned counsel for the respondents at the bar took up a position which was not maintained, or apparently even suggested, in the Court of Appeal. They said that, having regard to the findings of the arbitrator and the position of the appellants' property, there was nothing in the Act of Parliament to prevent them from working out the whole of the coal which belonged to them. The further working which the award restrained would not injure the mine, nor would it injure the canal by any operation prohibited by the Act of Parliament. If this argument is well founded, I must say I see no answer to it. Whether it is or is not well founded, depends partly on a question of fact and partly on the true construction of the Act of 1794. As regards the position of the appellants' property in reference to the canal, I am of opinion that they have no title, legal or equitable, to any mines or minerals lying and being within or under the lands set out or made use of for the canal. This is so, admittedly, except as regards a portion of the Chadderton property which was conveyed to their predecessors in title in 1866. The conveyance of 1866 passes land on both sides of the canal. But there is nothing in the deed to carry the mines under the canal. It was argued that the particulars of sale included the minerals under the canal, and that the purchaser intended to buy, and that the vendor intended to sell, those minerals. That may have been the intention of the parties. But there is nothing in the particulars of sale or any other document which compels one to come to that conclusion. The inference which the appellants desire your Lordships to draw is merely a matter of guess. Then it was argued that the conveyance of the two separate plots intersected by the canal would carry the mines under the canal. It was argued that this must be so by analogy to the presumption of law that where a piece of land is conveyed which is bounded by a public highway, or a non-navigable river, the conveyance passes the moiety of the highway or of the river (as the case may be) "unless there is something in the language of the grant indicating an intention to exclude, or something in the subject-matter or in the surrounding circumstances, from which such an intention may reasonably be inferred": (per Lord Fitzgerald, then Fitzgerald, J., in *Dwyer* v. *Rich* (Ir. Rep. 6 C. L. 144, 149.) It is very difficult to see the analogy. Here there is no public highway or non-navigable river; there is no authority; nor is there any principle which would justify the extension of the rule to such a case as this. I come now to the Act of Parliament. Sect. 39 reserves to the proprietors of land through which the canal was to be made the mines and minerals lying and being within or under the lands to be set out or made use of for the purpose of the canal, and it authorises the proprietor to work such mines and minerals, not thereby injuring, prejudicing, or obstructing the canal, and the works and conveniences connected therewith. That section says nothing about mines or minerals under or within adjoining lands. As regards such mines and minerals, the rights and liabilities of the mine-owner are left to the general law. Sect. 40 is of wider application. It enables the owner of adjacent mines, as well as the owner of subjacent mines, to obtain compensation from the canal company for the minerals which he has to leave unworked for the security or preservation of the canal or of the mines. In *Knowles* v. *The Lancashire and Yorkshire Railway Company* it was held by this House, following the decision of Lord Cottenham in the case of *Cromford Canal Company* v. *Cutts* (5 Rail. Cas. 442) that the meaning was that, when the working of a mine has reached a point at which the mine-owner finds that,

having regard to the proximity of the canal and his statutory liability, he cannot work further without some danger, or cannot work further to the same advantage as he could if the canal were not there, then it is open to him to initiate proceedings, and he is entitled to receive satisfaction for such minerals as shall be thought proper to be left for the security of the canal or the mine. Now, in this case it has been found by the award that there is no reason to apprehend danger to the mine from further working. It has, indeed, been found that the further working of the mine may injure the works connected with the canal, so as to entail upon the proprietors an outlay for some years in the way of repairs. But, if the damage which may necessitate those repairs is caused by the appellants working mines not under or within the lands set out or made use of for the canal, the case is outside of the Act altogether, and there is no statutory liability at all hanging over the appellants. The respondents do not want the works to be stopped. Not unnaturally they prefer to bear the expense of doing such repairs as may from time to time be required to paying down a large sum by way of compensation for coal which will be little or no use to them. Under these circumstances I am of opinion that the appellants cannot insist on being debarred from further working their mines, and upon receiving compensation on that footing. It was said that the judgments of some of their Lordships in *Knowles* v. *The Lancashire and Yorkshire Railway Company* went further, and laid down, or at any rate implied, that a mine-owner was entitled to receive compensation in such a case as this. But I think that there is nothing to justify this assertion. It appears to me that it was stated, carefully and clearly, that it was the apprehension of statutory liability—that is, liability for the consequences of working in contravention of the requirements or restrictions of the Act—and apprehension of statutory liability alone, which entitles the mine-owner to compensation when he cannot show that the further working would injure his mines. It must be remembered that the only question in *Knowles* v. *The Lancashire and Yorkshire Railway Company* was whether the words at the conclusion of sect. 37 were to have their ordinary meaning or or not. There the mischief had been done; the canal had been let down. No distinction was drawn between damage done by working the mine where it was underneath the canal and working where it was under adjoining land, nor was there anything to show that there was any possibility of drawing any such distinction. The whole point of the case turned upon the question of statutory liability. The mine-owners who wished to qualify the natural and ordinary meaning of the words on which the canal proprietors relied insisted that there was at least one case where minerals must be left unworked without compensation. But their Lordships did not think so. They held that in every case where there was statutory liability there were means of obtaining compensation. For these reasons I am of opinion that the appeal fails, and must be dismissed with costs.

Lord SHAND concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Vol. LXXIII., 1877*.

Solicitors for the appellants, *Woodcock, Ryland,* and *Parker,* for *Tweedale, Sons,* and *Lees,* Oldham.

Solicitors for the respondents, *Norris, Allens,* and *Chapman,* for *G. Jackson,* Rochdale.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, July 12.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

Re NOTTAGE; NOTTAGE *v.* PALMER (No. 1). (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Will—Legacy—Misdescription—General or specific gift.

By his will, dated in Oct. 1894, *a testator, who died in Dec.* 1894, *bequeathed to each of his two nephews "* 500*l. debenture stock or shares" of the A. Company; and to each of his three cousins "* 350 *ordinary shares," to M. "*250 *fully-paid shares," and to C. "* 50 *shares," of the same company. He bequeathed "the pecuniary legacies following," a list being appended. He bequeathed to his trustees "* 5000*l. debenture stock or shares" of the A. Company, "*350 *ordinary shares" of the same company, and "* 1500*l. debenture stock or shares" of the B. Company, "upon trust to continue the same in their present state of investment," or to sell the same and invest the proceeds, and to stand possessed of the stocks and shares and the proceeds and the investments upon the trusts therein mentioned. He bequeathed his residuary estate upon trust for conversion and to "pay or provide for the payment of the pecuniary legacies and sums hereinbefore bequeathed." His trustees were empowered to postpone the conversion of his "debentures or shares" in the A. Company, or any other part of his personal estate.*

At the date of his will, and at his death, the testator held fully-paid shares and debentures of the A. Company; he also held debentures of the B. Company, but no shares. Neither company had issued debenture stock.

Held, first, that the term "debenture stock or shares" as used by the testator was equivalent to debentures; secondly, that the trust legacy was obviously specific, having regard to the direction of the testator to allow the stocks and shares to continue in their present state of investment; and thirdly, that the other legacies of stocks and shares were also specific, having regard to the position of the gifts in the will and to the sense in which the testator used the term "pecuniary legacies," and to the language of the residuary gift.

Decision of Kekewich, J. reversed.

CHARLES GEORGE NOTTAGE, by his will, provided as follows:

I give to each of my said nephews, C. E. Palmer and A. N. Palmer, 500*l.* debenture stock or shares of the London Stereoscopic and Photographic Company Limited. I give to each of my cousins, B. Barraclough, K. Hinton, and E. Allen, 350 ordinary shares in the London Stereoscopic and Photographic Company Limited. I give to J. L. Mitchell 250 fully-paid shares in the said company.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

I give to S. M. Clarke fifty shares in the said company. I give the pecuniary legacies following (that is to say): [gifts of sums of money were here mentioned]. I give to my trustees before named 5000*l.* debenture stock or shares of the London Stereoscopic and Photographic Company Limited, 350 ordinary shares in the same company, 1500*l.* debenture stock or shares of the Barton Estate Company Limited, and thirty-five shares in the Delaware and Hudson Canal and Railway Company, upon trust to continue the same in their present state of investment, or to sell the same and invest the net proceeds of such sale in their names, with power to vary investments.

The testator then directed the trustees to "stand possessed of the said stocks and shares, and the proceeds of the sale thereof, or the investments for the time being representing the same," in trust to pay the income to five named persons (one of them being E. M. Bigwood), in the shares therein mentioned, during their respective lives, and on the decease of each a corresponding share in the capital was to fall into the residue. He then bequeathed legacies of various amounts to divers charitable institutions, and gave his residuary real and personal estate to his trustees upon trust to convert into money such parts of it as did not consist of money, and out of the proceeds and his ready money to pay his funeral and testamentary expenses and debts, "and pay, or provide for the payment of, the pecuniary legacies and sums hereinbefore bequeathed and the duty thereon," and invest the surplus as therein mentioned, and hold it on the trusts therein mentioned.

The will contained the following declaration:

And I declare that my trustees may postpone the sale and conversion of my debentures or shares in the London Stereoscopic and Photographic Company Limited, or any part thereof, or of any other part of my personal estate, for so long as they shall think fit.

At the date of his will, and at his death, the testator held 130 debentures of 50*l.* each of the London Stereoscopic and Photographic Company Limited, and 3710 5*l.* shares of the same company, all of which shares were fully paid up. The company had also issued 100*l.* mortgage debentures, but the testator did not hold any of them. The company had issued no debenture stock and no shares except ordinary shares.

The testator held debentures of the Barton Estate Company Limited, but did not hold any shares in that company. That company also had issued no debenture stock.

An originating summons was taken out by the trustees of the will asking for the determination (*inter alia*) of the following questions: (1) Whether the legacies of stocks and shares given by the will (other than the legacy bequeathed in trust) were specific or general; (2) whether that trust legacy was specific or general; (3) if the legacies of stocks and shares, or any of them, were general legacies, how such legacies were to be paid or satisfied, having regard to the fact that it was uncertain whether the estate would be sufficient to pay in full all the legacies given by the testator.

The summons was adjourned into court, and, on the 24th May 1895, came on to be heard before Kekewich, J., when his Lordship decided that the legacies were general, not specific; and that, as neither company had issued anything answering the description of "debenture stock or shares," the testator had bequeathed specified amounts of that which did not exist, those gifts being therefore ineffectual. His Lordship accordingly declared, first, that the legacies of shares were general legacies, but that the legatees of "debenture stock or shares" took nothing under the bequests to them; secondly, that the trust legacy was a general legacy as regarded the shares comprised therein, but void as regarded the 5000*l.* debenture stock or shares of the London Stereoscopic and Photographic Company Limited, and the 1500*l.* debenture stock or shares of the Barton Estate Company Limited; thirdly, that, if the testator's estate should prove insufficient for the purpose of paying in full all the legacies, the legacies of shares ought to abate in proportion to the values thereof at the date of one year from the testator's death.

From that decision C. E. Palmer and F. M. Bigwood respectively now appealed.

Crackanthorpe, Q.C. and *W. A. Peck* for the appellant C. E. Palmer.—Although by the term "debenture stock or shares" the testator did not make use of a correct description, there being nothing to which that description is properly applicable, yet, having regard to his holding in the two companies, what his meaning really was is sufficiently clear:

Door v. *Geary*, 1 Ves. sen. 255;
Trinder v. *Trinder*, L. Rep. 1 Eq. 695.

Then as to whether the legacies are specific or general, we submit that the bequest in trust is specific, inasmuch as the testator declares that his trustees may keep the 5000*l.* debenture stock or shares and other property in their "present state of investment," showing that he was referring to property which he then had in a state of investment, not to securities to be purchased. The bequests to the nephews of 500*l.* debenture stock or shares are, we say, also specific, though there may be more difficulty as to them. Although a bequest of consols is not treated as specific solely because the testator possesses consols, yet the court will have regard to slight indications which point to legacies being specific. Thus, where a testator having given legacies of stock generally then gave the rest of the stock "standing in my name," the earlier legacies were held to be specific:

Sleech v. *Thorington*, 2 Ves. sen. 560.

There are various indications in the present will that the testator was dealing with securities in his possession. Express power is given to his trustees to postpone the conversion of his debentures or shares in the London Stereoscopic Company. Moreover, in the clause relating to the residue of his real and personal estate, he directs the payment of pecuniary legacies, but makes no provision for the purchase of stock legacies. It is true that the legacies, if not specific, are pecuniary in the strictest sense; but it is evident that the testator did not regard them as such, for he has disposed previously of pecuniary legacies.

Crackanthorpe, Q.C. and *W. Freeman* for the appellant E. M. Bigwood.

Pattullo for the respondents, the residuary legatees.—In a case very similar to the present, a bequest of certain shares was held general and failed:

Re Gray; Dresser v. *Gray*, 57 L. T. Rep. 132; 36 Ch. Div. 205.

A bequest of "any debentures" was held not to pass debenture stock into which the testator's debentures had been converted, debentures and debenture stock being different securities:

Re Lane: Luard v. *Lane*, 43 L. T. Rep. 87; 14 Ch. Div. 856.

The mere mention by the testator of his securities in the London Stereoscopic Company does not suffice to show that whenever he made a gift of property in that company he intended to dispose of some securities in his possession. There being no property answering the particular description referred to by the testator, of which property he has made a general bequest, the gift fails.

J. G. Fawcus for the respondents, the trustees and executors of the will.

Lindley, L.J.—With regard to these first two appeals, I do not think that we shall gain anything further by postponing our judgment. I cannot agree with the conclusion arrived at by Kekewich, J., when he goes the length of saying that these appellants take nothing. I cannot get that out of the will. The testator seems to have had a good many shares, and amongst other things he had an interest in debentures and shares in the London Stereoscopic Company—I call it for shortness—and in the Barton Estate Company. At the time he made his will, and at the time of his death, which took place shortly afterwards, he had in the London Stereoscopic Company 130 debentures of 50*l.* nominal value, and 3710 shares of 5*l.* nominal value, fully paid, as I understand it. I also understand that he had nothing else whatever in that company. There was no "debenture stock" in that company, still less "debenture shares," whatever that may mean. There were no such things. There were two classes of debentures issued by the company, one called "mortgage debentures" taking priority over those debentures which the testator held. We are informed that such was the case. However he had no mortgage debentures. In the Barton Estate Company he had nothing but debentures; he had no shares at all. Now, first as regards the London Stereoscopic Company. He gives to each of his two nephews, naming them, "500*l.* debenture stock or shares of the London Stereoscopic and Photographic Company Limited." Then he goes on and says, "I give to each of my cousins," naming them, "350 ordinary shares" in the same company. Then he gives to another person "250 fully-paid shares in the said company," and he gives to another person "fifty shares"—without calling them anything else—"in the said company." Now, if one only for a moment bears in mind what there was, and what the testator had to give, it appears to me that he had, in a very inaccurate way, contrasted the "debentures" on the one hand, which he calls "debenture stock or shares," with "shares" on the other, which he calls sometimes "ordinary," sometimes "fully paid shares," and sometimes "shares," without any adjective at all. I cannot help thinking that his scheme is that he gives what he calls "debenture stock or shares," not knowing what to call them, but meaning something different from "fully paid shares" or "ordinary shares," or "fifty shares" to the persons named. Bearing also in mind that he had only 130 debentures of 50*l.* each, I cannot come to the conclusion that Kekewich, J. is right in saying that there is such a defective description as to destroy the whole legacy which was clearly intended to be given. There is something answering that legacy, although the description of that something is not very happy or accurate. Then as regards the Barton Estate Company, which is the subject of the second appeal. This is the language of the will: "I give to my trustees before named 5000*l.* debenture stock or shares of the London Stereoscopic and Photographic Company Limited, 350 ordinary shares in the same company, 1500*l.* debenture stock or shares of the Barton Estate Company Limited," so-and-so, upon certain trusts. In the Barton Estate Company, the testator had nothing except debentures. That shows to my mind almost conclusively that he did not know how to describe those debentures. But, having got debentures, he leaves what he has got under the description (not very accurate I admit) of "debenture stock or shares." Now, the remarks I have made about the London Stereoscopic Company apply also to this bequest. He contrasts there what he calls "debenture stock or shares" with "ordinary shares." That, I think, fortifies the conclusion at which I have arrived, namely, that he did know that he had different sorts of things—that he had debentures (not knowing whether to call them stocks or shares), and that he had ordinary shares. When he uses the expression "debenture stock or shares" what he means is "debentures" as distinguished from the other "shares" which he describes sometimes as "fully paid up" and sometimes as "ordinary," and sometimes without any adjective at all. As to the Barton Estate Company, he only had debentures. So far, therefore, I think there is no real difficulty in the case. The next point, however, arises whether these gifts are specific, or whether they are what are called "general legacies." As to the gift of 5000*l.* debentures and 350 ordinary shares in the London Stereoscopic Company, and the 1500*l.* debentures in the Barton Estate Company, there can be no reasonable doubt, because he goes on as to them to say that the trustees are to hold these "upon trust to continue the same in their present state of investment." That points, without any ambiguity or any doubt, to the things which he then had in some state of investment. That makes that bequest absolutely specific. As regards his bequests of "500*l.* debenture stock or shares" of the London Stereoscopic Company to his two nephews there is more difficulty, because there is nothing in immediate connection with that clause to show that he is dealing with the particular debentures which he had. But bearing in mind that he had debentures, that he is apparently dealing with those debentures, giving them to his nephews, and indicating in one place clearly that he intends them to be specific—namely, in the gift in the residuary clause to which Mr. Crackanthorpe called our attention—I think we should not be going too far, or stretching the doctrine of the court, in holding the first bequests to be specific also. When the testator says, "I give to each of my nephews 500*l.* debentures," I do not think that those are pecuniary bequests, but something more. They are not pecuniary bequests I think in the view of the testator, because further on he gives a string of what he calls "pecuniary legacies" which are mere sums of money. It is

not a gift of money to be laid out or to be applied in buying debentures; it is a gift of these debentures which the evidence shows he himself has. If that be right, then the clause as to residue does help. The clause as to residue is this: "I give, devise, and bequeath," and so on, "my residuary property not hereby otherwise disposed of unto my trustees upon trust to sell, call in, and convert into money," and so on, "and to pay my funeral and testamentary expenses and debts, and to pay or provide for the payment of the pecuniary legacies and sums hereinbefore bequeathed." Now, the pecuniary legacies and sums hereinbefore bequeathed do not, I think, apply to the bequest of these debentures. But coupling that with the clause which comes afterwards, empowering the trustees to "postpone the sale and conversion of my debentures." I think that we may say, and ought to say, upon the true construction of this will, that what the testator really meant was to give the 500*l.* debentures, part of that which he then held in the company. I think therefore that the first two appeals must be allowed, and that the declaration on the summons must be altered accordingly.

LOPES, L.J.—I have great difficulty in understanding how Kekewich, J. arrived at the conclusion which he seems to have arrived at, namely, that these legatees took nothing. Reading the will carefully, it appears to me that the testator was very doubtful as to the proper designation which he ought to apply to the interest in these companies, which he then possessed. It appears to me that he did not know what to call them—whether to call them "debenture stock" or "debenture shares," or how to describe them. First, with regard to the London Stereoscopic Company, he had in that company debentures and ordinary shares. I do not doubt for a moment, having regard to the words which he used (though, no doubt, he was uncertain as to how to designate them), he meant debentures. With regard to the Barton Estate Company, the language is more clear. In that company he only had debentures, and the difficulty there is not so serious to get over. I think that there he did mean the debentures that he had in that company. Then, the question arises as to whether these legacies are to be regarded as specific or general. It seems to me, with regard to the Barton Estate Company—as has been said by my Lord—that there is very little doubt indeed that the legacies of the debentures in that company are specific gifts. With regard to the London Stereoscopic Company, the difficulty is greater; but, having regard to the different parts of the will to which our attention has been called, I am inclined to think that the testator intended the gifts to be specific. By that I mean that he intended them to be gifts of particular things which he then possessed as distinguished from something which was to be provided out of his general estate by his trustees after his death. I am of opinion therefore, that these appeals should be allowed.

RIGBY, L.J.—I am of the same opinion. In construing a will we are bound to look to every part of it, and to gather what light we can from one part in attempting to construe another. Now, here we have a testator who is possessed of debentures in the London Stereoscopic Company. He is possessed also of ordinary shares in the London Stereoscopic Company, and he is possessed also of debentures in the Barton Estate Company. He appears to be dealing with something that he possesses in each of these companies, because he aims (according to my construction of the particular bequests) at describing something or other, and he does not quite know what the description ought to be. He calls the securities "debenture stock or shares." I read that as meaning "what I possess in the nature of debentures, whether properly called stock or properly called shares or whatever the description may be." I think that he is trying to dispose of something that he has got, and I think that that is made a little stronger by referring to the other bequests. He is treating it as a specific gift. If we are satisfied that he is trying to describe something which he had and to dispose of that, we have got a long way. Then we find that in the will he deals with a precisely similar sort of property, and he gives to trustees certain securities "to continue the same in their present state of investment or to sell the same." Then afterwards he says "and to stand possessed of the said stocks and shares and the proceeds of the sale thereof." There are three several expressions which can only be explained with reference to that bequest on the supposition that he was making a specific gift. The trustees are to hold the actual subject of the gift upon trust. Then we find that he gives what he calls correctly "pecuniary legacies;" and we find also that he gives in terms "sums of money." The charitable legacies are not included in the pecuniary legacies, though, of course, they are pecuniary legacies. If we hold that "debenture stock or shares" were general legacies, perhaps, in legal intendment, they would come under the meaning of "pecuniary legacies." But that is not a proper mode of construing a will — first of all, to find a legal definition which the testator has never heard of, and then to put that in the will as if it were part of the will, though he never meant it to be there. We have to deal with the language, and what he calls "pecuniary legacies" are those he designates by that name; and not being quite sure whether the others that he gives in money would be pecuniary legacies in the same sense, he calls them "sums of money." Then we come to the residue, and we find that the only legacies he wishes to provide for are pecuniary legacies or "sums of money," and there are words to answer very precisely those descriptions. Then we come to the investment clauses. I think that he shows there an intention to give the trustees special power to retain, in their present state of investment, his debentures. Taking it altogether, I think that it would be erroneous to suppose that, when he had in this way provided, he meant not that the legatees were to have something out of what he had got, but that they were to have something purchased for them. The thing is totally different when you have a testator saying, for instance, "I give 1000*l.* Consols." That is such a common case of investment that you cannot derive any conclusion, one way or the other, as to whether he meant consols which he might happen to have or consols to be purchased. But when a testator has several kinds of investments, and he deals with them all, dealing with some of them in such a manner as to make it absolutely plain that he intended that they should be specific

gifts; and, with regard to all, there are expressions in the will more suited to the hypothesis that the gifts in question are specific than that they are general, I think that we may fairly assume that they were specific gifts, and declare accordingly.

Appeals allowed.

Solicitors: *Neish, Howell,* and *Macfarlane; Lake* and *Lake; N. C. Barraclough; G. H. Barber* and *Son.*

Friday, July 12.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

Re NOTTAGE; JONES *v.* PALMER (No. 2). (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Charitable gift—Bequest for the encouragement of yacht racing—Validity—Mortmain and Charitable Uses Act 1888 (51 & 52 *Vict. c.* 42), *s.* 13.

By his will, dated in Oct. 1894, *a testator, who died in Dec.* 1894, *bequeathed a sum of money to trustees in trust to purchase annually a cup to be given to the most successful yacht of the season, declaring that his object in giving the cup was "to encourage the sport of yacht racing."*

Held, that this could not be regarded as a charitable gift, it being a gift for the purposes of encouraging a mere sport, and was therefore void for perpetuity.

Decision of Kekewich, J. (72 *L. T. Rep.* 795) *affirmed.*

CHARLES GEORGE NOTTAGE, by his will, declared as follows:

I bequeath to the Yacht Racing Association of Great Britain, out of such part of my estate as may be legally bequeathed for such a purpose, the sum of 2000*l.*, the same to be invested in the names of three trustees to be appointed by the council of the said association, and to be invested in the debenture bonds or debenture stock of any railway in the United States of America paying at the time of investment not less than 4 per cent. per annum upon the amount invested, but so that not more than one-fourth of the capital shall be invested at the same time in the same security, or in such other securities as the trustees so to be appointed as aforesaid shall deem expedient. And I direct that the trustees so to be appointed as aforesaid shall, out of the annual income of the trust fund, purchase annually a cup to be called "The Nottage Cup," which is to be given to the most successful yacht of the season of over 19 rating, or what may in future be held to be the equivalent of that rating; and the council of the said association shall decide annually which yacht has in their opinion the best claim to the cup, and in the event of there being any difference of opinion the vote of the majority of the said council is to decide the question; or the said council may, if they think fit, order the said cup to be specially raced for. My object in giving this cup is to encourage the sport of yacht racing, and I declare that, in the event of the Yacht Racing Association being dissolved, or ceasing to exist, the trustees of the said fund shall pay and make over the same to three trustees to be appointed by the council or committee of the Royal Thames Yacht Club, by whom the said fund shall be held upon similar trusts to those hereinbefore declared with regard to the purchase of a cup to be called "The Nottage Cup."

An originating summons was taken out by the trustees and executors of the will against the Yacht Racing Association of Great Britain and other persons beneficially interested under the will to determine the question (*inter alia*) whether the above-mentioned bequest was valid.

The summons was adjourned into court, and on the 23rd May 1895 came on to be heard before Kekewich, J., when his Lordship decided (72 L. T. Rep. 795) that the bequest being remotely and not directly beneficial to the community, was not charitable, and was therefore void for perpetuity.

From that decision the defendants, the Yacht Racing Association of Great Britain, now appealed.

Warrington, Q.C. and *Kenyon Parker* for the appellants.—If this gift is not charitable it is in effect an absolute gift to the appellants, the directions superadded being merely for the original legatees' benefit, who alone have an interest in it, for there is no one else who could enforce the trust. But we say that it is a charitable gift, being one which is beneficial to the community, or a part thereof, as tending to encourage shipbuilding and seamanship, and so contribute towards the defence of the realm. It comes within the words for public or general purposes. What is meant by "charitable" appears from the definition given by Lord Macnaghten in

Commissioners of Income Tax v. *Pemsel,* 65 L. T. Rep. 621, at p. 638; (1891) A. C. 531, at p. 583.

Yacht racing tends to train sailors. A large number of the seafaring population are employed and made handy in the management of vessels. It is, therefore, highly "beneficial to the community." In *Re Lord Stratheden and Campbell; Alt* v. *Lord Stratheden and Campbell* (71 L. T. Rep. 225; (1894) 3 Ch. 265) there was a gift in favour of a volunteer corps. That gift failed because it was not to come into effect till after a period exceeding the limit allowed by the rule against perpetuities; but Romer, J. was of opinion that it was a charitable gift. A gift to the National Rifle Association to be expended in teaching shooting at moving objects was held charitable:

Re Stephens, W. N. 1892, p. 140.

[RIGBY, L.J. referred to *Thomson* v. *Shakspear* (1 De G. F. & J. 399).] The *ratio decidendi* there was, that it was a gift to establish a museum for the benefit of the owners of a particular house. A gift "for the increase and encouragement of good servants" was held charitable:

Loscombe v. *Wintringham,* 13 Beav. 87.

A gift for the diffusion of geographical knowledge was held charitable:

Beaumont v. *Oliveira,* 20 L. T. Rep. 53; L. Rep. 4 Ch. 309.

It is not easy to determine what is sufficiently beneficial to the public to be a charitable object. Although in one sense every healthy sport is beneficial to the public, yet where the object is solely the amusement of those who engage in the sport, and it is only beneficial to the public so far as it promotes their bodily health, it may be that it is not a charitable object. But here there is a public benefit, not merely a benefit to those who engage in the sport of yacht racing, for the defence of the country is involved in the gift for the encouragement of yacht racing.

Pattullo, for the respondents the residuary legatees, was not called upon to argue.

J. G. Fawcus for the respondents, the trustees, and executors of the will.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

LINDLEY, L.J.—We are all quite aware of the extreme difficulty of drawing a line between gifts which are charitable in the sense in which lawyers use that term—that is to say, in a very wide sense—and gifts which are not; but this is really a new experiment. The testator here tells us exactly what he has in his mind. This is an institution of members for mere sport—it is a mere game; the testator treats it so, and he tells us so himself. At the end of the bequest he says: "My object in giving this cup is to encourage the sport of yacht racing." Taking a wide view I should say that, in my opinion, every healthy sport is good for the nation. I do not draw much distinction between cricket, football, fencing, yachting, or anything else. If that were a lawyer's idea of a charity, this would not have been the first time we should have heard of it, and I cannot find any case which tends that way—that is to say, any case which would authorise us in saying that a mere legacy to promote a game or a sport is a charitable legacy within the extended doctrine of the Court of Chancery. I quite agree that I find it very difficult to draw the line, and I do not attempt to draw the line. It is a case in which it is exceedingly difficult to do it. The cases in the books show that sometimes there is a case a little on one side, and sometimes a little on the other of the line. But I deal with the present case on the broad ground that I am not aware of any authority which warrants the inference that a legacy for the encouragement of a mere sport is a charitable gift. I think that is enough to decide this case. The appeal must, therefore, be dismissed with costs.

LOPES, L.J.—It is indeed most difficult to draw a line in this matter, but probably the safest way to deal with this case will be to say, what does not come within the definition of a charitable gift. I am clearly of opinion that a gift, the object of which is a mere sport or game which is primarily calculated to promote the amusement of individuals as distinguished from the community at large, upon the authorities cannot be said to be a charitable gift. If we were so to hold, we should indeed open a very wide door, because, if we were to hold that this is a charitable gift, I should feel very great difficulty in saying that a gift for the purpose of promoting bicycling, cricket, football, lawn tennis, or any other game you like to name, would not come within the same category. All those sports are calculated to promote the health, physique, and good constitution of the community at large. But legacies to encourage them are not of that kind which can be said to be charitable gifts.

RIGBY, L.J.—I am of the same opinion. I daresay it is impossible, and certainly it would not be advisable, to define in general words what is a charitable bequest. One must always go back to the analogy of the statute, and that is the only test which has ever really been applied. If this could succeed—if the gift of a fund to found a prize for yacht racing could succeed—it must be on the ground that it is a general public purpose. I know no other head under which it could come. I think the very terms of the will itself explain that. The Yacht Racing Association is spoken of as an association of yacht owners; and the prizes are to be won by the owners of the yachts. I think, however much we might favour the sport of yachting, we cannot go to the extent of saying that it is a general public purpose. There are a great many things which are highly laudable, and in many ways very useful, which are yet not charities within the meaning of the statute, and in my opinion this is one of them.

Appeal dismissed.

Solicitors for the appellants, *G. H. Barber* and *Son.*

Solicitors for the respondents, *Lake* and *Lake*; *N. C. Barraclough*; *Neish, Howell,* and *Macfarlane.*

Aug. 6 and 7.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

THE MIDLAND RAILWAY COMPANY *v.* GRIBBLE. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Railway company—Land taken compulsorily—Severance—Accommodation works—Level crossings—Right of way—Sale of part of land by owner—Abandonment of right of way—Railways Clauses Consolidation Act 1845 (8 & 9 *Vict. c.* 20), *ss.* 68, 74,

In 1855, *by the construction of their railway, a company severed the lands of an owner, from whom they had purchased under their compulsory powers, and so became liable to make, and at all times thereafter maintain, certain level crossings for the accommodation of the severed lands, under sect.* 68 *of the Railways Clauses Consolidation Act* 1845. *The lands on both sides of the railway line remained in the possession of one owner down to* 1885. *In that year the lands on one side of the line were conveyed to P., and a few years later the lands on the other side became vested in G. The conveyance to P. contained no reservation to the vendor of any rights over the lands conveyed. In* 1893 *P. released all his right and interest in the crossings, for value, to the railway company, who took up the crossings, cut dykes, and erected fences.*

Held, that the conveyance to P. in 1885 *was a final abandonment of the right to use the crossings; and further, that the right to use the crossings, being only a statutory accommodation to remedy the inconvenience caused by severing lands belonging to the same owner, ceased when the ownership of those lands was severed.*

Order of Wright, J. (sitting as an additional judge of the Chancery Division, 72 *L. T. Rep.* 683) *varied.*

IN 1855 the plaintiffs, under their compulsory powers, acquired for the purposes of their railway certain lands in Bedfordshire, forming part of the Henlow Grange estate, of which Hanbury Raynsford was at that time tenant for life.

An arbitration as to the purchase money and compensation took place, and by consent the umpire settled the crossings to be provided by the plaintiffs under sect. 68 of the Railways Clauses Consolidation Act 1845.

By an indenture, dated the 19th March 1855, under which H. Raynsford conveyed the required property to the plaintiffs, the umpire's award was recited, and the level crossings were

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

described. The deed contained the following reservation:

Except and always reserved unto the said Hanbury Raynsford, and other the owner or owners for the time being in succession to him, of the hereditaments and premises adjoining the land and premises hereby conveyed, the crossings or passages mentioned and set forth in the hereinbefore recited award, ... and which crossings or passages, with all proper gates, fences, and approaches, are to be made and for ever maintained by and at the expense of the said company, their successors and assigns, for the use of the said Hanbury Raynsford and other the person or persons aforesaid, and his and their tenants, workmen, and servants, cattle, carts, and carriages.

The level crossings were duly made. Two crossings were afterwards substituted by consent for one of the two original crossings, but no question arose as to the effect of such substitution. These two substituted crossings were those in question in the present action.

For thirty years after the construction of the crossings H. Raynsford and his successors in title continued to be the owners of both parts of the severed lands, and the crossings were duly maintained by the plaintiffs.

In 1885 the successor in title of H. Raynsford put up all the lands for sale by public auction in separate lots. The lands on the west side of the railway were sold, and with the concurrence of the Alliance Bank, who were mortgagees, conveyed to Eli Plowman.

At the time of this sale and conveyance no reference appears to have been made to the level crossings, except that the approaches thereto were marked upon the sale plan.

In 1888 the lands on the east side of the railway were sold and conveyed by the Alliance Bank (as mortgagees exercising their power of sale) to Edward Hammond Thompson; and in 1891 E. H. Thompson sold and conveyed these hereditaments to the defendant George James Gribble.

By a deed of the 2nd Nov. 1893, Eli Plowman, in consideration of the plaintiffs laying down a siding for his use and occupation, released to them all his estate, right, and interest in the two level crossings, and in the maintenance thereof, and all rights of way thereover, under the deed of the 19th March 1855, or otherwise.

The plaintiffs thereupon, in Nov. 1893, conceiving the right to be extinguished for all purposes, pulled up the level crossings, removed the gates, and cut dykes and erected a fence on their own land across the approach to the crossings.

The defendant asserted that he had a continuing right of way, and threatened to remove the obstruction.

On the 2nd July 1894 the plaintiffs brought this action, and claimed a perpetual injunction to restrain the defendant from interfering with the fence, and damages.

The defence was, that the defendant had a right of way over the level crossings by virtue of sect. 68 of the Railways Clauses Consolidation Act 1845, or by virtue of the reservation in the conveyance of the 19th March 1855.

He also counter-claimed for a declaration that he and his tenants were entitled to the free use and enjoyment of the said right of way, subject to their not preventing or obstructing the plaintiffs in the working of the railway, and for an injunction to prevent the obstruction of his right of way.

On the 9th April 1895 the action came on for trial before Wright, J., sitting as an additional judge of the Chancery Division. On the 11th May his Lordship delivered judgment, holding that the obligation imposed upon the plaintiffs under sect. 68 was to maintain the level crossings only so as to "make good any interruptions caused by the railway to the use of the lands" through which it was made; and that obligation having been suspended or extinguished in the events which had happened, the plaintiffs were entitled to an injunction to restrain the defendant from interfering with their fence, but without prejudice to the right (if any) of the defendant and his successors, in case he or they should become entitled to pass over, or use the lands on the other side of the line, for the purposes of the occupation of the defendant's own land: (72 L. T. Rep. 683.)

From that decision the defendant now appealed.

C. G. O. Bridgeman (*Hopkinson*, Q.C. with him) for the appellant.—The claim of the appellant is based chiefly upon the deed of the 19th March 1855, by which the rights are reserved to the owner or owners for the time being of the adjoining lands, and these accommodation works were to be made and for ever maintained by and at the expense of the railway company. The appellant's right under the deed is at least as high as, and possibly higher than, his right under the Railways Clauses Act 1845. The appellant has a continuing right of way or easement to use the crossings for all purposes necessary and suitable for the occupation and enjoyment of his own lands. It is an easement which, on the severance of the dominant tenement, goes with the property in each of the severed lands, for, if a dominant tenement is subdivided the servient tenement is subdivided also:

Newcomen v. *Coulson*, 36 L. T. Rep. 385; 5 Ch. Div. 133.

A public right of way remains, although the site has become a *cul-de-sac* by the stopping up of one end by an Act of Parliament:

Reg. v. *Burney*, 31 L. T. Rep. 828.

Where there is a change in the nature of the dominant tenement, the rights retained by the owner of such tenement whose lands have been compulsorily taken by a railway company still remain, so long as they do not interfere with the proper working of the railway line:

The United Land Company Limited v. *The Great Eastern Railway Company*, 33 L. T. Rep. 292; L. Rep. 10 Ch. App. 586.

The release by the owner of lands compulsorily taken of his statutory rights, under sect. 68 of the Railways Clauses Consolidation Act 1845, does not prejudice the occupier:

Corry v. *The Great Western Railway Company*, 44 L. T. Rep. 701; 7 Q. B. Div. 322.

Nor will the release by one owner prejudice the rights of another. A right to go over Mr. Plowman's lands on the other side of the railway line will perhaps at some future date be acquired, for farming or other purposes connected with the lands, and unless the appellant comes at once to assert his right to the crossings it may hereafter be said to have been abandoned. The fact that

he is not at this moment in a position to exercise his right does not preclude him from taking proceedings to prevent an obstruction which is of a permanent nature:

Bower v. *Hill*, 1 Bing. N. C. 549.

As regards sect. 68 of the Railways Clauses Consolidation Act 1845, it would be putting a narrow construction upon the limiting words in the first portion of the section to hold that the accommodation works are only to apply to lands when held under a common owner. He referred also to Gale on Easements, 5th edit,, p. 140; 6th edit., pp. 143, 146; and 5th edit., p. 587; 6th edit., pp. 506, 549.

Birrell, Q.C. and *Sargant* for the respondents.—The appellant has no right to go on or over the lands on the other side of the railway line, and therefore cannot have any present right to make use of the crossings. That right was granted when the crossings were originally made as accommodation works upon the severance of the lands belonging to one owner. The crossings were "necessary for the purpose of making good any interruptions caused by the railway" to the user of his lands. Now, however, that state of things has come to an end, the right having been extinguished; and the appellant cannot claim a continuing right of way merely on to the line and back. The contention of the appellant that he is entitled to cross and recross the railway, when he has no right to go anywhere on his neighbour's lands on the other side, is novel, and cannot be maintained. The respondents are therefore justified in preventing the crossings being used. If it could be shown that there was a continuing right of way the respondents would doubtless be wrong in the course they have taken. But, if the present right to use the crossings is gone, there is no real grievance sustained by the appellant. They referred to

The National Manure Company v. *Donald*, 4 H. & N. 8, 16.

C. G. O. Bridgeman replied.

Lindley, L.J.—This case has raised a point which is new; it has never arisen before to my knowledge. But I think that it is not difficult although it is new. The appeal is by the defendant from an order made by Wright, J., which declares that the defendant is not entitled now to any right of way over the level crossing in question, that is, over the railway to which I will refer presently, nor any right to cause any obstruction, and granting an injunction to restrain the defendant from using that crossing. It is necessary, in the first place, to state shortly the facts which give rise to this controversy. For some time before 1885, a Mr. Raynsford was the owner of some property in Hertfordshire, which the Midland Railway Company wanted to cross. Under the powers contained in the Lands Clauses Consolidation Act 1845, and the Railways Clauses Consolidation Act 1845, they made their line of railway across his land, cutting it in two, he owning and occupying it as his own land on both sides of the line. Under those circumstances he required the railway company to make some accommodation works, and the accommodation works which he wanted included this crossing, not a roadway, but simply a means of getting from the land on one side of the line to the land on the other side, he being, as I have already said; in possession, and owner on both sides. Consequently what is called a level crossing was made, a crossing which, as I understand, was nothing more nor less than a couple of gaps in the hedge, with a protecting gate, so that carts might go from one side of the line to the other. That was the nature of the accommodation work of this crossing. There was no public road of any sort; there were merely two gaps in the hedge protected by gates. Now, that accommodation work was constructed by the railway company in consequence of the enactment contained in sect. 68 of the Railways Clauses Consolidation Act 1845, which runs thus: "The company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say, such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof." It is obvious that these things are to be done for the accommodation of the person through whose lands the railway passes. Let us now consider the stress of the words "shall at all times maintain." That does not mean that the company must maintain the accommodation works at all times if the landowner does not want them. Having asked for the accommodation and got it, he could if he chose release it, and if he chose to release it there would be an end of the statutory obligation about its being at all times thereafter maintained. It is not a public duty; it is a duty to him privately, and, of course, to those claiming under him. Now what happened was this: Up to 1885, Mr. Raynsford, as I understand, remained in the occupation and enjoyment of the land on both sides of the railway line. In 1885 he conveyed the land on one side to Mr. Plowman, and he retained the land on the other side. Now what was the effect of that? He conveyed the land to Mr. Plowman without granting to Mr. Plowman any right of way over his retained land, and without reserving to himself any right of way over Mr. Plowman's land. That is to say, he severed his land in such a manner as to show conclusively that this accommodation way over the railway was no longer of any use to him, and to show conclusively that he never intended to use it thereafter. Now that appears to me to be a clear and distinct abandonment of his right of way over that railway. It was of no use to him any longer, and having severed the land without any reservation of the right, there was an end of the right of way over the railway. It was an abandonment of his easement. It was perfectly competent to him to do so in point of law. Ever since the great case of *Moore* v. *Rawson* (5 D. & Ry. 234; 3 B. & C. 332), with regard to ancient lights, the law has been perfectly well settled. It was not an abandonment for a month or a year, but a distinct final abandonment without any intention to reserve this right of way. To my mind, upon the conveyance to Mr. Plowman made at that time, and under those circumstances, without any express reservation, there

was an end of the statutory right. That is the simple point arising in this case, and all that follows is unimportant. As Mr. Raynsford had no right of way to grant to the defendant, we need not notice what took place in 1893, except for the reason that it has been referred to by his counsel. Well, in 1893, Mr. Plowman did not want this gate for this crossing; he could no more use it than he could use the railway. As he did not want it, he was willing to get rid of it. He wanted a siding, and the company agreed to let him make it if he would block up this opening. That merely shows that, being desirous to get a siding, he was willing to give up the right which certainly gave him no other right, that is, to maintain a gap in the hedge protected by a gate. Now, Wright, J. has put into this order words which, in our opinion, ought to be struck out, and it is our duty to make such order as we think the judge in the court below ought to have made. It appears to me that he has, by over-caution, put into this judgment words which may, perhaps, give rise to some expectation or some hope on the part of the defendant that he has still got, or may get, some right of way. I think, in mercy to him, and in justice to both parties, the order appealed from ought to be varied by striking out the word "now" in the declaration, and the whole of the clause stating that the injunction ought to be without prejudice. With that variation in the order, therefore, the appeal will be dismissed, and dismissed with costs.

Lopes, L.J.—I entirely agree. For what reason Mr. Gribble wants to preserve this passage or right of way I cannot understand. If he wants to have the privilege of walking backwards and forwards across the line he will do it at imminent risk from the trains passing by. And if he wants it for the purpose of going across to look over and see how the crops on the other side are growing, I can only say that that was not the object originally contemplated. Now, what is this passage-way? It is an accommodation work. It had its origin in that, and all the incidents of an accommodation work belong to it. It had its existence under the 68th section of the Railways Clauses Consolidation Act of 1845. What is an accommodation work of this kind? An accommodation work like this passage-way is a work necessary for the purpose of making good any interruption of lands by the railway, the lands on either side being in the occupation of the same owner. That accommodation work is made by the railway company for a special purpose, that special purpose being to maintain a communication between the lands of the same owner or occupier which have been intersected by the railway. And, in my judgment, directly that special purpose is at an end, and when, as the defendant's counsel have admitted, it is practically impossible to use it for that purpose, the accommodation being no longer required, the obligation to afford it also ceases. In 1885 this happened: This land having been in the occupation of Mr. Raynsford, previously to that time in 1885 he sells the land on one side of the railway to Mr. Plowman. He keeps the land on the other side in his own hands for some time, and eventually that land devolves on Mr. Gribble and Mr. Gribble is now the owner. In 1885 the grant to Mr. Plowman was a grant of the fee simple. It was not for any limited period; it was an absolute parting with the fee, and there was no grant made on the one side of the railway and no reservation on the other. It was, as I have said, an absolute parting with the fee without any reservation of any kind at that time; and the necessity for the accommodation work having then ceased, to my mind, as I have said before, the obligation to afford it also ceased. Now something was said about the release by Mr. Plowman in 1893. I do not think that that affects the case in any way whatever. The history of that transaction is very shortly stated. Mr. Plowman wanted a siding, and the company did not want to give it him. But eventually the company agreed to give it him if he would stop up this gap in the hedge, he having no right at all in connection with it. I think that the order ought to be varied as the Lord Justice has suggested; and that this appeal fails.

Rigby, L.J.—I am of the same opinion. I do not mean to say that there could not be such a right as the defendant's counsel have been insisting upon—a right to go over another man's piece of land which still exists, although it might be of no possible use to the grantee. Suppose, for instance, I want to get a right of way over two estates to a point on the land to which it is convenient for me to go. I can bargain with the man on one side for the right to go over his land, and he can grant it to me if he chooses free, but that is quite irrespective of the question of right to go over the other estate. We had that question before us not long ago upon an appeal from the Palatine Court. If you get a right of way over the one estate, and merely that, and you cannot go any further without bargaining with the other owner, it is of no importance to you that you have that right now. The question is whether there was a right here, and, I am clear, there was no longer a right to use this level crossing as an independent right. It was to be used as a crossing or as a passage simply, and it is clear that, if at any time before the severance they had used the passage-way not for the purpose of crossing, but for the purpose, we will say, of carting goods there without the consent of the railway company, not crossing merely, and passing over the railway, that would have been a trespass. It is only when you go over for the purpose of crossing—in other words, for the purpose of passing over the railway to the land on the other side—that you have a right to go there at all. Consequently, there is no easement to grant, and no right under the Act to an accommodation work, except for the purpose of passing from one side of the line to the land on the other. When that is made, in point of law, an impossibility, all practical right is gone to use the crossing or the passage at all. Now in 1885, there was the conveyance to Mr. Plowman Whether because of its absolute uselessness—and, looking at the map, I should be disposed to think that was so, because the land on the other side gives a perfectly good access to a good road—or from forgetfulness, I do not care which, there was then, at any rate, a deliberate act done by which the whole of the land on the opposite side of the railway was sold without the reservation of any right over it, or the grant of any corresponding right to Mr. Plowman of passing

over the railway to come on to this land. Now I consider that an absolute abandonment. The law does not look to possibilities which have not been bargained for. No doubt the next day the vendor might have bought that land back again, or might do so at any future time—he has not done so in fact—but that would not have given him a new right of way. In 1885 he had abandoned what he got under the Act, under the award or under the conveyance, whatever it was, by the railway company, and he had no right from that moment to let a cart or horse go on the level crossing at all. I think that it would be impossible to raise from the release of 1893 any contention whatever with regard to that abandonment. The defendant's counsel argued that this must obviously involve intention. That may be true or not. There may be an intention in a man's mind to do something which is inconsistent with his act; but, if he does anything of that kind, his act and not his intention must govern the matter. There are plenty of such cases, cases in which it has been held that you must not inquire into a man's thoughts on the subject, but that the matter is governed, and you are absolutely bound by, the man's actual deed. I quite agree with the variation in the order as suggested by Lindley, L.J., and the result will be that, with that variation, the appeal is dismissed, with costs.

Order varied.

Solicitors for the appellant, *Gosling, Ingleby, Royds,* and *Rawstorne.*

Solicitors for the respondents. *Beale* and *Co.*

Monday, July 29.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Kershaw *v.* Taylor. (*a*)

ON APPEAL FROM THE QUEEN'S BENCH DIVISION.

Metropolis — Drainage — Nuisance — Sanction of district board to two houses being drained by one drain—Building owner improperly connecting four houses with one drain—Liability of owner of house to repair joint drain—"Drain" or "sewer" — Metropolis Local Management Act 1855 (18 *& 19 Vict. c.* 120), *s.* 250.

Where a person obtained the sanction of a district board to the construction of a drain for carrying the drainage of two houses into the sewer, and improperly, without the sanction of the board, connected four, instead of two, houses with the sewer by the one drain:

Held, that the drain in question was not a drain for draining a group of houses by a combined operation under the order of a district board, there being no order sanctioning the use of one drain for four houses; that, as it was used for the drainage of more than one house without such order, it was a "sewer," and not a "drain," within sect. 250 *of the Metropolis Management Act* 1855; *and that a subsequent owner of one of the houses was not estopped by the misconduct of the builder, of which he had no knowledge, from setting up as a defence to a summons against him for a nuisance on his premises arising from such drain, that it was a "sewer," and therefore repairable by the board.*

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

Appeal from the judgment of a Divisional Court (Wright and Kennedy, JJ.) on a case stated by a metropolitan police magistrate.

The respondent was summoned for that there existed, on the 21st Jan. 1895, at the premises known as "Avon," in Tankerville-road, in the parish of Streatham, by reason of the act, default, and sufferance of the respondent, a nuisance, namely, a foul and defective combined drain and house drains connected therewith.

Upon the summons coming on for hearing the magistrate dismissed it, but agreed to grant a case under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49; and for the purposes of the case the following facts were to be taken to have been either proved or admitted:

The appellant is a sanitary inspector for Streatham, and took out the summons on behalf and by direction of the board of works for the parish. The respondent is, and has for some years been, the owner of the premises known as "Avon."

On or about the 30th Aug. 1885, Mr. Gatfield, a building owner, gave written notice to the board of his intention to build six semi-detached houses in Tankerville-road, Streatham, in the county of Surrey, and attached to that notice was a plan showing the system of drainage proposed; and, subsequently, he built six houses in Tankerville-road, now known as "Cromer," "Roslyn," "Clyde," "Avon," "Severn," and "Wye."

On the 31st Aug. 1887 the notice and plan, together with other building notices, were laid before, and considered by, the board, which resolved:

The Streatham and Tooting surveyor laid before the board the following building notices, viz. (*inter alia*): From Mr. H. Gatfield, for six houses on the north-east side of Tankerville-road; and the board decided not to object to the several plans (the surveyor having stated that there was no objection thereto) subject to the drainage works being executed to the satisfaction of the surveyor, and the buildings not being built beyond the respective general lines of frontage.

Notice of the terms of the resolution having been given to Mr. Gatfield, he forthwith proceeded with, and shortly after completed, the building of the six houses, including "Clyde," "Avon," "Severn," and "Wye."

On or about the 5th Oct. 1894 the appellant, in the course of his duty as sanitary inspector, visited the premises known as "Avon," when he found that a nuisance existed upon the premises owing to defective drainage.

On or about the 6th Oct. 1894 he served formal notice upon the respondent, requiring him to abate the nuisance, and for that purpose to do certain works connected with the drainage, and specified in the notice.

On or about the 20th Nov. 1894 the respondent caused the ground to be opened for the purpose of abating the nuisance and doing the works, and then for the first time ascertained that his premises "Avon," and the premises known respectively as "Clyde," "Severn," and "Wye," were drained in the manner shown on the plan which was annexed to and formed part of the case. The respondent thereupon refused to proceed, and never has proceeded with the work of repairing the drain beyond the point where, as shown on the plan, it received the drainage of

the premises known respectively as "Severn" and "Wye, contending that from that point the drain was and is a sewer vested in the board, which, therefore, he is not liable to repair; and the nuisance still continued to exist.

Since the 20th Nov. 1894 the owner of the premises known as "Severn" has disconnected the drainage of his house from the drainage system shown on the plan, and the premises are now drained direct into the sewer belonging to the board, and running along under Tankerville-road. The premises known as "Wye," "Clyde," and "Avon" respectively are still drained in the manner shown on the plan.

On the 8th Dec. 1894 the appellant, on behalf of the board, caused to be served upon the respondent a notice requiring him to abate the nuisance, and to execute all the works necessary for that purpose, and intimating that in default of compliance legal proceedings would be commenced against him.

On the 21st Jan. 1895, the respondent not having complied with the notice, a summons was taken out against him under the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), which came on for determination on the 25th Feb. 1895.

It was contended at the hearing, on behalf of the appellant, that the premises known respectively as "Clyde," "Avon," "Severn," and "Wye" were, and that the premises "Clyde," "Avon," and "Wye" still are, drained by a combined operation within the meaning of the Metropolis Management Act 1855 and the Metropolis Management (Amendment) Act 1862 under an order or direction of the board, and that the resolution of the board of the 31st Aug. 1887 was in point of law an order or direction to that effect within the meaning of the Acts, and that, under the circumstances of the case, the respondent could not be heard to say that the drain shown on the plan was a sewer.

On behalf of the respondent it was contended that there was no order or direction of the board for draining the premises by a combined operation within the meaning of the Acts, and that, even if there were anything in the nature of an order or direction for drainage by a combined operation, the system of drainage executed was in no way approved by the board, and that the drain shown on the plan was in law a sewer from the point where it received the drainage of the premises known as "Wye."

The magistrate was of opinion, as a matter of law, that the resolution of the board of the 31st Aug. 1887 was not an approval of the system of drainage shown on the plan by reason of the variance between the two plans, and that in law the drain shown on the plan was a sewer from the point where it received the drainage of the premises known as "Wye"; and he therefore dismissed the summons.

The question for the court was, whether he was right in his decision, and, if not, what should be done in the premises.

The form of notice to the board of the intention to build issued by the board to Gatfield, and filled in by him (which notice was annexed to and formed part of the case), had the following note at the foot of it:

This notice must be accompanied by a block plan showing the proposed drainage, also the relative position of the intended buildings with the nearest existing buildings and roads. In no case will more than two houses be allowed to use one drain. Three days' notice must be given before the drains are laid through or under any house, and such drains, together with all inlets, traps, &c., are to be constructed under the inspection and to the satisfaction of the surveyor to the board. No drain is to be covered and no drain will be connected with the sewer until it has been inspected by such surveyor. The drain will be inspected within twenty-four hours from the expiration of the notice.

According to the plan accompanying the notice, the drainage from each pair of houses was to be carried by a single drain into the sewer, so that the six houses would be drained by three drains.

The Divisional Court held that the decision of the magistrate was right.

The sanitary authority appealed.

By the Metropolis Local Management Act 1855, sect. 68, all sewers within any district (except main sewers) are vested in the board of works for such district; and, by sect. 69, the district board is to repair and maintain them. By sect. 85, if any drain appears to be in bad order and condition, or to require amendment, the board may require the owner or occupier of the premises to do the necessary works.

By sect. 250:

In the construction of this Act . . . the word "drain" shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation, under the order of any vestry or district board; and the word "sewer" shall mean and include sewers and drains of every description, except drains to which the word "drain," interpreted as aforesaid, applies.

Channell, Q.C. and *Marwood* for the appellant.—The magistrate and the Divisional Court have not only held that this is not a "drain," because the order of the board only mentioned a combined drain for two houses, and this has been wrongfully connected with four, but also that it is a "sewer." The sanction of the board is, however, as necessary to the making of a sewer as to the making of a combined drain. By the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 47: "Every person other than a vestry or district board intending to make or branch a sewer, either into a sewer . . . shall in the first instance lay the plan and section thereof before, and apply for the sanction of, the vestry or district board . . . and no sewer shall be begun to be made by such person until the sanction in writing of such vestry or district board shall have been obtained." What was done here surreptitiously prevents this being a "drain" within the definition; but it cannot make it a "sewer" without the board's sanction. The question is—who is to repair it? It is clear that the builder could not have been heard to say that it was not a "drain" for the purpose of taking advantage of his own wrong. It is submitted that neither can the defendant take advantage of that wrongful act, and so escape a liability to repair which he would otherwise be subject to. If the defendant is not liable to abate this

nuisance, no one is, as it is clear that the board are not:

Bateman v. *Poplar Board of Works*, 58 L. T. Rep. 720; 37 Ch. Div. 272.

R. Bray for the respondent.—The only question in this case is, whether that which causes the nuisance is in fact a drain or a sewer. It cannot be a drain, because it drains four houses without any order; and everything which is not a drain is, by the definition, a sewer.

Channell, Q.C. in reply.

Lord ESHER, M.R.—In this case the owner of a house has been required by the sanitary authority to do certain drainage works on his premises, which works he has refused to do; and the question whether he is justified in so refusing depends upon whether that which he is called upon to repair is a "drain" or a "sewer" within the interpretation clause of the Metropolis Local Management Act 1855. The house in question, together with five others, was built by a man named Gatfield in 1887. Before building these houses, he sent in to the district board a plan showing the system of drainage which he proposed in respect of them. The board passed a resolution that the proposed plan might be carried out, subject to the work being executed to the satisfaction of their surveyor. Gatfield thereupon proceeded to build the houses; but, instead of following the plan which had been sanctioned by the board, according to which the drainage of each pair of houses was to be carried by a separate drain into the sewer, he makes a single drain serve for draining four of the houses. It follows that the surveyor of the board did not go to see if the work was done to his satisfaction. It has been argued that, as the work could not be constantly done under his supervision, he could not test whether it was done to his satisfaction, and that any expression of such satisfaction on his part must be purely formal. I do not accept that suggestion. In my opinion, if the surveyor had gone to see whether the work had been properly carried out he would have ascertained that it had not been; but he did not go. Those being the facts, and the Act providing that any drain which drains more than one building, unless under the order of the district board, is a sewer, it is clear that Gatfield, by what he did, in fact constituted this receptacle for drainage a sewer within that definition. Therefore, if, as against the defendant, the only question is what this thing is in fact within the meaning of the Act of Parliament, the summons against the defendant was rightly dismissed. The defendant's position is that, as owner of a house, he was called upon to remedy defects in its drainage. He proceeded to do so; but, upon examining that which he is required to repair, he finds that it drains three other houses besides his own; that it is in fact, therefore, a sewer, which he is not bound to repair; and he thereupon declines to continue the work. What ground is there for saying that there is any estoppel, as against him, which prevents his asserting, as the fact is, that this is a sewer? He had not done anything wrong in the matter. In my opinion, all we have to do is to say that this is a sewer within the definition in the Act. The circumstance that the man who built the house did not do what he was told to do appears to me to be altogether immaterial in this case. The defendant is responsible for nothing that happened with regard to the original execution of the drainage works when the house was built. He finds that it has been so constructed as to be a sewer, and not a drain; and he is, therefore, not liable to make good any defects in it. This is not the least like the case which was put in argument, of a stranger to the board interfering with a drain, and connecting it with the drains of other houses without the knowledge of anyone. That state of facts would raise a question which we have not to decide on the present occasion. In this case the district board knew that the work was going to be done, and it was only by their negligence that Gatfield was enabled to depart from the sanctioned plan. The judgment of the Divisional Court was right, and the appeal must be dismissed.

KAY, L.J.—On the 8th Dec. 1894, Kershaw, one of the sanitary inspectors for the Wandsworth District Board and the complainant in this case, caused the defendant to be served with a notice that legal proceedings would be taken against him if he did not execute certain works necessary for abating a nuisance. The defendant not having complied with that notice, on the 21st Jan. 1895 a summons was taken out against him by Kershaw charging him with suffering a nuisance, namely, a foul and defective combined drain and house drains connected therewith, to exist on his premises. Upon that summons, the question to be decided was, whether the particular conduit-pipe which caused the nuisance was a drain or a sewer. If it was a drain, the defendant was liable for the nuisance caused by its defective condition; if it was a sewer, it was repairable, not by the defendant but by the district board. Sect. 250 of 18 & 19 Vict. c. 120 is imperative in its terms: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only . . . and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies." The question, therefore, comes to be whether this was either a drain used for the drainage of one building only, or, if a drain for draining more than one building, it is so used under the order of the board. If it is neither, the magistrate was right in holding that the defendant was not liable. It is admitted that it was neither the one nor the other. It was used for the drainage of four buildings; and it was not so used under the order of the board, because the board sanctioned a plan by which two houses only were to be drained by it, and on the form of notice to the board of proposed new buildings issued by them to Gatfield, the man who built the house, and filled up by him, there appears this rule of the board: "In no case will more than two houses be allowed to use one drain." So far, therefore, from there being an order of the board authorising the draining of four houses by a combined operation, the only order of the board was expressly limited to two houses. I might stop there, because that, in my opinion, is the only question which we have to decide. The defendant says that he is not liable, because this is not a drain; and, in my opinion, that contention is

right. But the board try to get behind that by saying that the connecting this drain with more than two houses was a wrongful act on the part of the man who built them, and that, therefore, it is to be taken to be a drain for the purpose of this summons. I cannot follow that argument. The only question upon this summons appears to me to be, *rebus sic stantibus*, is this a drain or a sewer? The case of the board is, that they did not know that the drain was connected with the four houses; but, if they did not know it, that was through their own negligence. We are not now considering a case in which a vestry or district board has had no notice that any building or drainage operations were about to be carried out. This is a case in which the drain has become a sewer as much by the default of the sanitary authority as by the default of the party making it. And, as regards the person against whom the present proceedings are taken, he is as innocent as anyone could possibly be of any responsibility for the improper carrying out of the plan that had been sanctioned. I therefore agree that this appeal should be dismissed.

SMITH, L.J.—In this case, the complainant, a sanitary inspector in the Wandsworth district, served a notice upon the defendant requiring him to abate a nuisance, and for that purpose to do certain works to a drain upon premises of which the defendant is mortgagee in possession, and in respect of which, therefore, he is liable as owner. The defendant, upon commencing the work, finds that that which causes the nuisance is no longer a drain, but has become a sewer; in other words, that it is not used for the drainage of one building only, or for a group of houses under the order of a district board. He was not, therefore, bound to continue the work, and he accordingly refused to do so. Thereupon a summons is taken out against him for suffering a nuisance to exist on his premises from a defective drain. The question upon that summons was, whether that which caused this nuisance was a drain or a sewer. The definition clause in the Act says clearly that certain things shall be "drains," and every other description of sewers and drains shall be "sewers." Counsel for the appellant admitted that this was not a "drain" within the words of the definition. He would not, however, admit that it was a "sewer." But I do not think that he satisfactorily explained how that could be in the face of the words of the Act that everything which was not a "drain" within the definition was to be a "sewer." His argument seemed to be, that it could not be a sewer because a sewer cannot be made without the leave of the board. But I do not see that. It ought not to be; but if it is in fact made without the proper sanction in writing having been obtained, it is not the less a sewer within the definition, because of the illegal act of the person who made it. It seems to me that in this case the district board have got themselves into the difficulty by not taking care that the drains were inspected by their surveyor before they were covered. I think that this is a sewer within the definition in sect. 250 of the Metropolis Local Management Act 1855; that the magistrate and the Divisional Court were therefore right in holding that the defendant was not liable; and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *W. W. Young* and *Son.*

Solicitors for the respondent, *Griffinhoofe* and *Brewster.*

June 26 *and July* 19,

(Before KAY and SMITH, L.JJ.)

HOWORTH *v.* SUTCLIFFE. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Costs—Action of tort—Title to hereditaments—Jurisdiction of County Court—County Courts Act 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 56, 60, 116.

In an action brought in the High Court for damage to the plaintiff's reversion in certain hereditaments, the value of which exceeded 50*l. by the year, by reason of the interference by the defendant with the flow of water in a pipe passing through the defendant's land and supplying the hereditaments, the defendant denied the plaintiff's title to the pipe and flow of water, and, while denying liability, paid* 40*s. into court. The plaintiff took out the* 40*s. in satisfaction of his claim.*

Held, that the title to a hereditament was in question within the meaning of sect. 56 *of the County Courts Act* 1888, *and, therefore, as the action could not have been commenced in a County Court, the plaintiff was entitled to his costs of action, and sect.* 116 *of the County Courts Act did not apply.*

THIS was an appeal from an order of Pollock, B., at chambers, affirming a decision of the master, who had refused to tax the plaintiff's costs of action.

The action was brought in the High Court, and by his statement of claim the plaintiff alleged that he was owner in fee simple of a mill and a public-house, at Todmorden, in the county of York, which were in the occupation of his tenants, and that he was also owner of a pipe running in part through land of the defendant, and was entitled to the flow and exclusive use and benefit of a stream of water conveyed along the said pipe to his premises for the use in succession of the tenants and occupiers of the public-house and of the tenants and occupiers of the mill; that the defendant in the year 1878 secretly and wrongfully broke and stopped the said pipe, and diverted the water conveyed along the same, and in the year 1882 secretly and wrongfully made a further break in the pipe, and further diverted the water conveyed along the same at another point; that the defendant had continued to divert the water as aforesaid; and that the plaintiff's reversion in his premises was thereby damaged; and he claimed damages and an injunction.

By his statement of defence the defendant refused to admit the plaintiff's title to the premises mentioned, and to the said pipe and flow of water, and he alleged that, in 1882, by arrangement with one Barraclough, who was then the occupier and lessee of the public-house, he diverted water from the pipe to supply his stable, but that such diversion was discontinued in 1894, during the continuance of Barraclough's lease, and save as aforesaid he denied the commission by him of the acts complained of.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

He also, while denying liability, brought into court 40*s.*, and said that that sum was sufficient to satisfy the plaintiff's claim.

The plaintiff took the 40*s.* out of court in satisfaction of his claim, and brought in his bill of costs in the action to be taxed.

The master refused to tax upon the ground that the plaintiff was deprived of his costs by the County Courts Act 1888, because he had recovered less than 10*l.* in an action of tort which could have been commenced in a County Court.

Pollock, B. at chambers affirmed this decision of the master, but gave leave to appeal.

The plaintiff appealed.

It was admitted that the value of the hereditaments in respect of which the easement was claimed exceeded the sum of 50*l.* by the year.

Scott Fox for the plaintiff.—The plaintiff's title to the hereditaments has been denied, and is therefore in question. Consequently the action could not have been commenced in the County Court, and the plaintiff is entitled to his costs of bringing it in the High Court:

Hawkins v. *Rutter*, (1892) 1 Q. B. 668.

C. A. Russell for the defendant.—This action might have been commenced in the County Court, It is not enough, in order to bring a case within sect. 56, to show that it is possible that the title to hereditaments may come in question. Any action of trespass to land may possibly bring into dispute a question of title to hereditaments. It is only at the hearing that the question of title arises. The action could have been commenced in the County Court, and the judge would have had jurisdiction to try the case until it appeared that a question of title was actually involved. Then he would have struck the case out:

Latham v. *Spedding*, 17 Q. B. 440;
Sewell v. *Jones*, 19 L. J. 372, Q. B.

The defendant could not set up any title in himself or anyone else, and therefore the title was not "in question," *i.e.* "in dispute," in the action:

Re Emery v. *Barnett*, 4 C. B. N. S. 422;
Mountnoy v. *Collier*, 1 E. & B. 630.

Cur. adv. vult.

July 19.—Kay, L.J. delivered the following written judgment:—The master in this case declined to tax the plaintiff's costs of the action on the ground that the action was for a tort, and that the plaintiff only recovered 2*l.* damages. Pollock, B. agreed with the master, but gave leave to appeal. If the action was improperly brought in the High Court, this decision is right. It was an action by one who claimed to be owner in fee simple of a mill and public-house situate at Todmorden, in the county of York, and also claimed to be owner of a pipe passing through the defendant's land, and to be entitled to the flow of water through it exclusively. The alleged tort was that the defendant had diverted the water from this pipe in his own land. It was argued that this is not like an ordinary action of trespass in which occupation of the tenement is all that need be proved, the title not coming at all in question. The plaintiff was not in occupation. His tenant was, and the plaintiff sued for injury to his reversion. Unless the defendant admitted it, the plaintiff, it was argued, would be obliged to prove his title to the pipe and flow of water through the defendant's land. In fact, the defendant by his pleading refused to admit this, but he said that he had diverted the water with the consent of the occupier of the public-house, and that such diversion has since been discontinued during the lease under which such occupier held, and he never intended to renew it, and the defendant, denying liability, paid into court 40*s.* The plaintiff was satisfied with this. He took the 40*s.* out of court, and applied to have his costs of the action taxed. Reference is made to sects. 56, 60, and 116 of the County Courts Act 1888, and to various cases which I will proceed to consider, premising only that it seems to me important to put, if possible, such a construction upon the Act as will enable a plaintiff to judge, when he brings his action, whether he should bring it in the High Court or in the County Court. Sect. 56 of the County Courts Act 1888 provides that actions for a debt, demand, or damage, not exceeding 50*l.*, may be commenced in a County Court, provided, amongst other things, the title to any corporeal or incorporeal hereditament shall not be in question, unless, by sect. 60, the annual value of such hereditament shall not be more than 50*l.* a year, or, in the case of an easement, the value of the hereditament in respect of which the easement is claimed shall not exceed that annual sum. Then sect. 116 provides that if, in an action of tort brought in the High Court which could have been commenced in the County Court, the plaintiff recovers less than 10*l.*, he is not to have any costs unless, amongst other things, the High Court allows costs. In *Sewell* v. *Jones* (19 L. J. 372, Q. B.), the action was to recover damages for trespass. A motion was made for a prohibition by the defendant on the ground that the land on which the alleged trespass was committed belonged to him, and the rule for a prohibition was made absolute. In *Latham* v. *Spedding* (17 Q. B. 440) it was held that, in an action of trespass, a plea of not possessed did not raise a question of title. In *Mountnoy* v. *Collier* (1 E. & B. 630) a tenant, in answer to an action for use and occupation, sought to prove that, before the time referred to, his landlord's title had expired, and it was held that this did put the plaintiff's title in question. In *Emery* v. *Barnett* (4 C. B. N. S. 423), in an action for rent, the defendant had left the premises, and it was held that if he left voluntarily no question of title was raised, but otherwise if he was ejected by title paramount. In *Williams* v. *Jones* (15 L. T. Rep. 248) the defendant, in answer to an action for removing stone from the plaintiff's land, set up an Inclosure Act, by which he alleged that the stone was reserved to him. This, it was held, raised a question of title. In *Hawkins* v. *Rutter* (1892) (1 Q. B. 668) it was held that, in an ordinary action for trespass, where possession only need be proved by the plaintiff, his title does not come in question; and it was further decided that the easement referred to in sect. 60 of the County Courts Act 1888 does not apply to a public right of way, but only to an easement where there is a dominant and servient tenement, and the value of either does not exceed 50*l.* a year. If this were a simple action of trespass, in which the plaintiff need only allege and prove possession, his title would not come in question, even if the defendant pleaded that the plaintiff was not possessed. In such an action the title would only come in question if the defen-

dant set up a title in himself to the *locus in quo*. The plaintiff here sues for injury to his reversion, and the defendant sets up a right to take the water by agreement with a former tenant of the plaintiff. That raises at once the question whether such agreement was binding on the plaintiff; in other words, whether by such an agreement the defendant acquired a title against him, and this is clearly a question of title which, if the plaintiff had not accepted the 40*s*., must have been decided at the trial. I think, therefore, that on these pleadings the plaintiff's title was put in question, and that the case could not be tried in a County Court, and that the plaintiff is therefore entitled to the costs of the action.

SMITH, L.J. delivered the following written judgment:—The question is whether this action, which has been brought in the High Court, could, within the meaning of sect. 116 of the County Courts Act 1888, have been commenced in a County Court, for, if it could, it being an action of tort, and the plaintiff having recovered only 40*s*., he is not entitled to any costs, whereas if the action could not have been commenced in a County Court the plaintiff is entitled to costs, and to have them taxed against the defendant. As I understand the Act and the cases thereon, the law as to whether an action brought in the High Court could have been commenced in a County Court depends upon whether, if the action were brought and tried in a County Court, the title to a corporeal or incorporeal hereditament exceeding in value 50*l*. by the year would in reality come in question. If it would, then the action could not have been commenced in a County Court within the meaning of the section, for by sects. 56 and 60 the County Court would have no jurisdiction to try it. It is agreed that in this case the value of the hereditaments exceeded 50*l*. by the year, but it was argued for the defendant that no title to any hereditament in reality came in question. It has been held, and in this I agree, that the mere assertion by the plaintiff of title to a hereditament of over 50*l*. in value by the year is not sufficient to show that the action could not have been commenced in the County Court; but, in order to show that the plaintiff could not sue in the County Court, he must establish the fact that a question of title did really and *bonâ fide* come in issue; not merely that the defendant had so pleaded that it possibly might do so, but that it in reality must do so: (*Latham* v. *Spedding*, 17 Q. B., at p. 440.) Now, the plaintiff's case is that at the time of the committing by the defendant of the wrongs complained of, the plaintiff was owner in fee of a mill and of a pipe connected therewith which was situate under the defendant's land, and as such owner was entitled to the exclusive use of the water conveyed by that pipe to his mill for the use of his tenants, and that in the years 1878 and 1882 the defendant secretly and wrongfully bored into the pipe and tapped the water running therein, whereby the plaintiff's title to the pipe and to the exclusive use of the water running therein has been interfered with, and his reversion in the mill has been injured. All these allegations are put in issue by the defendant, and in addition he sets up a leave and licence by the plaintiff's tenants to him to do what is complained of, and he also, but without admitting liability, pays 40*s*. into court. The question is, could the plaintiff succeed in this action by mere proof that he was, when the wrongful acts were committed, in possession of the mill by his tenants who were then enjoying the use of the water? If such proof would suffice, I should hold again, as I did in *Hawkins* v. *Rutter* (1892) 1 Q. B. 668), that title to a hereditament did not come into question within the meaning of the section. But would it suffice? Suppose the plaintiff went to trial merely proving that he was in possession of the mill by his tenants, who were enjoying the water, how would that prove that the pipe under the defendant's land was the plaintiff's property, and that the defendant was in the wrong in boring into the pipe which was upon his own land? It would prove nothing of the kind, and in my judgment if the plaintiff proved nothing more than possession of the mill he ought to be nonsuited. It should be observed that the plaintiff could never prove that he or his tenants were in possession of the pipe, for this was under the defendant's land, and not in his possession or that of his tenants. As the plaintiff cannot establish his case by proving a mere possessory title, I am of opinion that he must go further and prove what is his title to the mill and pipe. This being disputed, the title to a hereditament within the meaning of the Act must come in question. It is true that the plaintiff has taken out of court the 40*s*. paid in by the defendant, with a traverse of the plaintiff's title, as adequate damages for the loss he has sustained by the alleged wrongful acts of the defendants; but how does this make the action one which could have been commenced in the County Court, for, had it been tried there, the County Court would have had no jurisdiction to try even whether the 40*s*. was sufficient or not, for this never could have been ascertained until the plaintiff's right to the pipe and mill had been tried out? Kay, L.J. has gone through the cases, and I do not refer to them again. In my judgment, this appeal must be allowed, with costs here and below, and the plaintiff is entitled to have his costs taxed against the defendant.

Appeal allowed.

Solicitor for the plaintiff, *Trenam*, for *Sager*, Todmorden.

Solicitor for the defendant. *Lambert Kirkman*, for *Eastwoods* and *Sutcliffes*, Todmorden.

Friday, Aug. 9.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

Re STOGDON; *Ex parte* LEIGH. (*a*)

APPEAL IN BANKRUPTCY.

Bankruptcy—Form of bankruptcy notice—Address of creditor—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-sect.* 1 (*g*).

A bankruptcy notice must contain an address of the creditor at which the debtor can pay, or secure, or compound for the debt.

Therefore, where the address of the creditor given in a bankruptcy notice was "White's Club, St. James's," and the creditor was out of England at the service of the notice and for seven days after:

Held, that the notice was bad on account of the insufficiency of the address.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

This was an appeal from a decision of Mr. Registrar Linklater dismissing a bankruptcy petition. The petition was founded upon the non-compliance by the debtor with the requirements of a bankruptcy notice which the creditor had served upon him.

The bankruptcy notice was in the form given in the Bankruptcy Rules 1886, and required the debtor within seven days after service thereof "to pay to Richard Cecil Leigh, of White's Club, St. James's, S.W., the sum of 2525*l.* 6*s.* 10*d.*, claimed by him" as being the amount due on a final judgment obtained by him against the debtor in the Supreme Court, dated the 12th June 1895, &c.

At the time of the service of the notice, and during the seven following days, the creditor was travelling on the Continent.

It was stated that he had no other address in England besides White's Club.

The notice bore on it the names of Messrs. Mason and Edwards, as solicitors for the judgment creditor, and they held a power of attorney to act for him in the matter. It was stated that the debtor had had dealings with Messrs. Mason and Edwards as solicitors for the judgment creditor, and that he was aware that they held a power of attorney to act for him.

The registrar dismissed the petition founded upon the debtor's non-compliance with the requirements of the notice upon the ground that the notice did not give any sufficient address of the creditor.

The creditor appealed.

Cooper Willis, Q.C. for the creditor.—The address given is quite sufficient. The form only requires some address to be given. If the debtor had gone to White's Club and inquired for the creditor he would have been referred to the creditor's solicitors, who had a power of attorney to deal fully with the matter. No other address in England than White's Club could have been given, as the creditor had no residence in England:

Lambe v. *Smythe*, 15 M. & W. 433.

Herbert Reed, Q.C. and *Frank Mellor*, for the debtor, were not called upon.

Lord Esher, M.R.—I think that this bankruptcy notice was defective. No such address of the judgment creditor is mentioned in it as was intended by the Act should be given. None of the things which the debtor is required by the Act and the notice to do could have been done at White's Club. For the purposes of the Act such an address as is given here is no address at all. The appeal must be dismissed.

Kay, L.J.—I agree. It is not a sufficient compliance with the statutory requirements to give in a bankruptcy notice an address of the judgment creditor at which he can only be heard of, and where he will not himself be found. The notice requires the debtor to pay the debt, or else to secure or compound for it within seven days after service of the notice, and if the debtor does not comply he will be made bankrupt. If the only address of the creditor in the notice is one at which the debtor can only hear about his creditor, and cannot pay the debt, or secure or compound for it, then there is no sufficient address given to satisfy the statutory requirements. It is admitted that the creditor in this case was not in England at any time during the seven days mentioned in the notice, and it would be monstrous to make the debtor a bankrupt upon the non-compliance with this bankruptcy notice, when he could not possibly have complied with it, and paid the debt within the seven days of its service.

Smith, L.J.—I entirely agree.

Appeal dismissed.

Solicitors for the creditor. *Mason* and *Edwards*.
Solicitor for the debtor, *C. E. Soames*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 22, 29, *July* 2 *and* 23.

(Before Stirling, J.)

Re The London and New York Investment Corporation (Limited and Reduced). (*a*)

Company—Reduction of capital—Incidence of loss—Founders' ordinary and preference shares—Extinguishment of founders' shares—Ratification of director's resolution for issue of preference shares—Companies Acts 1867 *and* 1877.

The capital of an investment company registered in 1889 *was fixed by the memorandum of association at* 1,000,000*l.*, *divided into founders' ordinary and preference shares, all issued and fully paid. The preference shares were to have* 5 *per cent., then the ordinary shares were to take* 7 *per cent., and any profits remaining were to go equally between founders' and ordinary shares. Until* 1894 *the preference shareholders had received* 5 *per cent. The ordinary shares had received from* 5 *to* 8 *per cent. down to* 1893, *but nothing in* 1894. *In the first year of the company's existence the holders of founders' shares received a sum equal to* 1 *per cent. on the ordinary shares, and since that year nothing. Valuations of the securities and investments held by the company were made, and showed a loss of* 251,000*l.* *No special resolutions for the issue of the preference shares had been passed previously to their issue, but resolutions ratifying the issue were passed afterwards. Upon a petition for the sanction of the court to a scheme for reduction of capital, passed by a large majority of all classes of shareholders, by which the loss was to fall first on the founders' shares and then on the ordinary shares:*

Held, upon the construction of the memorandum of association, that the company could ratify the issue of preference shares, and had, in fact, ratified it, and that, under the circumstances, there was nothing inequitable or unjust in the scheme within the meaning of British and American Trustee and Finance Company v. Cowper (70 *L. T. Rep.* 882; (1894) *A. C.* 399), *and applying the rule as to the incidence of loss laid down by Cotton, L.J. in* Bannatyne v. Direct Spanish Telegraph Company (55 *L. T. Rep.* 716; 34 *Ch. Div.* 287), *and by Chitty, J. in* Re Floating Dock Company of St. Thomas (1895) 1 *Ch.* 691; 64 *L. J.* 361, *Ch.*) *the court could sanction the reduction proposed.*

This was a petition presented by the London and New York Investment Corporation, to obtain the sanction of the court to certain resolutions duly passed for the reduction of capital, on the

(*a*) Reported by John Sanderson, Esq., Barrister-at-Law.

ground that paid-up capital to the amount of 251,000*l.* had been lost. The company was registered under the Companies Acts on the 11th Oct. 1889.

The objects for which the company was established, as defined by its memorandum of association, included (amongst others) the two following:

(*a.*) To raise money by share capital and invest the amount thereof in or upon or otherwise to acquire and hold any bonds, stocks, obligations, or securities of foreign or colonial or British governments, states, dominions, sovereigns, provinces, municipalities, corporations, rulers, or public authorities, or the bonds, debentures, debenture stocks, scrip, obligations, shares, stocks, whether preference or ordinary and whether fully paid or not, or securities of gas, water, railway, and other companies, ships, canals, public works, and undertakings incorporated or established by Act of Parliament, Royal Charter, or under the Joint Stock Companies Acts in England or the Colonies, or by State authority, or under the laws of any foreign country or State and in or upon real estate, and whether by way of contributory mortgage or otherwise.

(*b.*) To act as agents or trustees for joint-stock and other companies, corporations, states, or municipalities, whether domiciled in the United Kingdom or elsewhere, in the issue of their shares, stock, bonds, debentures, and debenture stock, and the undertaking and guaranteeing of such issues and the guaranteeing to the holders the due payment of principal and interest of debentures and debenture stock, and the making of loans upon the security thereof either to private persons or public companies. Provided, however, that this clause shall not authorise the company to act as trustee or make directly or indirectly any such issue as aforesaid within the United Kingdom of Great Britain and Ireland, except through the Trustees, Executors, and Securities Insurance Corporation Limited, or their nominees, but an issue within such kingdom may be guaranteed by the company.

By clause 5 of the memorandum of association it was declared that

The nominal capital of the company is 1,000,000*l.*, divided into 100,000 shares of 10*l.* each, of which 200 shall be founders' shares, 50,000 shall be preferred shares, and the remaining 49,800 ordinary shares.

All this capital had now been issued and was fully paid up.

Clause 7 of the memorandum of association contained the following provisions:

(*b.*) There shall first be paid out of the net profits of the company in each year to the holders of the preferred shares a cumulative preferential dividend, at a rate not exceeding 5*l.* per cent. per annum on the amount paid-up thereon for the time being. (*c.*) There shall, in the next place, be paid out of the net profits of the company to the holders of ordinary shares a dividend at the rate of 7 per cent. per annum on the amount paid up thereon for the time being. (*d.*) After these payments, and providing for the further remuneration of the directors, one moiety shall belong to the holders of founders' shares, and the residue shall belong to the holders of ordinary shares. (*f.*) Any of the original shares and any new shares from time to time to be created may (but subject always and without prejudice to the rights of the holders of the founders' shares who shall, in each and every year, receive their interest or dividends as herein expressed) from time to time be issued with any such guarantee or any such right of preference whether in respect of dividend or of repayment of capital or both or any such other special privilege and advantage over any shares previously issued or then about to be issued, or at such a premium or with such deferred rights as compared with any shares previously issued or then about to be issued, or subject to any such conditions or provisions, and with any special right or without any right of voting, and generally on such terms as the company may from time to time, by special resolution, determine.

Art. 7 of the articles of association was in these terms:

The founders' shares shall entitle the holders thereof to such dividends and other interest in the profits of the company as is defined by the memorandum and articles of association; but, except in the case of liquidation, they shall not entitle the holders thereof to any share in the capital of the company beyond the actual amount paid up or duly credited as paid up upon them.

Art. 169 was:

In any winding-up of the company the holders of founders' shares shall be entitled (as between themselves and holders of preferred and ordinary shares) to one moiety of any assets of the company remaining after the payment and discharge of the debts and liabilities of the company, and the repayment to the holders of preferred and ordinary shares of the amount paid up or credited as paid up on such shares, together with the costs of winding-up; provided always that in the division of any reserve fund under this clause the founders shall be entitled to one moiety of any portion of such reserve fund arising from the issue of any shares in the company at a premium, but as to any other reserve fund shall only be entitled to one moiety of such reserve fund up to 20 per cent. of the subscribed capital, and no more.

Art. 10 provided that, subject to the memorandum of association, the shares should be under the control of the directors, who might allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times as the directors should think fit.

Art. 107 provided for the retirement of the directors by rotation.

The preferred shares were not immediately issued, but the prospectus inviting application for ordinary shares contained the following sentence:

It is proposed hereafter to issue 50,000*l.* preference shares of 10*l.* each (preferred both as to capital and dividend), carrying such rate of interest, not exceeding 5*l.* per cent., as the directors may determine.

In or about June 1890 the directors issued a second prospectus, inviting applications for ordinary shares upon the basis of the first prospectus, containing the following statement:

These shares are preferred as to capital, and are entitled to a cumulative dividend of 5*l.* per cent. per annum in advance of the ordinary shares.

No special resolution sanctioning the issue of the preference shares had been passed previously to the allotment of the shares.

But subsequently to the issue of the shares by special resolutions of the company duly passed at extraordinary general meetings held on the 27th April and 15th May 1893, it was resolved:

(1.) That the cumulative preferential dividend of 5 per cent. per annum payable under the memorandum of association . . . to the holders of the 50,000 preferred shares be at the rate of 5 per cent. per annum. (2.) That, as against both the founders' shares and the ordinary shares . . . such preferred shares shall confer a right to priority in the capital upon a winding-up . . . or otherwise, but such preferred shares shall not confer or have any other right or interest in the distribution of the surplus assets.

In October 1894 the directors determined to have a general valuation made of the securities

and investments held by the company. These consisted of two classes—those in North America, and those in this country or elsewhere. The valuation of the securities and investments in North America was made by two brokers of the New York Stock Exchange, who valued them as they stood on the 31st Oct. 1894, taking them at the market price of that day.

The other securities were valued by the board of directors, who took the selling quotation on the 31st Oct. 1894. In the case of those not quoted, they made inquiries, and fixed what they thought to be the fair value. The result was to bring out a loss of 251,000*l.*, including a sum of 73,397*l.* representing actual loss upon the sales of securities.

A second valuation was made on the 28th Feb. 1895; but the result was that there was no difference substantially in the position of the company.

The company had passed special resolutions which the court was now asked to sanction, for reduction of capital, the scheme making the loss to fall first on the founders' shares and then on the ordinary shares. This was opposed by a holder of thirty ordinary shares and by three holders of founders' shares.

The voting on the resolutions for reduction of capital showed that the resolutions had been supported by a large number of shareholders of all the three classes. The scheme for the reduction was:

That the capital be . . . and is reduced from 1,000,000*l.*, divided into 100,000 shares of 10*l.* each, of which 200 are founders' shares, 50,000 preference shares, and the remainder are ordinary shares, to 749,000*l.*, divided into 50,000 preference shares of 10*l.* each, and 49,800*l.* ordinary shares of 5*l.* each, and that such reduction be effected by cancelling the capital which has been lost or is unrepresented by available assets, the following paid-up capital, that is to say: (1) the whole of the 10*l.* per share paid up on the 200 founders' shares; and (2) 5*l.* of the 10*l.* per share paid up on each of the ordinary shares.

The following dividends had been paid on the several shares: On the preferred shares, in 1890, 5 per cent.; 1891, 5 per cent.; 1892, 5 per cent.; 1893, 5 per cent.; 1894, 5 per cent. On the ordinary shares, in 1890, 8 per cent.; 1891, 7 per cent.; 1892, 5 per cent.; 1893, first half-year, 5 per cent.; 1894, nothing. The founders' shares had received in 1890 an amount equal to a dividend of 1 per cent. on the ordinary shares, but since that year they had received nothing.

Buckley, Q.C. and *C. H. Sargant* for the petition, cited

Re Floating Dock Company of St. Thomas, (1895) 1 Ch. 691.

[STIRLING, J.—Had the shares blotted out in that case any priority as to dividend? It would appear to be unjust to blot them out where there is priority in respect of dividend, though there may be no priority in respect of capital.]

Graham Hastings, Q.C., and *E. C. Macnaghten* for a holder of thirty ordinary shares.—We oppose the petition on the ground that the preference shares have not any preference either as to dividend or capital, and the case is not within the decision of Chitty, J., in *Re Floating Dock Company of St. Thomas*. The special resolution passed in 1893 was entirely void, being passed by both preferred and deferred shareholders voting together. The issue of the prospectus referring to the preference shares does not help the holders, for by article 7 (*f*) a special resolution must have been passed before the issue of the preference shares. The evidence as to loss is not satisfactory. Two valuations are put in, but details of the securities are not given. The information before the court is not sufficient to warrant it dealing with such a large sum as is here in question. If no order is made the loss will fall on all classes of shareholders equally. The scheme for distributing the loss asks the court to give priority where there is none, and is unfair and inequitable. The special resolution being absolutely void, lapse of time is immaterial, and further, though time has elapsed, nothing has been done under the resolution which can affect our position. The resolution is void under clause 7 (*f*) of the memorandum of association which gives the company power to create capital and to give priority of any kind it thinks proper; but we contend that priority must have been given by special resolution of the company passed before the shares were issued. If that is the right construction any resolution purporting to be passed in 1893 was void, not only with regard to matters within sect. 8 of the Companies Act 1862 (25 & 26 Vict. c. 89), but also in regard to other matters. [STIRLING, J.—I thought the recent authorities were in favour of the other view. Have you any recent authority showing that a matter which is not required by the Act of 1862 to be stated in the memorandum may not be altered?] According to Buckley on the Companies Acts (6th edit.), p. 16, the word conditions in sect. 12 of the Act of 1862 which deals with the power of companies to alter the memorandum of association is general. It is not restricted to the conditions required by the statute to be inserted in the memorandum. If conditions not required by the statute to be inserted and being, not details with regard to the management of the company, but conditions in the sense that they form a part of the constitution of the company are inserted in the memorandum they are by virtue of that section unalterable. *Ashbury* v. *Watson* (54 L. T. Rep. 27: 30 Ch. Div. 376) is a clear authority for the proposition, and there is no subsequent authority overruling that case. *Hutton* v. *Scarborough Cliff Hotel Company* (13 L. T. Rep. 57; 11 Jur. N. S. 849; 3 Dr. & Sm. 521) has no doubt been doubted by the House of Lords in *British and American Trustee and Finance Corporation* v. *Couper* (70 L. T. Rep. 882, 887; (1894) A. C. 399, 417). In *Ashbury* v. *Watson*, Fry, L.J., says, that the principle is illustrated by *Hutton* v. *Scarborough Cliff Hotel Company*, but it is universal. All that that case decided was that there was an implied condition of equality in the memorandum, but it did not deal with an express condition as to priority such as is contained in the present memorandum. *British and American Trustee and Finance Corporation* v. *Couper* dealt with the question whether a company was to be divided into two. It was a decision on a special case, and is no authority here. Though the court has jurisdiction to sanction a reduction of capital it will not sanction the reduction of some shares and not of others unless some good ground for it is shown. A subsequent resolution is idle because the new shareholders come in and vote.

Rowden for a holder of one founders' share.—I am liable under the scheme in the petition to have my share totally extinguished. While admitting the effect of *Re Floating Dock Company of St. Thomas*, I submit that to extinguish the founders' shares the petition must show (*a*) that the founders' shares are primarily liable for the loss of capital, and (*b*) that they can obtain no possible benefit in the way of dividend:

Re Union Plate Glass Company Limited, 61 L. T Rep. 327; 42 Ch. Div. 513;
British American Trustee and Finance Corporation v. *Couper*, 70 L. T. Rep. 882, 886, 887; (1894) A. C. 399, 413, 415.

G. P. C. Lawrence, for the Law Debenture Corporation in the same interest. There is no case in which the court has annihilated shares. In *British and American Trustee and Finance Corporation* v. *Couper* the shares were unnecessary. There is a clear distinction between that case and one of founders' shares. I submit the court should write off the nominal value and not cancel the founders' shares. The founders' shares ought at least to have a *scintilla* of interest left to them in case the affairs of the company should improve.

Gilbert Purcell for a holder of one founders' share.

Buckley in reply.—The special resolutions were carried unanimously in April 1893. There was a compromise after the defect in the preference shares was discovered. Even if the argument for the holders of ordinary shares be otherwise well founded, *British and American Trustee and Finance Corporation* v. *Couper* seems to dispose of it. The court, in considering the application, has to apply the test whether it is consistent with the contract between the different classes of shareholders. The Companies Act 1867, sect. 11, specifies the time at which and the conditions on which special resolutions for the reduction of capital are to be passed. The ordinary shareholders have since 1893 assented. Cotton, L.J., in *Bannatyne* v. *Direct Spanish Telegraph Company* (55 L. T. Rep., at p. 719; 34 Ch. Div. at p. 299, 300), says that where there is a reduction of capital the loss must fall on those who would have to bear it in the event of a winding-up. *Re Union Plate Glass Company* (*ubi sup.*) was dissented from in *Re Gatling Gun Limited* (62 L. T. Rep. 312; 43 Ch. Div. 628), where it was held that the court has power under the Acts of 1867 and 1877 to sanction a special resolution for the reduction of some only of the shares of a company. The terms as to founders' shares are contained in the memorandum and articles of association. The holders of these shares cannot throw their loss on somebody else. He referred to

Eichbaum v. *City of Chicago Grain Elevators Limited*, 65 L. T. Rep. 704; (1891) 3 Ch. 459; 61 L. J. 28, Ch.

[STIRLING, J.—A special resolution is a public document and ought to be registered.] You are entitled to assume that every formality has been complied with in dealing with the company. [STIRLING, J.—Must you not be taken to know that registration had not taken place?] No, unless registration was necessary for its validity, which it was not. [STIRLING, J.—The losses have been ascertained by taking an ascertained value on a particular day. It very important to consider whether this is a temporary depreciation or a permanent loss.]

Cur. adv. vult.

July 23.—STIRLING, J. in delivering judgment stated the facts of the case and proceeded:—The first question is, whether it is established that the alleged loss of capital has actually occurred. I have stated the effect of the evidence in support of the petition. The detailed valuations have, at my request, been produced to me. Although several shareholders appear in opposition not one of them has thought fit to adduce any evidence to the contrary, or even to pledge his own belief that the loss has not occurred, nor have the witnesses in support of the petition been cross-examined. The matter is eminently one for decision by commercial men. The directors, with the assistance of competent advisers, have exercised their judgment on it, and the shareholders of all classes have by large majorities accepted the views put forward by the directors. I hold then that the allegations of the petition are sufficiently proved. The next question is, whether the reductions ought (as proposed by the resolutions) to be thrown primarily on the founders' shares (which it is proposed to wipe out altogether) and next on the ordinary shares. The case of the *British and American Trustee and Finance Company* v. *Couper* (70 L. T. Rep. 882; (1894) A. C. 399) shows that it is the duty of the court to be satisfied before confirming the resolution that there is nothing unjust or inequitable in the proposed reduction. Now, it appears from what was laid down by Cotton, L.J. in *Bannatyne* v. *The Direct Spanish Telegraph Company* (55 L. T. Rep. 716, see p. 719; 34 Ch. Div. 287, see pp. 299, 300) and by Chitty, J. in *Re Floating Dock Company of St. Thomas* (1895) 1 Ch. 691, see p. 699) that where there are different classes of shares, the loss on a reduction ought to fall on those who would have to bear it if there was a winding-up; and taking this to be the rule, I have to see how it is to be applied in the present case. As regards the founders' shares, 200 in number, they represent a capital of 2000*l.* The holders take no share of the profits until a dividend of 5 per cent. has been paid on the preference shares, and of 7 per cent. on the ordinary shares. After these dividends are paid and the directors have been remunerated, the remaining profits are to be paid (according to the memorandum of association) as to one moiety to the holders of the founders' shares, and the residue to the holders of the ordinary shares (art. 7). Upon a winding-up the holders of founders' shares are by art. 169 to be entitled to one moiety of any assets of the company remaining after the discharge of the debts and liabilities of the company and the repayment to the holders of preferred and ordinary shares of the amount paid up on those shares. Now, it appears from an examination of the balance-sheet prepared by the accountants that there is required for payment of the above-mentioned dividends to the preference and ordinary shareholders a sum of (in round figures) 56,500*l.*, while the present investments, after deducting interest on debentures, &c., yield a net annual income of about 16,000*l.* leaving a deficiency of about 40,000*l.* to be made up before any dividend can be received by the holders of founders' shares. Further, if all the existing investments were realised at their par value, there would be an existing loss of over

73,000*l*. In my judgment there is no reasonable prospect of anything ever coming to the holders of founders' shares, either in respect of dividend or capital, and consequently I cannot consider it unfair to throw on them in the first instance the loss which has actually occurred. The case of the ordinary shareholders raises a different and more difficult position. It is contended on their behalf that, regard being had to the circumstances under which the preference shares were issued, the latter do not carry with them any preference as regards distribution of capital on a winding-up. [His Lordship then read arts. 5, 7 (*b*) (*f*) of the memorandum of association, and arts. 10, 107, of the articles of association, and proceeded:] Having regard to these provisions, I think it was competent to the directors to fix the rate of preferential dividend, so long as it did not exceed 5 per cent., but it was not competent for them, without the sanction of a special resolution, to confer any other preferential rights. [His Lordship read the prospectus of ordinary shares of the 12th Oct. 1889, the resolution of the directors of the 11th June 1890 for the issue of preferred shares, and the prospectus of preference shares of the 20th June 1890, and continued:] No special resolution sanctioning the issue of preference shares was passed previously to the allotment of the shares. After referring to the paragraphs 10 and 11 of the petition, and the special resolutions of the 27th April and the 15th May 1893, he proceeded: It is contended that these resolutions are of no validity. It is said that the memorandum of association, according to its true construction, requires that the special resolution defining the preference shares should be passed previously to the issue of the shares; and that a resolution passed subsequently to the issue of the shares cannot set the matter right, because it is passed by a body of shareholders different from that which would be called upon to sanction the preference before the issue. In the present case, for example, the holders of ordinary and founders' shares were the persons by whom the special resolutions ought to have been passed, while the resolutions of 1893 were passed by the whole body of shareholders, including the holders of preference shares as well as ordinary and founders'. On this two questions seem to arise: (1) Was the issue of preference shares absolutely incapable of ratification by the company? and (2) If not, has it been duly ratified? As to (1) if the issue was absolutely beyond the powers of the company as defined by the memorandum of association, then it was, no doubt, incapable of ratification. The vice of the transactions lay in this, that the directors took upon themselves to issue the shares without obtaining the sanction of a special resolution. There is nothing however in the memorandum of association to prevent the company from passing a special resolution to the effect that it should be left to the directors to determine what rights of preference should be given to the preferred shareholders. It is said that the special resolution ought to have been passed before the issue of the shares, but the memorandum does not say so; and I do not think it ought to be construed so as to prevent the company rectifying a slip such as has occurred in the present case if that can be done consistently with justice. This being so, it seems to me that it cannot be said that the acts of the directors as regards the issue were incapable of ratification. How then is such ratification to be given? At the meetings held on 27th April and 15th May 1893 holders of preference shares voted as well as holders of ordinary and preferred shares. If the resolutions then passed had been carried by the votes of the preference shareholders I should have thought that they could not be relied on, but the meetings were attended by substantial numbers of holders of ordinary and founders' shares, and the resolutions were unanimous; and in my judgment (subject to what I am about to say) these resolutions constituted a sufficient ratification of the acts of the directors. It is contended, however, that in April 1893 it was too late for the preferred shareholders to claim the rights to which they might originally have been entitled. It is said that they must be taken to have had from the first notice that the issue of preferred shares had not received the sanction of a special resolution, because a copy of such resolution if passed ought, in accordance with sect. 53 of the Companies Act, to have been found in the office of the Registrar of Joint Stock Companies, and such a view of the legal position appears to be sanctioned by what is laid down in *Irvine* v. *Union Bank of Australia* (37 L. T. Rep. at p. 180; L. Rep. 2 App. Cas., at p. 379). It is further pointed out that some of the shares were surrendered, and it is suggested that the surrender was made in consequence of the discovery of the defect in the original issue. Again, it is said that the preference shareholders accepted dividends in the interval between the issue of the shares and the 27th April 1893. Notwithstanding these circumstances, I am not persuaded that the rights of the preference shareholders were affected thereby. Such notice as they had of the absence of a special resolution was constructive only; and if, in point of fact, the preference shareholders were ignorant of the omission, and such ignorance is attributable (as I think it is) to the frame of the prospectus, I think mere constructive notice could not prejudice their rights against the company, whatever might be the effect of such notice as against third parties. There is no evidence to show that the defect had become known to the preference shareholders before April 1893. The solitary holder of ordinary shares who opposes the petition has not pledged his own belief that this is the fact, or cross-examined the witnesses who have made affidavits in support of the petition. However this may be, I think it lay with the holders of founders' and ordinary shares to determine whether the act of the directors should be ratified or not. The prospectus on which the ordinary shares were issued warned the holders of those shares that shares to be preferred both as to capital and dividend, were afterwards to be issued. The prospectus of the preferred shares plainly states that these shares were to have a preference as to capital. Under these circumstances, it may well have been that the holders of ordinary and founders' shares considered in April and May 1893 that it was not otherwise than in accordance with honesty and justice that the right of preference, as regards capital, should be sanctioned by them, if this could lawfully be done. In my opinion such sanction was within their legal powers, and has been effectually given. I come to the conclusion,

therefore, that there is nothing in the proposed reduction which is unjust or inequitable, or requires the court to abstain from confirming it. I therefore make an order in accordance with the prayer of the petition.

Solicitors: For the petitioners, *Paines, Blyth,* and *Huxtable;* for the ordinary shareholders, *Cordell* and *Son;* for the Law Debenture Corporation, *William A. Crump* and *Son;* for holders of founders' shares, *Hugh C. Godfray; Slaughter* and *May.*

May 15 *and July* 17.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re STANDARD GOLD MINING COMPANY LIMITED. (*a*)

Company — Winding-up — Private examination — Depositions — Right of contributory or creditor to inspect — Companies Act 1862 (25 *&* 26 *Vict. c.* 89), *s.* 115 — *Companies (Winding-up) Rules, April* 1892, *rr.* 11, 32.

Where a company is being wound-up every contributory and every creditor, whose proof has been admitted, is entitled to inspect and take copies of the depositions of persons examined under sect. 115 *of the Companies Act* 1862.

IN the winding-up of the Standard Gold Mining Company Limited G. B. Mee, a contributory and late director of the company, and certain other persons, had been examined under sect. 115 of the Companies Act 1862.

The depositions were not placed on the ordinary file of proceedings of the company, but on a separate file kept for the purpose.

On the 25th April 1895 Mee applied by summons to Williams, J. in chambers for an order that he might be at liberty to inspect the file of the proceedings, and in particular the depositions in question, and to take copies of or extracts from the same, or any part thereof, or in the alternative a declaration that the said depositions were then upon the file and formed part of the file of the proceedings of the court under rules 11 and 32 of the Companies (Winding-up) Rules of April 1892, and that he was entitled to inspect and take copies of or extracts from the same. The judge made an order dismissing the application.

This was a motion by the applicant to discharge the order, and for an order in the terms of the summons.

The Companies (Winding-up) Rules of April 1892 provide:

11. All petitions, affidavits, summonses, orders, proofs, notices, depositions, bills of costs, and other proceedings in the High Court in a winding-up matter to which these rules apply shall be kept and remain of record in the office of the registrar in one continuous file, and no proceeding in any winding-up matter to which these rules apply shall, from and after the commencement of these rules, be filed in the Central Office.

32. Every person who has been a director or officer of a company which is being wound-up, and every duly authorised officer of the Board of Trade, shall be entitled free of charge, and every contributory and every creditor whose claim or proof has been admitted, shall be entitled, on payment of a fee of one shilling, at all reasonable times, to inspect the file of proceedings (whether in the High Court or any other court) and to take copies or extracts from any documents, or to be furnished with such copies or extracts at a rate not exceeding fourpence per folio of seventy-two words.

Bramwell Davis, Q.C. and *Theobald* for the motion.—The applicant comes within the express terms of rule 32 of the Companies (Winding-up) Rules, April 1892, and he is therefore entitled to inspect the file of proceedings and to take copies therefrom. They referred to

General Order of Nov. 1862. rule 58;
Re Greys Brewery Company, 50 L. T. Rep. 14; 25 Ch. Div. 400;
Re London and Lancashire Paper Mills Company, 59 L. T. Rep. 362; W. N. 1888, p. 63;
Re Beall; Ex parte Beall, 70 L. T. Rep. 643; (1894) 2 Q. B. 135.

Gore Browne for the liquidator.—Were it not for the change in the wording of rules 11 and 32 and the case of *Ex parte Beall* (*ubi sup*) it could not be contended that the applicant is entitled as a matter of right to see these depositions. Inspection under the Bankruptcy Act 1869 and the Bankruptcy Rules 1870, rr. 9 and 12, was not a matter of strict right:

Ex parte Pratt; Re Hayman, 47 L. T. Rep. 368; 21 Ch. Div. 439;
Williams on Bankruptcy, 4th edit. p. 80;

but a matter for the exercise of the discretion of the court. The new rules I submit in effect are the same as rules of the General Order of Nov. 1862, under which the court had a discretion to withhold or to grant inspection:

Re Norwich Equitable Fire Insurance Company. 51 L. T. Rep. 404; 27 Ch. Div. 515;
Re W. Heseltine and Son Limited, W. N. 1891, p. 25;
Re American Exchange in Europe Limited; American Exchange in Europe Limited v. *Gillig,* 61 L. T. Rep. 502;
Re Gold Company, 40 L. T. Rep. 865; 12 Ch. Div. 77;
North Australian Territory Company v. *Goldsborough, Mort, and Co.,* 69 L. T. Rep. 4; (1893) 2 Ch. 381.

[WILLIAMS, J. referred to *Ex parte Chater; Re Crosby* (Buck. 290); Annual Practice 1895, p. 1195.]

Bramwell Davis, Q.C., replied. *Cur. adv. vult.*

July 17.—WILLIAMS, J.—Two questions have been raised in this case. The first is a question of right, and the second a question of discretion. It is said, first, that the applicant has a right to inspect these depositions, and, secondly, that whether or not he has a right, the court ought in the exercise of its admitted power, to give him leave to do so. Depositions under sect. 115 of the Companies Act 1862 were taken in accordance with a practice which arose as long ago as the last century. It is plain that an examination in bankruptcy was for the purpose of informing the court. It was not in any ordinary sense of the word a proceeding. The depositions so taken were not evidence against anyone. Of course when a deponent had made statements on affidavit, if subsequent judicial proceedings were taken he might in cross-examination be asked whether he had said so and so on a previous occasion, at all events subsequently to the Common

(*a*) Reported by W. IVIMEY COOK, Esq. Barrister-at-Law.

Law Procedure Act 1852, and I dare say before that, it was necessary to put the depositions in the deponent's hands, or confront him with them if anyone wished to examine him with reference to them. But in no sense were depositions evidence in any judicial proceeding. The power given to the Bankruptcy Court—formerly by sect. 96 of the Bankruptcy Act 1869, and now by sect. 27 of the Bankruptcy Act 1883—is to a large extent the basis of sect. 115 of the Companies Act 1862. I think that for a very long time the effect of that section has been treated as identical with that of the Bankruptcy Acts, though perhaps this has not been the case in the more recent decisions. At all events it was so far a very long time. The right in respect of inspection of depositions under sect. 115 has been more or less dealt with by the General Order of Nov. 1862, rule 58 of which provides that "all orders, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions, and certificates, and all other documents relating to the winding-up of any company, shall be filed by the official liquidator, as far as may be, in one continuous file, and such file shall be kept by him or otherwise, as the judge may from time to time direct. Every contributory of the company, and every creditor thereof whose debt or claim has been allowed, shall be entitled, at all reasonable times, to inspect such file free of charge, and, at his own expense, to take copies or extracts from any of the documents comprised therein, or to be furnished with such copies or extracts at a rate not exceeding three-halfpence per folio of seventy-two words; and such file shall be produced in court, or before the judge, and otherwise, as occasion may require." That is the order in question. As far as I have been able to understand the authorities it seems to me that, notwithstanding the very wide terms of that rule, the judges have treated examinations under sect. 115 as private, and as if neither creditors not contributories were as of right entitled to inspect the depositions. So far as bankruptcy is concerned the matter is governed by rule 9 of the Bankruptcy Rules 1870. That rule provides that, "All proceedings of the court shall remain of record in the court, so as to form a complete record of each matter, and they shall not be removed for any purpose except for the use of the officers of the court, or by special direction of the judge or registrar, but they may at all reasonable times be inspected by the trustee, the bankrupt, and any creditor who has proved, or any person on their behalf." The practice in bankruptcy, whether under the Act of 1869 or the Act of 1883, and in the winding-up of companies, was for a long time to treat the depositions as private—as matters intended for the information of the court only. The question I have to decide in this case is, whether that practice is now right or wrong; whether, in a winding-up, a creditor or contributory is entitled, under the rules now governing these matters, to inspection of everything which is placed on the file, including examinations taken under sect. 115 of the Act of 1862. Difficulties must have arisen a very long time ago, and, in liquidations, probably shortly after the General Order of Nov. 1862 was made. Various devices were resorted to by trustees in bankruptcy and liquidators, in order to keep the depositions off the file, for instance, by not taking the signature immediately. It appears to me that that shows that practitioners were not very certain whether creditors and contributories were not entitled to inspection. The rules at present in force are rules 11 and 32 of the Companies (Winding-up) Rules of April 1892. [His Lordship read the rules and continued:] The words there are very strong indeed, and seem, *primâ facie*, to give a right to inspection, to the exclusion of any discretion in the matter. I should mention that, as a matter of fact, the depositions in the present case are not on the file in accordance with rule 11, but, in accordance with the practice in chambers, have been put on a separate file; but I do not propose to decide the case on any such ground as that they are not on the file. If the depositions ought to be on the ordinary file, I shall treat them as if they were there; if they ought not to be on the file, then rule 32 does not apply to them. *Ex parte Pratt* (*ubi sup.*) was a decision on rules 9 and 12 of the Bankruptcy Rules 1870, which, although not identical in terms with the rules in winding-up, seem to me to be quite as strong. In that case the court seems to have thought that the respondent, who is stated to have proved as a creditor, had not an absolute right to a copy of his depositions, but that it was a mere matter of discretion whether he should be allowed to have a copy. [His Lordship referred at considerable length to the report of the case in 21 Ch. Div. 439 and continued:] The right to inspect and take copies of depositions in bankruptcy was also discussed in *Re Beall* (*ubi sup.*), and it was there held that depositions taken in a bankruptcy at a private examination under sect. 27 of the Bankruptcy Act 1883 were a "proceeding of the court" within rule 12 of the Bankruptcy Rules 1886, and ought to be placed on the file; and an application by a bankrupt to have depositions so taken removed from the file on the ground that if allowed to remain there they might be brought to the knowledge of the Incorporated Law Society was refused. Davey, L.J. in delivering judgment (at p. 141 of (1894) 2 Q. B.) says: "The depositions were taken by the court at the instance of the official receiver, and were taken down by a shorthand-writer, who was sworn and who thereby became the agent of the court. They were, in fact, taken by the court itself for the purpose of the proceedings in the bankruptcy. Why they should not be placed on the file, like any other proceedings in bankruptcy, I am at a loss to understand, and, they being on the file, I can see no ground whatever for taking them off. They are placed there for the inspection of the debtor and of any other person who is entitled to inspect them under rule 12." There it is expressly put as a matter of right and not as a matter of discretion. I find some difficulty in reconciling what was said by Davey, L.J. with what was said by Jessel, M.R. in *Ex parte Pratt* (*ubi sup.*). One says it is a matter of discretion, and the other that it is a matter of right. The cases with which I have hitherto dealt have been cases in bankruptcy. There are some authorities as to examinations in the winding-up of companies, the last being *North Australian Territory Company* v. *Goldsborough, Mort, and Co.* (*ubi sup.*). There the plaintiffs, a company in liquidation, brought an action against the defendants to obtain rescission of a contract for the purchase of real property. In the course of the liquidation, and after the com-

mencement of the action, certain persons were examined under sect. 115 of the Companies Act 1862, and their depositions were duly taken. A commission subsequently issued in the action for the examination of the witnesses abroad, and one of the persons who had been examined under sect. 115 was examined under the commission on behalf of the defendants. During his cross-examination on behalf of the plaintiffs he was asked as to the truth of certain of his answers given in the examination under sect. 115, and the answers were read to him from the depositions. He said that the statements contained in them were correct. He was also cross-examined as to certain answers given by other persons who had been examined under sect. 115, and those answers were read to him. The defendants having taken out a summons for leave to inspect and take copies of those depositions which had been used by the plaintiffs in the cross-examination, it was held by the Court of Appeal that the defendants were not entitled to the inspection. I do not understand from the statement of facts in that case that the defendants were creditors or contributories in the winding-up, and it seems to me, therefore, that the case has no application to the one before me. I wish, however, to observe that the rule there applied by Lord Esher, M.R., seems to me to be the same as that which used to be applied in bankruptcy, when inspection was invariably refused on the application of a creditor until notice had been given by the applicant of his intention to use the depositions in some judicial proceedings. When I find the practice inconsistent with a rule which has recently been republished, and that there is a conflict of authority, as in this case, it seems to me that I have no alternative but to decide the case in accordance with the words of the rule. It would be very difficult for me to say that the applicant is not entitled to see these depositions. I treat them as being on the file, and the applicant as a person who, as a creditor or contributory, comes within the words of rule 32, and, however inconvenient it may be, I must give effect to the words of the rule. It is, however, extremely inconvenient that the practice should be in this state. The court ought, in my opinion, to have a discretion in the matter, and if I were at liberty to exercise such discretion I should allow the applicant to see his own depositions, but not those of the other deponents.

Solicitors: *Linklater, Hackwood, Addison,* and *Browne; Loughborough, Gedge,* and *Nisbet.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Dec. 12, 1893, *Jan.* 27, 1894, *and May* 13, 1895.

(Before the PRESIDENT (Sir F. H. Jeune.)

ARKWRIGHT *v.* ARKWRIGHT. (*a*)

Divorce—Variation of marriage settlements—Consent order—Mistake — Amendment of original order — Subsequent circumstances — Further references—Order—Costs out of settled fund.

The Court, upon the application of the testamentary guardians of an infant child of the marriage of the petitioner and respondent, directed, after various references to the registrar, that an order, made by Butt, J. in 1886, *upon the consent of the petitioner, respondent, and trustees of the marriage settlement, be amended by extinguishing the respondent's interest in a portion of the settled funds; and further directed that the costs of all parties be paid out of the said portion of the trust funds or the income thereof.*

THIS was a motion to amend an order made in 1886, for variation of settlements.

Herbert Robert Arkwright and Julius Arkwright, the testamentary guardians of Esmé Francis Wigsell Arkwright, the son of the marriage of the petitioner and respondent, moved that an order of the 8th June 1886 be amended, or, in the alternative, that they have leave to file another petition to vary the marriage settlements of the petitioner and respondent.

The order of the 8th June 1886, made by Butt, J., was in these terms: "On reading the statement filed on behalf of the petitioner in this cause and the report of the registrar, to whom the averments contained in the petition filed in this court on the 17th Nov. 1885 had been referred for investigation; and on hearing counsel on behalf of the petitioner, respondent, and trustees thereon, on the application of counsel for the petitioner, it is ordered that the said report be confirmed, and that the same be referred back to the registrar to draw up and settle an order of this court to carry the same into effect."

The present application having come before the President (Sir F. H. Jeune) on the 7th Aug. 1893, the following order was made: "On reading the statement filed on behalf of the child, issue of the marriage between the petitioner and respondent, and the affidavits sworn, and on hearing counsel on behalf of the parties thereon, it was ordered that it be referred to one of the registrars to report as to what should have been the proper order as to the variation of settlements upon the materials then before the court; and it was further ordered that, in the meantime, the trustees of the settlement, dated the 27th Aug. 1878, and all other persons, be restrained from dealing with the property comprised in the same, save and except as hereinafter mentioned, and by consent, but without prejudice to this application, it was further ordered that the sum of 500*l.* a year, part of the income derived from the respondent's fund under the said indenture of settlement, be continued to be paid to her under the order of the 8th June 1886."

On the 28th Nov. 1893 the registrar reported, in substance, as follows:

The decree absolute in this case was pronounced on the 27th Oct. 1885, by reason of the respondent's adultery with the co-respondent.

There are two children, issue of the marriage, aged eleven and ten years respectively.

The respondent has married the co-respondent.

By an indenture of ante-nuptial settlement, 10,000*l.*, the property of the petitioner, was assigned to trustees in trust to pay the income to the petitioner for life, and, on the death of either party, to the survivor for life.

A similar sum of 10,000*l.*, the property of the respondent, expectant on the death of either of her parents, was assigned to trustees in trust to pay 200*l.* a year to the respondent, and the remainder of the income to the petitioner, as in the indenture mentioned.

Subject to the foregoing trusts, several joint and

(*a*) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law.

several powers over the trust funds were given to the petitioner and respondent.

Under the order of the 8th June 1886, 200*l.* a year, part of the respondent's property, was to be paid to her for life, then to the petitioner for life, with remainder to the children; and on the death of the survivor of the petitioner and respondent the trustees were to stand possessed of the respondent's property for the benefit of the children; but, in the event of the respondent surviving the petitioner, and of the son dying under twenty-one, and the daughter dying under that age and unmarried, the property of the respondent was to belong to her absolutely. The respondent's powers of appointment under her settlement were to be extinguished, but the indenture of settlement was to remain otherwise in force.

The petitioner is dead; and therefore the settlement not having been varied as to the respondent's right to the petitioner's property for her life in the event of her survivorship, she would now be entitled for life to the income of the trust fund brought into settlement by the petitioner.

It was contended by counsel for the petitioner that this interest ought to be extinguished, and the order altered accordingly. Counsel on behalf of the respondent contended, on the other hand, that the order was made by consent, and that, at least, it should not be varied until after an inquiry as to what other property the children of the marriage were entitled to at the date of the original order, and at the present time.

It seems that this inquiry was not included in the terms of the reference.

The respondent filed no answer to the petition for variation. The trustees filed an answer, but did not object to the prayer of the petition being varied, as now asked.

The report concluded as follows:

A prayer to the following effect was included in the petition for variation of the settlement, and it is submitted that an order should now be made in the terms of that prayer: "That except as aforesaid (*i.e.*, as altered by the order) the rights, powers, and interests of the respondent under the said settlement be extinguished as if she were dead at the date of the said order."

From an affidavit of Chas. Thos. Orford, a member of the firm acting as solicitors for the respondent, it appeared that, by an agreement dated the 9th April 1896, and made between the late petitioner, Frank Wigsell Arkwright, and the respondent, Rosa Fredrica Arkwright (now Fitzgeorge), it was arranged that Vera Nina Arkwright, the daughter of the petitioner and respondent, should be delivered into the custody of Mrs. Elizabeth Baring, the mother of the respondent, and that out of the 200*l.* a year payable by the trustees to the respondent out of the income of her trust fund 50*l.* a year should be paid to the respondent's mother so long as she should retain the custody of the said child. It was further arranged that, on the petition to vary the settlement, the registrar should report that a sum of 5000*l.*, part of the respondent's settled fund, should, on the death of the petitioner and respondent, become the absolute property of the said Vera Nina Arkwright upon her attaining the age of twenty-one or marrying.

By an order of the 4th May 1886 the agreement was ordered to be carried out and to be filed.

The petitioner, who died on the 12th March 1893, by his will dated the 15th Feb. 1889, in exercise of the power of appointment given to him by the settlement of the 27th Aug. 1878 and the order of the court dated the 8th June 1886, appointed his trust fund of 10,000*l.* in favour of his son on his attaining the age of twenty-one years. The petitioner made no provision for his daughter, whose paternity had been doubted.

Upon the death of the petitioner the respondent became entitled to the income of the 10,000*l.* settled by him, the order for variation not having interfered with the trusts of this settlement, nor mentioned them in any way.

Bayford, Q.C., in support of the application, submitted that the registrar's report should be confirmed, and the order for variation of the settlements be amended accordingly. He referred to

Benyon v. *Benyon and O'Callaghan*, 62 L. T. Rep. 329, 381; 15 P. Div. 54.

Inderwick, Q.C. and *Deane* for the respondent.—At the date of the agreement of the 9th April 1886 the petitioner desired to have the custody of the daughter, and it was stipulated, when he gave her up, that the child should continue to bear his name. The deputy registrar drew up his report in accordance with the terms of that agreement, and a judge's order of the 8th June 1886 was made by consent and confirmed the deputy registrar's report. From that time down to the present the order has been acted upon, and the respondent has received the interest on the settled fund. In these circumstances the court has no power to vary the order now. An order for variation of settlements is made once for all, and cannot be altered:

Benyon v. *Benyon and O'Callaghan* (*ubi sup.*).

The same rule applied in Chancery. In those instances where this court and the Court of Appeal have interposed in order that justice should be done between the parties, it has always been upon the footing that the order drawn up and promulgated was not the order which the judge had intended to make upon the facts before him. [The PRESIDENT.—This case rests on the narrow question whether the deputy registrar intended to make the order which he did make.] The registrar has no power to make any order in such cases as this. He simply reports to the court. The deputy registrar's report was submitted to the respective solicitors, and they assented to it. It then came before the court, and Butt, J. said he would sanction what the parties and their solicitors had agreed to. It is doubtful whether that order could have been varied upon appeal, inasmuch as it was an order made by consent. [The PRESIDENT.—Can there, in strictness, be an order by consent where interests of infants are involved?] Of course, the judge would exercise his own discretion in the matter; but it does not lie in the mouth of the representatives of one of the assenting parties to seek now to set it aside:

Mellor v. *Swire*, 53 L. T. Rep. 205; 30 Ch. Div. 239.

Drawing up an order in terms in which it was not originally made is different from altering an order which has been properly drawn up. *Askew* v. *Peddle* (14 Sim. 301) was a case of error in the mode in which the order was drawn up. In *Stewart* v. *Forbes* (16 Sim. 433), which was a case of alleged mistake as to the effect of an order, the court decided that it was not at liberty to alter a decree unless there was a clerical error in it. That was the same sort of case as the present

Tucker v. *The New Brunswick Trading Company of London* (63 L. T. Rep. 69; 44 Ch. Div. 249) was an application to alter an order, on the ground that the order did not carry out what was intended. By the order, it was said, the judge had intended to make two persons liable, whereas, upon its construction, it only made one liable. The Court of Appeal refused to alter the order. In *Harrison* v. *Harrison* (57 L. T. Rep. 119; 12 P. Div. 130, 145) an alteration was, however, made. In questions of altering the record, the judge who was a party to the record may be able to say whether the order contains a clerical error. But when the judge is dead, who is to decide whether it was, or was not, a clerical error? There is a wide distinction between an order made *per incuriam* and a mere clerical error. The judge made this order after hearing counsel for both parties and for the trustees, and therefore it was not made by a slip or through a clerical error. The petitioner lived for seven years after the order was made, and, now that he is dead and cannot be heard, the trustees of the petitioner's son come and say, for the first time, that the decision was wrong, and that, if counsel and solicitors had not misled the judge, the order would not have been made in that form. The respondent has, moreover, a vested interest which she might have assigned. The application raises all sorts of curious points. If the court is now going to alter this order, it must be done upon an entirely new set of facts, and we must go before the registrar as if upon a new petition, and must lay the facts before him as they now stand. The registrar was precluded from allowing the respondent to be heard on certain points, as the terms of reference directed him to report upon the materials which were originally before the deputy registrar and before Butt, J. If the consent, upon which the order confirming Mr. Strong's report was made, is now to be set aside, the respondent ought to be allowed to supplement those materials. The order was not made *per incuriam*, and there is no power to review it. If, however, the court is of opinion that it has that power, the respondent ought not to be debarred from putting before the registrar or the court the fresh facts which now exist. Under the new variation now proposed, the daughter of the marriage would be deprived of the power of her mother to benefit her. Should not the daughter's interest be protected if this matter is to be inquired into afresh?

Bayford, Q.C. in reply.—It never entered the mind of the petitioner that his wife was to retain any interest in this property. It was an accidental omission on the part of the deputy registrar, and the judge's mind was not informed about it. *Gladstone* v. *Gladstone* (35 L. T. Rep. 380; 1 P. Div. 442) is an authority as to the power of the court to review an order for variation of settlements. The court has power to alter mistakes, and also to review an order if it finds that such an order would not have been made if all the facts had been brought before the judge who made it. Fortunately, the respondent has not disposed of her interest. *Cavendish* v. *Cavendish and Rochefoucauld* (19 L. T. Rep. 497; 38 L. J. 13, P. & M.) is another authority in our favour. [The PRESIDENT.—I directed that the case should go back to the registrar, on the authority of the case of *Gladstone* v. *Gladstone* (*ubi sup.*); but I rather think that the registrar considered himself bound by the agreement which was arrived at when the matter was originally before the judge. The view that I took on the last occasion was, that this matter could not be treated as a mere clerical error, and that the deputy registrar reported as he did, because he had not considered the point as to the extinction of the wife's interest in the fund in question. I thought, moreover, that *Gladstone* v. *Gladstone* (*ubi sup.*) decided that the court would not lay down any hard and fast rule in these cases.]

Inderwick, Q.C.—*Gladstone* v. *Gladstone* (*ubi sup.*) was decided before the case of *Benyon* v. *Benyon and O'Callaghan* (*ubi sup.*), and is, having regard to some Chancery authorities, a doubtful decision. A distinction has been drawn between orders made after a dissolution of marriage and orders made upon a decree for judicial separation.

The PRESIDENT. — This is really to a considerable extent an appeal from the view which I expressed the other day in this case, to the effect that it should be referred back to the registrar. I made that order in view of the authority of *Gladstone* v. *Gladstone* (35 L. T. Rep. 380; 1 P. Div. 442). I did not think then, and I do not think now, that I ought to treat this matter as one of mistake, either on the part of the registrar or the court, in the sense that they meant one thing and said another. I cannot think that there is any real distinction to be drawn between the registrar and the judge. If the registrar made a mistake, so that words got into the order which he did not intend should be there, or left words in it which he did not intend should remain, I cannot help thinking that there would be power to treat that as a clerical error, and to correct it. This is exactly what the late President did in *Harrison* v. *Harrison* (57 L. T. Rep. 119; 12 P. Div. 130, 145). The principle of making alterations, where there has been a mere mistake, is very clearly indicated by the Chancery authorities, which show that, if there has been a mere clerical error, this can be set right, even if as long a period as seven years has elapsed; but that where it is not a question of mere clerical error, but of correction of a mistake in another sense—for instance, the correction of an order which the judge would not have made if he had had other materials before him—the order cannot be amended. This case falls within the clear principles laid down by the authorities of the Court of Chancery. It was before the registrar, before the parties, and before the court, and yet the attention of nobody appears to have been directed to this point, and so a mistake appears to have been made. The agreement does not touch the matter very nearly. We have a petition asking for the husband's fund to be dealt with. We have it going before the registrar, one of the parties stating that it was agreed that the interest of the respondent in the husband's fund should be extinguished. The deputy-registrar, in his own handwriting, recited the effect of the settlement, and drafts of his report were sent to the parties before it was filed, but neither of them noticed the omission. The matter afterwards came before the judge, and, by the consent of everyone, he confirmed the registrar's report. It is impossible to say there was a clerical slip.

It is clear, and the silence of Mr. Orford's affidavit shows it, that they from first to last never understood what was being done, and it is evident that neither Mr. Orford, his opponent, or the registrar, ever had the matter of the husband's share of the property before their minds at all; and the report in consequence passed that over in silence. It is an extraordinary fact that it should be so, but I am none the less satisfied that it is a fact. Under these circumstances what can be done? Unless it is a hard and fast rule that such an order should not be re-opened, this is a case, if ever there was one, in which it should be done. I quite agree that matters which have arisen subsequently to the order cannot be now dealt with. *Benyon* v. *Benyon and O'Callaghan* (62 L. T. Rep. 329, 381; 15 P. Div. 54) is an authority to that extent, and *Cavendish* v. *Cavendish and Rochefoucauld* (19 L. T. Rep. 497; 38 L. J. 13, P. & M.) is not an authority the other way. I am inclined to follow the opinion expressed by Lord Hannen in *Gladstone* v. *Gladstone* (*ubi sup.*), and to consider what ought to be done now, and what should have been done in the first instance. I intended Mr. Registrar Pritchard to consider what order should, in his opinion, have been made by the deputy registrar, and that he should report his view to me; but I am not sure that the registrar has exactly understood my order in the sense in which I intended it. If I find, on inquiry, that he fairly considered the matter, by placing himself in the position of the deputy registrar at the time when the latter considered his report, I shall come to the conclusion that he has decided the case upon the right materials. If, on the other hand, he has excluded anything, I think that the matter will have to be sent back to him for reconsideration. I propose, therefore, to ascertain from Mr. Registrar Pritchard exactly what took place before him, and it will be conveyed to the parties hereafter.

Jan. 27, 1894.—The case having been put in the paper to be mentioned,

The PRESIDENT said:—There has been more delay with regard to this case than I intended, because I am afraid that I did not make myself quite clear. What I meant was to confirm the report, unless I heard from the registrar that he had not adopted the view which I intended he should take in dealing with this matter. Originally I thought, after looking at the authorities, and particularly the decision in *Gladstone* v. *Gladstone* (*ubi sup.*), that there was power to send the case to the registrar for him to consider whether, at the date when the original order was made, that order was one which would have been made if all the points had been present to the minds of the parties and there had been no mistake. The report of the registrar is ambiguous, and he seems to have thought that the question of the property of the children of the marriage at the date of the original order and at the present time were not matters which the deputy registrar who made the original order would have considered prevented him from recommending that the reversionary interest of the wife in the fund brought into settlement by the husband should be extinguished. In that sense, the registrar said that this inquiry was not included in the terms of the reference. That view seems to me to be correct. I think that the deputy registrar ought not to have been prevented from making what would undoubtedly have been the usual order, and the one which would have been made but for the mistake of all parties at the time, namely, an order for extinguishing the wife's reversionary interest in the fund brought into settlement by the husband. If, since the date of the original order, the wife's reversionary interest in that fund had been assigned or incumbered, other considerations might have arisen. But that is not the case. I am of opinion, therefore, that the report of Mr. Registrar Pritchard ought to be confirmed. I think this is clearly a case in which the costs of all parties ought to come out of the settled fund, inasmuch as the present proceedings have been rendered necessary through the common mistake of everyone concerned.

In consequence of fresh difficulties which arose in connection with the order, the matter again went before Mr. Registrar Pritchard on the 15th and 29th Jan. 1895; and, upon his further report, the case was again brought before the court on the 13th May 1895, when, in addition to the counsel who had previously represented the parties,

C. A. H. Black appeared for the infant daughter, who had come in, by her guardians, and now objected to the registrar's report. The only new case cited in the course of the arguments was *Coborn* v. *The Palace Theatre Limited* (11 Times L. Rep. 103, 227).

May 13.—The PRESIDENT.—I confess I should have been glad if this matter could have been arranged between the parties, because the foundation of the whole matter, in relation to the view I took before, and take now, is that this was really a common mistake of all the parties concerned. I have dealt with the law, rightly or wrongly, on the previous occasion. Following the case of *Gladstone* v. *Gladstone* (35 L. T. Rep. 380; 1 P. Div. 442), it occurred to me that there is jurisdiction in this court, where it is clear that there has been a mistake—a common mistake—of all parties in drawing up and making an order, to reconsider the matter. It cannot be put, I think I ought to say again, merely on the ground of mistake. If I thought that there had been a mistake in drawing up the order, and that the judge meant one thing while the person drawing up the order had meant another, that would give the court jurisdiction to rectify it. But the matter cannot be put in that way. The true state of things is, that by the mistake of everybody the husband's fund which had been brought into settlement was not dealt with in the way in which it would have been dealt with if it had been brought before the registrar who made the report and the judge who decided it. I have now no doubt whatever that, if the matter had been brought at the time to the knowledge of the registrar or the judge, the order would have been the same as it now is, with the single exception that the wife's interest in that fund would have been determined. But, to my mind, that does not altogether exhaust this matter, because it appeared to me that if it was to be reconsidered, there might be other things that ought to be taken cognisance of, and I was very anxious that everything that can be said and suggested should, in point of fact, be investigated. I have very little doubt that, supposing

it could have been shown that since the time when the order of 1886 was made the parties had innocently altered their position—if, for example, it had been shown that a charge had been created by the wife on her anticipated interest—I think it would not have been possible to vary the order. Nothing of that sort, however, has taken place. But the matter went a little further even than this. I do not desire to decide formally, but I think it may well be that, where an order is to be considered under circumstances of this kind, it may be just to consider, not only what the court would have done at the time, but what, having regard to subsequent circumstances, it may now be considered just that the court should, at the time, have done. I do not know whether it would be legitimate to consider that, but I was anxious to ascertain whether there were any facts of that class. That matter has been inquired into, and, according to the view of the registrar, no such circumstances existed. It has been suggested that something in regard to the position of the daughter, in relation to her father, or supposed father, may not have been fully in the minds of the persons when making the original order. I do not think that would appear to be the case; all that was known to the parties at the time. But another matter is before me. It has been suggested that the property has become greatly increased, and it is said further that, as far as one can see, consideration was not given by the court to the circumstance that, at the time of making the order, the son was undoubtedly entitled in remainder to property worth some 1500*l.* a year. The answer given to that by the registrar is that, although it may be true that that particular matter was not brought to the mind of the registrar or the judge, still, it was a matter that was perfectly well known both to the husband and wife at the time; and I think this must have been so. They both knew that the son had this reversionary interest, and I cannot help thinking that, even if the matter had been brought before the court, it would have made no difference; and I can easily understand that the reason why it was not brought forward was that all parties considered that this was not a matter which it was material to consider. The true state of the matter I believe to be that, as regards the husband's fund, all parties knew that the wife's interest would be extinguished in accordance with the common practice. At present the suggestion is that other arrangements were made. I do not think it necessary to go into the case on the pleadings, or into the contention that, in one form or another, she ought to get a larger interest in respect of the 10,000*l.* which she bought into settlement, in order to compensate her for the loss of the life interest in the 10,000*l.* brought into settlement by the husband. To say that something of the sort was contemplated or ought to have been done by the parties is very far from saying that it must be done; and I cannot see my way to do that compulsorily. All I can do, taking the facts as they are, is to say that the registrar's report must be confirmed, and that the wife's interest in the husband's 10,000*l.* must be extinguished, and that the rest of the variation of settlements effected in 1886 should remain. I think this is a case in which the costs of all parties ought to come out of the 10,000*l.* brought by the husband into settlement, which is really the fund in dispute.

Bayford, Q.C.—The present order will be, that the registrar's report be confirmed, the former order to stand, with the addition that the wife's interest in the husband's fund is to be extinguished: costs out of the husband's fund—that would be, out of the income. One does not like to diminish the child's settled fund.

Inderwick, Q.C.—That is a matter which is usually left to the trustees.

Bayford, Q.C.—The court should make the order to-day, out of the income. As it was a dispute as to the income, this would be more in accordance with the practice. There is no difficulty about there being sufficient money available to meet the costs.

The PRESIDENT.—Very well. The wife is to have the income up to the date of the present order. It is a matter for consideration what the date of this order should be.

Solicitors for the applicants, *Wontner* and *Sons*.
Solicitors for the respondents, *Wordsworth, Blake*, and *Co.*

House of Lords.

Thursday, June 20.

(Before the LORD CHANCELLOR (Herschell), and Lords ASHBOURNE, MACNAGHTEN, and DAVEY.)

THORNE *v.* HEARD AND ANOTHER. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Mortgage—Sale—Fraud of agent—Statute of Limitations—Trustee Act 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8.

Where fraud is relied upon to take a case out of the Statute of Limitations it must be the fraud of, or imputable to, the person who invokes the aid of the statute.

The respondents were first mortgagees, and the appellant was second mortgagee, of the same property. In 1878 *the respondents sold under their power of sale. S., who was the mortgagor's solicitor, acted for all parties, and the purchase money was more than sufficient to pay off both mortgages. After satisfying the respondents' mortgage S. appropriated the balance of the purchase money to his own use, and continued to pay interest to the appellant as if his mortgage was still in existence, and concealed the fact of the sale from him. He gave the respondents a receipt for the amount due to the appellant as his agent. In* 1892 *the appellant discovered the fraud, and brought this action against the respondents for p ıyment of what was due to him, and for an account.*

Held (affirming the judgment of the court below), that the respondents were protected by sect. 8 *of the Trustee Act* 1888 (51 *&* 52 *Vict. c.* 59), *as they were not "party or privy" to the fraud, and the proceeds were not "still retained" by them, so as to take the claim out of the Statute of Limitations, as S. was not acting within the scope of his authority as their agent in committing the fraud.*

Semble, *that knowledge of the existence of a second*

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

mortgage, which a solicitor acting for all parties has acquired as solicitor for the mortgagor, is not constructive notice to the first mortgagees, so as to make them trustees of the balance of the sale money for the second mortgagee.

THIS was an appeal from a judgment of the Court of Appeal (Lindley, Kay, and Smith, L.JJ.), reported in 70 L. T. Rep. 541 and (1894) 1 Ch. 569, who had affirmed a judgment of Romer, J., reported in 68 L. T. Rep. 791, and (1893) 3 Ch. 530.

The facts of the case, which were not in dispute, appear from the head-note above, and are fully set out in the reports in the courts below.

Cozens-Hardy, Q.C. and *Philpotts* appeared for the appellant, and contended that, but for the provisions of sect. 8 of the Trustee Act 1888, it would be an undefended action, and there was fraud to take it out of that section. Searle was the respondents' agent, and his knowledge was constructive notice to them of the existence of the second mortgage, and he was their agent to receive the purchase money, and therefore they are privy to his fraud, and the balance of the money is constructively still retained by them within the meaning of the section. See

Charles v. *Jones*, 56 L. T. Rep. 848; 35 Ch. Div. 544.

It was a continuing breach of trust, and the fraud was committed in the course of the agent's business, which makes the principal liable. See

Barwick v. *English Joint Stock Bank*, 16 L. T. Rep. 461; L. Rep. 2 Ex. 259;
McGowan v. *Dyer*, L. Rep. 8 Q. B. 141;
Mackay v. *Commercial Bank of New Brunswick*, 30 L. T. Rep. 180; L. Rep. 5 P. C. 394;
Swire v. *Francis*, 37 L. T. Rep. 554; 3 App. Cas. 106.

The case of *The British Mutual Banking Company* v. *Charnwood Forest Railway Company* (57 L. T. Rep. 833; 18 Q. B. Div. 714) was relied upon in the court below, but it has no real bearing on the case. In *Moore* v. *Knight* (63 L. T. Rep. 831; (1891) 1 Ch. 547) it was held that the Trustee Act of 1888 did not affect the principle of

Blair v. *Bromley*, 2 Phil. 354; 5 Hare, 542.

The cause of action did not arise till the discovery of the fraud in 1892, and the statute only began to run from the last payment of interest by Searle. See

Vane v. *Vane*, 28 L. T. Rep. 320; L. Rep. 8 Ch. 383.

There was a concealed fraud, which takes the case out of the statute, which the appellant had no opportunity of discovering at an earlier period, and it was made possible by the respondents' default and negligence, so that they are estopped. See

Allcard v. *Skinner*, 57 L. T. Rep. 61; 36 Ch. Div. 145.

Warmington, Q.C. and *Creed*, who appeared for the respondents, were not called upon to address the House.

At the conclusion of the argument for the appellant, their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—[After stating the facts as to the mortgages his Lordship continued as follows:] My Lords: In the latter part of 1877 there was a contract made to sell the property in question. Whether the transaction was initiated by the respondents, or by the mortgagor for whom Mr. Searle was acting, or whether it had its origin with Mr. Searle himself, who was the third mortgagee of the same property, does not appear; but it is beyond dispute that he was acting with the full sanction of the first mortgagees and on their behalf, and acting in exercise of the power of sale vested in them. The purchase money, 1700*l.*, was received by Mr. Searle. No part of it ever came physically into the hands of the respondents except 1000*l.*, which was paid to them by Mr. Searle in discharge of their mortgage; the rest remained in the hands of Mr. Searle. No doubt Mr. Searle, who was aware of the mortgage to Thorne, ought at once to have paid over to Thorne out of the 700*l.* the amount due to him, namely 333*l.*, and only to have retained for his own purposes the residue. But, instead of that, he retained the entire sum in his hands and applied it to his own purposes, paying from time to time the interest due upon Thorne's mortgage to Thorne; and I take it that Thorne was not aware that his mortgage was not still subsisting. In 1892 Searle became bankrupt, and then the fraud of which he had been guilty came to light. Of course about his fraudulent conduct there is no question. The appellant puts his case in this way: the first mortgagees, the respondents, he says received the 1700*l.* through their agent Searle. Upon receiving it they became trustees of all that was not necessary to satisfy their mortgage debt for the persons entitled, namely, the second mortgagee and the third mortgagee. It is said that in not paying the money to the second mortgagee they were guilty of a breach of trust, that they can be called to account by the second mortgagee in respect of it, and that the claim which the second mortgagee makes is not barred by the Statute of Limitations, because, although the Act relieving trustees, passed in the year 1888, has in certain cases enabled trustees to plead the Statute of Limitations where they could not have done so before, yet by reason of the exceptions in that statute the present case is not one in which the trustees can avail themselves of that defence; and moreover that the time only began to run from the year 1892 when they discovered the fraud; so that, even if the case be within the statute, the statutory period has not yet elapsed. So far as appears upon the evidence the respondents were never aware, down to the time of the sale and the receipt of the money by Searle, that any second mortgage existed at all. As far as appears, all that they knew was, that there was a mortgagor, and that Searle was the solicitor for the mortgagor. But it is said that, although they may not themselves have known of the existence of Thorne and of the second mortgage to him, yet the fact that there was such a mortgage was known to Searle. That fact was undoubtedly known to Searle; but it is equally clear that he had acquired that knowledge not in connection with this transaction at all; he had acquired that knowledge previously, when he was not in any way acting for the respondents, because he had been the person who negotiated that mortgage with Thorne. It is true that, in the course of this transaction of sale, Searle for some reason or other had put upon the abstract of title a reference to

this mortgage, and on the requisition of the purchaser he obtained from Mr. Thorne, telling him that it was for the purpose of a contract of sale, his deeds, with a view to letting the proposed purchaser, or the person under contract to purchase, see them. He subsequently received them back, and re-delivered them to Thorne. It is said that in this way he did become acquainted with the fact of this second mortgage whilst acting as solicitor in this transaction for the respondents. Considering that the solicitor knew *aliunde* of the existence of this mortgage, that it was not necessary in any way to communicate its existence to the first mortgagees in regard to their sale under the powers given by that mortgage, and seeing that all that he did was to make use of the knowledge which he had previously acquired to ask for the deeds in the way that I have described, I think that it may be a matter open to question whether that would be knowledge by their solicitor which could be imputed to the respondents so that it must be regarded as their knowledge. It is quite unnecessary to express an opinion upon or to determine that point. I have only made these observations in order that I may not be supposed to assent without further consideration to the propositions contended for on behalf of the appellant. Now, the question arises whether the Statute of Limitations can be pleaded. First it was said that the right did not arise till 1892, when the fraud was discovered, that there was here a concealed fraud, and that, although there was no fraud on the part of the respondents (that is not alleged), nor any concealment on their part, yet that there was fraud on the part of a person acting as their agent, namely Searle, a concealment by Searle, who was the agent for the respondents, and that, consequently, it was not until the discovery that any cause of action arose. I am entirely unable to give any countenance to such an argument. It appears to me to be perfectly clear that, in order to charge any person with a fraud which has not been presumably committed by him, the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something, and purporting to do something, on behalf of the principal. If the person is doing something within the scope of his authority, purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal. Now in this case there is no pretence for saying that in what he did that was fraudulent, or what he improperly concealed, Searle was acting for the respondents. It appears to me that, as soon as they had received the 1000*l.*, leaving Searle in possession of the remainder in which they claimed no right or title, to which they believed that either Searle, or somebody for whom he was acting, was entitled, all agency on their behalf by Searle in relation to that surplus was absolutely at an end. From that moment he held it not as their agent at all; it was not intended that he should hold it for them; they did not contemplate that he was holding it for them, nor that he intended to hold it for them. To suppose that, in defiance of the intention of both the parties to such a transaction, nevertheless there was a relation of agency, would, it seems to me, be a somewhat extravagant conclusion. I, therefore, can entertain no doubt that in the present case there has been no such fraud, or concealed fraud, shown as to prevent the statute from running, if the statute applies, from the year 1878. I ought to notice one point which was pressed, or rather two points, that it was the duty of the respondents to find out Mr. Thorne, and to see that he was paid, and that this was a continuing duty which they have violated. If such a doctrine as that were to be given assent to in a case such as this, the value of the statute of 1888 would be practically at an end. It is said that here the respondents gave back to Searle Thorne's deeds, and so enabled him to commit the fraud. They only had these deeds in their possession by an accident. There was nothing to call their attention to the fact that they were Thorne's deeds. They received them after the sale was completed, at a time when they did not believe that they had any further interest in the transaction at all. They were asked to look into a bundle of deeds to see if they had two deeds described in a particular way. They found those deeds and returned them. There was no obligation upon them to see what the contents were, and there is no reason to suppose that they ever did know the contents. To say that under these circumstances the Act imposes any liability upon them seems to me a hopeless contention. The only remaining question is, Did the statute apply? It is contended that it did not, because of the exception contained in sect. 8, sub-sect. 1, "Except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy." It seems to me to be impossible seriously to say that the respondents were "party or privy" to the fraud in this case. The fraud was a fraud committed by Searle entirely subsequent to the transaction in which they had any interest or any concern, and they neither knew of it, nor assented to it, nor received any benefit from it, nor took part in it in any sort of way. Under these circumstances I am at a loss to see how it can be said that they were "party or privy" to it. But, then, it is said that there is another exception, namely, where the claim is "to recover trust property or the proceeds thereof still retained by the trustee"—"still" of course meaning at the time when the action is brought. In spite of the ingenious argument addressed to us by Mr. Cozens-Hardy upon this point, I remain unconvinced. I have a difficulty in seriously grasping the contention. To say that the leaving this sum of money with Searle by the respondents under the belief that it was money which Searle was entitled to keep and hold and distribute, in which they had no sort of concern, with which they had nothing to do, was a retaining of the money by them so that it was in their hands at the time when this action was brought, is a proposition which I can hardly treat seriously. For these reasons I think that the judgment of the court below is right, and ought to be affirmed.

Lord ASHBOURNE.—My Lords: I entirely concur. I think that sect. 8 of the Trustee Act of 1888 supplies a clear defence; and that is the opinion of all the learned judges before whom this case has come. Romer, J. had no doubt upon

that, and the three Lords Justices also came clearly to that conclusion. I really think that this section might be torn up if it is not to apply to a case of this kind. It is difficult to imagine to what case it would apply if it does not apply to this. It has been urged in argument that the section would not apply, because some case of fraud might be imagined, or imputed, or suggested against the defendants. It has also been urged that it might be imputed that they still have the fund under their control. I am unable to follow either of these contentions. I am unable to see any ground on which it can be suggested that anything like fraud can be imputed to the trustees, or on which anything can be suggested bringing them within the exceptions in the clause in regard to their action. That being so, I think that this appeal entirely fails. Therefore I am clearly of opinion that the appeal should be dismissed with costs.

Lord MACNAGHTEN.—My Lords: I am of the same opinion. By a recent, and I think a very beneficial, change of the law, a trustee who has committed a breach of trust is entitled to rely on any Statute of Limitations as fully as anybody may do who is not a trustee, provided that his conduct has been free from any taint of fraud, and provided that he has not derived, and is not in a position to derive, any personal benefit from the transaction impeached as a breach of trust. I assume that, but for recent legislation, the respondents would have been liable to answer the appellant's claim. But I think that the Act of 1888 was intended to apply, and does apply, to such a case as this; and indeed I cannot imagine any case to which the Act could more properly or more clearly apply than the case which has been discussed before your Lordships to-day.

Lord DAVEY.—My Lords: I am of the same opinion. It appears to have been assumed, or it is stated to be not in dispute, that but for the Act of 1888 the defendants would have been liable in the present case. I will assume, without expressing any opinion of my own, that it is so. But, assuming that the constructive notice contended for would have brought to the knowledge of Mr. Heard that which certainly he did not in fact know at the date of the sale, that Thorne was an incumbrancer upon this property, so as to convert Mr. Heard and his co-trustee into trustees for Thorne, I am of opinion that the statute of 1888 forms a perfect answer to the claim. Two questions have been argued: First, whether the case is not within one of the exceptions mentioned in the early part of the 8th section; and secondly, it has also been argued that, independently of the statute, the time began to run only at a period less than six years before the commencement of this suit. I do not desire to say anything more than has been already said by your Lordships, or more than is contained in the judgments which have been delivered in the courts below upon the first point. It appears to me to be impossible to say that the money was "still retained" by the trustees, and it must be remembered that there is no evidence of actual knowledge, or rather, I should say, that the evidence disproves actual knowledge, on the part of the respondents of Mr. Thorne's position. But it is sought to say (I am not speaking of constructive notice) that they must have acquired knowledge of it through the receipt which was signed by Mr. Searle, purporting to act as Thorne's agent, and put with the respondents' papers. Now it appears to me that the appellant is in this dilemma; either the respondents read that receipt, or they did not. If they did not read it, I see no evidence whatever that they acquired any knowledge of Thorne's existence, or of his interest in the property, and the money was in that view paid to the mortgagor's agent. If they did read that receipt, what did it tell them? It told them that Searle was (I will assume wrongly) purporting to act as Thorne's agent, and that he had given a receipt in discharge of the respondents in that character. If they did read this receipt, why were they not at liberty to believe, erroneously as it turns out, but still to believe, that Searle was acting in that character? If so, it appears to me that the case is exactly the same; in fact, the case is that they paid away upon that view the money to Searle, erroneously believing that he was Thorne's agent. If that be the state of facts, it seems to me idle to contend that money which is paid away by a trustee to another person in the erroneous belief that he fills a particular character which as it turns out he does not fill, is still retained by the trustee within the meaning of the Act. Upon the other point which was so fully discussed before your Lordships, that the statute did not begin to run till within six years of the beginning of this action, I only desire to say this: In my opinion, if fraud or a non-discovery of fraud is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of, or in some way imputable to, the person who invokes the aid of the Statute of Limitations. Now the fraud which is imputed to Searle, and apparently justly, is that he put Thorne off his guard by continuing to pay his interest to him as if his security was still a subsisting one. It cannot be pretended for a moment that he was acting as agent for the respondents in doing that. He did not make the payments of interest in his character of agent for the respondents, he made them as agent for the mortgagor; and I see no foundation whatever upon which Searle's fraud can be attributed to the respondents, or can be said to have been committed by him while he was acting in the character of the respondents' agent. Upon that ground and the other grounds which have been stated in the judgments delivered in the courts below and by your Lordships, I hold that there was no fraud imputable to the defendants which would prevent the running of the Statute of Limitations.

Judgments appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Mear* and *Fowler*, for *G. H. Thorne*, Nottingham.

Solicitors for the respondents, *Yarde* and *Loader*, for *Bond, Pearse*, and *Prickman*, Okehampton, Devon.

Supreme Court of Judicature.

COURT OF APPEAL.

June 28, *July* 1, 2, *and Aug.* 7.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Russell *v.* Russell. (*a*)

APPEAL FROM THE DIVORCE DIVISION.

Husband and wife—Restitution of conjugal rights—Judicial separation—Cruelty—What constitutes legal cruelty—Matrimonial Causes Act 1884 (47 & 48 *Vict. c.* 68).

In order to constitute legal cruelty as between husband and wife there must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it.

Since the passing of the Matrimonial Causes Act 1884 *the court is not bound to decree restitution of conjugal rights in all cases at the instance of a party who has successfully resisted a claim for judicial separation, or* vice versâ.

A wife in a suit brought against her husband for judicial separation which failed, charged him with the commission of an unnatural criminal offence, and reiterated that charge subsequently, notwithstanding the verdict of acquittal which he had obtained. The wife then brought a suit for restitution of conjugal rights, which the husband opposed on the ground of cruelty on the part of the wife in making the above charge, well knowing the same to be false; and he also counter-claimed for judicial separation on the same ground.

Held, by the Court of Appeal, that the conduct of the wife in making the above charge was sufficient to justify the court in refusing to decree restitution of conjugal rights; but held (dissentiente *Rigby, L.J.*), *that it did not amount to legal cruelty sufficient to support the husband's counter-claim for judicial separation.*

Order of Pollock, B. varied.

In Nov. 1890 the Countess Russell commenced a suit against the earl for judicial separation, on the grounds of cruelty and sodomy. That suit was dismissed, but the countess continued to reiterate the charges of sodomy.

This suit was then brought by her for restitution of conjugal rights.

The earl, by counter-claim, asked for a decree of judicial separation on the ground of the countess's cruelty in making the above charges, well knowing them to be false. He also set up as a defence that the suit was not brought *bonâ fide* with the desire of resuming cohabitation, but for the purpose of founding proceedings under the Matrimonial Causes Act 1884 (47 & 48 Vict. c. 68) for alimony and judicial separation.

In April 1895 the suit came on for trial before Pollock, B., sitting with a special jury.

His Lordship in the course of his summing up called the attention of the jury to the dicta of Lord Brougham in *Paterson* v. *Paterson* (3 H. of L. Cas. 308, at pp. 319, 328) on the necessity of extending the rule laid down by Lord Stowell in *Evans* v. *Evans* (1 Hagg. Cons. Rep. 35).

The learned judge, at the conclusion of the summing up, asked the jury to say—first, whether the petitioner had been guilty of cruelty; and, secondly, whether, in her conduct and correspondence since the trial in 1891, she was acting *bonâ fide*.

In answer to these questions put by the learned judge, the jury found that the petitioner had been guilty of cruelty, and had not acted *bonâ fide* since the last trial.

The learned judge upon that verdict dismissed the wife's petition and pronounced a decree of judicial separation in favour of the husband.

The petitioner now appealed.

Murphy, Q.C. and *Barnard* (with them *Le Bas*) for the appellant.—There was no evidence of cruelty to go to the jury, and no answer to the appellant's petition for restitution of conjugal rights. The question is governed by the law administered by the ecclesiastical courts, and according to that law there is no defence to a suit by a wife for restitution of conjugal rights except matrimonial offences committed by her, and there cannot be legal cruelty unless there is actual violence or conduct producing or tending to produce injury to health. This appears from a series of decisions from the year 1755 down to the present time:

Holmes v. *Holmes* (1755), 2 Lee Eccl. Rep. 116;
Evans v. *Evans* (1790), 1 Hagg. Cons. Rep. 35;
Oliver v. *Oliver* (1801), 1 Hagg. Cons. Rep. 361, 364;
Otway v. *Otway* (1812), 2 Phil. Eccl. Rep. 95;
Barlee v. *Barlee* (1822), 1 Add. Eccl. Rep. 301;
Westmeath v. *Westmeath* (1826), 2 Hagg. Eccl. Rep. Supp. 1, 56;
Bray v. *Bray* (1828), 1 Hagg. Eccl. Rep. 163;
Neeld v. *Neeld* (1831), 4 Hagg. Eccl. Rep. 263;
Dysart v. *Dysart* (1844), 3 Notes of Eccl. Cas. 324, 365, 366;
Furlonger v. *Furlonger* (1847), 5 Notes of Eccl. Cas. 422;
Greenway v. *Greenway* (1848), 6 Notes of Eccl. Cas. 221;
Paterson v. *Paterson* (1850), 3 H. of L. Cas. 308, 318;
Gale v. *Gale* (1852), 2 Rob. Eccl. Rep. 421;
Tomkins v. *Tomkins* (1858), 1 Sw. & Tr. 168;
Curtis v. *Curtis* (1858), 1 Sw. & Tr. 192;
Milner v. *Milner* (1861), 4 Sw. & Tr. 240;
Prichard v. *Prichard* (1864), 3 Sw. & Tr. 523;
Scott v. *Scott* (1865), 4 Sw. & Tr. 113;
Cousen v. *Cousen* (1865), 4 Sw. & Tr. 164;
Milford v. *Milford* (1866), 15 L. T. Rep. 392; L. Rep. 1 P. & D. 295, 299;
Forth v. *Forth* (1867), 16 L. T. Rep. 574; 36 L. J. 122, P. & M.;
Stace v. *Stace* (1868), 18 L. T. Rep. 740; 37 L. J. 51, P. & M.;
Kelly v. *Kelly* (1870), 21 L. T. Rep. 564; 22 Ib. 308; L. Rep. 2 P. & D. 31, 59;
Birch v. *Birch* (1873), 28 L. T. Rep. 540; 42 L. J. 23, P. & M.;
Rippingall v. *Rippingall* (1876), 24 W. R. 967;
Mytton v. *Mytton* (1886), 57 L. T. Rep. 92: 11 P. Div. 141.

When the Divorce Act 1857 was passed the then state of the ecclesiastical law must be taken to have been known to the Legislature. New offences were created by that Act, and, if it was intended to enlarge the definition of legal cruelty, it is to be expected that the statute would have said so in distinct terms. This has not been done, and since that Act the judges of the Divorce Court have adhered to the old doctrine that there must

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

be violence or injury to health. Indeed, in the former suit between these parties (*Russell* v. *Russell*, unreported) upon the very same doctrine as to legal cruelty, the application of the countess for a judicial separation on the ground of her husband's cruelty was refused. We submit that on this view there was no evidence of cruelty in the present case such as ought to have been put before the jury. The appellant originally made the charge in question against her husband in the course of legal proceedings, and she has perhaps repeated it; but the evidence does not prove any habitual reiteration of it. See

Henderson v. *Broomhead*, 28 L. J. 360, Ex.; 1 C. P. Div. 540;

Seaman v. *Netherclift*, 34 L. T. Rep. 878; on app., 35 L. T. Rep. 874; 2 C. P. Div. 53.

The husband did not institute any proceedings of his own on the ground of cruelty, except in answer to his wife's claim for restitution of conjugal rights. He waited until the wife commenced her suit for restitution, and then set up cruelty by way of counter-claim. And this was four years after the parties had ceased to live together. The court has no discretion in the matter, but a husband or wife is entitled as of right to a decree for restitution of conjugal rights, unless he or she has been guilty of some matrimonial offence, such as adultery or cruelty, which would entitle the other party to a judicial separation:

Burroughs v. *Burroughs*, 4 L. T. Rep. 374; 30 L. J. 186, P. & M.;

Scott v. *Scott*, 4 Sw. & Tr. 113;

Rippingall v. *Rippingall*, 24 W. R. 967.

The principle on which the court acts in such cases as the present is shown by the Divorce Act 1857. Sect. 17 provides that the court may decree restitution of conjugal rights where satisfied that there is no legal ground why the same should not be granted; and sect. 22 provides that, in proceedings other than for dissolution of marriage, the court is to act in conformity with the principles theretofore acted upon by the ecclesiastical courts. [LOPES, L.J.—In *Mackenzie* v. *Mackenzie* (1895) A. C. 384) Lord Herschell seems to have suggested that a wife could not get a decree for restitution of conjugal rights unless she came to the court with clean hands. Is that not in accordance with the general principles acted on by the court?] In these cases the principles applied by the ecclesiastical courts are those to be applied:

Otway v. *Otway*, 59 L. T. Rep. 153; 13 P. Div. 12, 141.

And those courts did not, we submit, require an applicant to come to them in all cases with clean hands. They considered a party entitled to relief unless he or she had been guilty of some matrimonial offence:

Miles v. *Chilton*, 6 Notes of Eccl. Cas. 636; 1 Rob. Eccl. Rep. 684;

Sullivan v. *Sullivan*, 2 Add. Eccl. Rep. 299;

Andrews v. *Ross*, 59 L. T. Rep. 900; 14 P. Div. 15;

Duplany v. *Duplany*, 66 L. T. Rep. 267; (1892) P. 53.

Furthermore, in his summing up the learned judge in the court below did not really put before the jury any definition of legal cruelty. There was misdirection, and the verdict was against the evidence.

Robson, Q.C. and *Bargrave Deane* (Sir *Henry James*, Q.C. and *A. L. Davies* with them) for the respondent.—The gross charge in question was made by the appellant, although she had no ground or pretence for believing it to be true, and in fact she never did believe it. The jury have found that the appellant made the charge without believing it to be true. The charge was made originally in answer to a demand in the former suit for further and fuller particulars of cruelty. That was the first time that the respondent ever heard of the charge. It is clearly an absolutely gratuitous charge. The appellant contends that this is not legal cruelty within the definition which has been judicially adopted. But the offence is one without any precedent in the history of the court, and this makes the present case an entirely new one. It is not the case of a charge made in the course of angry recrimination, and probably believed at the time when it was made. We say that it amounts therefore to legal cruelty. The question of what is legal cruelty has been dealt with by Lord Stowell in *Evans* v. *Evans* (1 Hagg. Cons. Rep. 35). He does not directly define it; but he mentions certain things which are not within it, such as acts of petulance and passion, or the denial of indulgences. He says that cases where the facts fall short of actual cruelty must be dealt with with great care, and to be admitted the facts must show an absolute impossibility that the duties of married life can be discharged. He does not exclude all cases in which no injury to health is shown. What could make the duties of married life more impossible to be discharged than an accusation such as the appellant has made against her husband? An accusation made deliberately and repeated though shown to be untrue. It is utterly impossible for the parties to live together again. A man could not live day after day with a woman who did that; and the court would not decree what it knows cannot be done. The charge is an act of cruelty differing from any accusation made in private. It renders the maintenance of a common home impossible. It is not necessary to prove actual injury to health; and this act must, if the parties are compelled to live together again, end in injury to health. The authorities relating to legal cruelty do not support the proposition asserted on the other side. There may be cruelty by a wife to a husband without serious bodily injury to him or his safety being imperilled:

Prichard v. *Prichard*, 3 Sw. & Tr. 523.

[LOPES, L.J.—Is there any case in which it has been held that mere words, however violent, would constitute cruelty?] Probably not, but a charge such as this would. *Milner* v. *Milner* (4 Sw. & Tr. 240), and *Kelly* v. *Kelly* (21 L. T. Rep. 564; 22 Ib. 308; L. Rep. 2 P. & D. 31, 59) show that acts will be treated as acts of cruelty, though they are not acts of personal violence, or causing injury to health. [LOPES, L.J.—In *Milner* v. *Milner* (*ubi sup.*) there was an assault.] It is sufficient, we submit, if we show that the words are such as might lead to physical violence, or result in injury to health. It is monstrous to say that the appellant is entitled to go on making these statements, and at the same time can oblige her husband to live with her simply because his health, he being a young man, has not failed. It is very difficult to give an exhaustive definition

of cruelty, but anything which would make living together intolerable would, we say, amount to that:

D'Aguilar v. *D'Aguilar*, 1 Hagg. Eccl. Rep. 773;
Saunders v. *Saunders*, 5 Notes of Eccl. Cas. 408, 418;
Stace v. *Stace*, 18 L. T. Rep. 740; 37 L. J. 51, P. & M.

They referred also to

Woodey v. *Woodey*, 31 L. T. Rep. 647.

Murphy, Q.C., in reply, referred to

Weldon v. *Weldon*, 9 P. Div. 52.

Cur. adv. vult.

Aug. 7.—LOPES, L.J. read the following judgment, in which Lindley, L.J. concurred:—This is a most important case, and admittedly one of first impression; it is, therefore, with anxious care that the court approaches its consideration and determination. It is a suit by the wife for the restitution of conjugal rights, which the respondent resists on the ground of his wife's cruelty. The jury found that the petitioner had been guilty of cruelty towards the respondent, and that, in her conduct and correspondence since the first trial, she had not acted *bonâ fide*—which means that she did not believe the charge made against her husband to be true. The cruelty set up may be thus stated, viz., that the wife, who had for two years at least been living apart from her husband, persisted in charging him with the commission of an unnatural criminal offence, of which he had been acquitted by the verdict of a jury, and which charge she had refused to apologise for, or retract. Two questions arise—(1) Was legal cruelty established? If it was, the respondent is entitled to a judicial separation, and the wife fails in the suit for restitution of conjugal rights. (2) If it was not, is the petitioner, in the circumstances of this case, entitled to a decree for restitution of conjugal rights? The facts of the case, so far as concern the present inquiry, are not largely, if at all, in dispute. It is necessary, however, to state some of them, in order to make the judgment of the court intelligible. The petitioner and respondent were married in Feb. 1890, and they separated in the following May. They then lived together for a short time, but in June they separated again for a period of three months. The three months went by and they never cohabited again. In Nov. 1890 the wife filed her petition for a judicial separation, charging her husband with many acts of cruelty towards her, and amongst them with having committed an unnatural criminal offence. In Dec. 1891 that petition was tried. The jury, after a long trial, acquitted the husband of the cruelty alleged, and his character was thereby completely vindicated. Then commenced the course of conduct on the part of the wife, of which the respondent now complains. It may be thus described—that she deliberately persisted in charging him with the criminal offence of which the jury had acquitted him. She did this on several occasions by word of mouth, and by letters addressed to members of his family and others, and would not retract or apologise. In an interview which the petitioner had with the editor of the *Hawk* she reiterated her charge against her husband, and intimated that, had the opportunity been afforded her, she could have established it. The jury have found that the petitioner did not believe the charge to be true. If she did not, her repeating it is the more reprehensible. If she did, her desire now expressed to return to cohabitation with her husband is incredible. However, that she conducted herself in the way we have described is indisputable. Is this legal cruelty? This is the question the court has to determine. The learned judge in the court below has not defined legal cruelty, and has left it somewhat at large to the jury. The court, in our judgment, ought to define it—we will not say exhaustively, but, at any rate, sufficiently for the purposes of this case. We define it thus: There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty. We propose to test the definition by some of the more important cases that have been decided on the subject. Sect. 22 of the Matrimonial Causes Act 1857, says: "In all suits and proceedings other than proceedings to dissolve any marriage the court shall proceed on principles and rules which, in the opinion of the court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have hitherto acted, but subject to the provisions herein contained and to the rules and orders under the Act." It is material, therefore, to consider what, in the view of the ecclesiastical courts, constituted legal cruelty for which a divorce *a mensa et thoro* could be obtained. *Evans* v. *Evans* (1 Hagg. Cons. Rep. 35, 38), decided by Lord Stowell in 1790, is the leading case on the subject. As we read that case, no husband could be found guilty of legal cruelty towards his wife unless he had either inflicted bodily injury upon her, or had so conducted himself towards her as to cause actual injury to her mental or bodily health, or as to raise a reasonable apprehension that he would either inflict actual bodily injury upon her or cause actual injury to her mental or bodily health. In a word, he must so have conducted himself towards her as to render future cohabitation more or less dangerous to her life, or limb, or mental or bodily health. There are some expressions in that most admirable judgment of Lord Stowell to which we would wish to refer. At page 38 the learned judge says: "What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manner, rudeness of language, and a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty—they are high moral offences in the marriage state undoubtedly, not innocent, surely, in any state of life, but still they are not that cruelty against which the law can relieve." At page 39 the learned judge sums up what he had previously said thus: "These are negative descriptions of cruelty; they show only what is not cruelty, and are yet, perhaps, the safest definitions which can be given under the infinite variety of possible cases that may come before the court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke and other books of practice is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed

that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been mentioned. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it; and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because, assuredly, the court is not to wait till the hurt is actually done; but the apprehension must be reasonable." This was the state of the law in 1790, and we venture to say that the doctrine there enunciated as to what constituted legal cruelty has never been materially altered. At that time no amount of want of civility, rudeness, insult, or abuse, however gross, which did not affect life, limb, or mental or bodily health, or where there was not a reasonable apprehension of its so doing, was considered by the ecclesiastical tribunals to amount to legal cruelty, and that though the parties were at the time cohabiting. So far as we can ascertain, the authority of the case of *Evans* v. *Evans* (*ubi sup.*) has never been questioned. It would be superfluous to cite the long course of decisions with regard to cruelty which have been decided since *Evans* v. *Evans* (*ubi sup.*). Before the Divorce and Matrimonial Causes Act 1857, and since the passing of that Act, the same rule with regard to what constitutes legal cruelty has been maintained, and has been followed by Sir Cresswell Cresswell, Lord Penzance, and Sir James Hannen; and Sir Charles Butt, in Dec. 1891, at the trial of the case of *Russell* v. *Russell* (unreported), when the present petitioner sued for a judicial separation on the ground of cruelty, said, in laying down the law to the jury, that cruelty had been very often defined as injury causing danger to life, or limb, or health, or causing reasonable apprehension of danger to life, or limb, or health; and it is, generally speaking, where the continuation of the conduct charged would be likely to produce injury, either bodily or mental, or injury to health without any physical violence, that this court interposes to protect the wife. There is no case in the books where words alone, however violent, however galling, and even if imputing a crime of the most disgraceful kind, have been held *per se* to constitute legal cruelty, and this when the parties were cohabiting as husband and wife. The case of *Bray* v. *Bray* (1 Hagg. Eccl. Rep. 163, 167) is a case which, so far as we can discover, has never been cited or followed as an authority, and is contrary to *Gale* v. *Gale* (2 Rob. Eccl. Rep. 421), subsequently referred to. *Bray* v. *Bray* (*ubi sup.*) was a decision only with regard to adultery. In *Milner* v. *Milner* (4 Sw. & Tr. 240) the assault was quite sufficient to show that the husband was unable to control himself, and could not be trusted not to break out again into violence towards his wife. In *Popkin* v. *Popkin* (1 Hagg. Eccl. Rep. 768) a husband's attempts to debauch his own female servants, and in *Durant* v. *Durant* (1 Hagg. Eccl. Rep. 745, 752) the bringing by him of groundless and malicious charges against his wife's chastity were only held to be acts of legal cruelty to the extent that it was said of them that they would weigh with the court in conjunction with other charges. In *Popkin* v. *Popkin* (*ubi sup.*) it was said: "The attempts to debauch his own women servants was a strong act of cruelty; perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings." And in *Durant* v. *Durant* (*ubi sup.*) the court said: "If a person who had ill-treated his wife, and had been guilty of acts of violence and words of menace, and finally made a charge of misconduct and criminality which he had not attempted to allege nor to prove, and under that pretence had shut his door against her, it cannot be doubted that such conduct would be admissible matter in a suit for separation by reason of cruelty." By some authorities in the civil law this was held to be a distinct ground of separation, and passages were quoted in the argument to that effect, which it is unnecessary again to state. These courts, and the law of this country, have not gone the length of recognising it as a substantive ground, but it is a fact amongst others *per quod consortium amittitur*. In *Oliver* v. *Oliver* (1 Hagg. Cons. Rep. 361) it is said, "Words of menace importing the actual danger of bodily harm will justify the interposition of the court, as the court ought not to wait until the mischief is actually done. But the most innocent and deserving woman will sue in vain for the interference for words of mere insult, however galling." Again, in *Gale* v. *Gale* (2 Rob. Eccl. Rep. 421) a charge of incest *per se* was held to be insufficient to constitute legal cruelty. Sir John Dodson, in his judgment, said: "Undoubtedly the charge of having committed incest is not *per se* sufficient to constitute legal cruelty; but, coupled with other averments of a substantial character, I think, on the authority of the cases cited, that charge may form a part of the libel." *Birch* v. *Birch* (28 L. T. Rep. 540; 42 L. J. 23, P. & M.) is worthy of notice. It was the petition of the wife for dissolution of the marriage on the ground of adultery coupled with cruelty, and was decided by Sir James Hannen in 1873. The cruelty relied on was of this nature: The husband frequently beat one of the children with great violence in the wife's presence, swore at and abused her, and refused her delicacies which her state of health required. She did not allege that she had ever been struck by her husband, or that any act of violence had been committed by him towards her. Sir James Hannen says: "I cannot hold consistently with the authorities that legal cruelty is established. I must hold to those views, which seem to have been taken by my predecessors, that the cruelty must be of such a character as to endanger the life, the limbs, or the health of the party claiming relief. In saying this it must be such as to endanger the health of the complaining party; it does not follow that it should be such as actually to reach that point so as to cause injury to health. If there be reasonable ground to believe that it will be persevered in so as to cause mischief, then the complaining party may bring it before the court as constituting legal cruelty, for it is not necessary that he or she should wait until the mischief is done. But I cannot come to the conclusion in this case that the wife had any apprehension of personal violence." We proceed to deal with the cases upon which the respondent relies. We select the strongest of them. *Paterson* v. *Paterson* (1850),

3 H. of L. Cas. 308) has been mainly relied upon by the respondent. It was a Scotch case, and, although it was said that the general principle of the law as to divorce *a mensa et thoro* was the same in England and Scotland, Lord Brougham, at the end of his judgment, says: "I will not say that the law of Scotland as far as decided cases go may not extend somewhat further than our laws in favour of the remedy." Lord Brougham at p. 328 in effect says this: "Suppose a man were continually charging his wife with every sort of immorality and criminal conduct and there were not a shadow of foundation for those charges, made before her family, her friends, relatives, and servants, and in face of the world, there is little doubt that what now rests only upon opinions would ultimately assume the form of decisions, and that to such injurious treatment, making the marriage state impossible to be endured and rendering life almost unbearable, the courts of the country would extend the remedy of a divorce *a mensa et thoro*." These, however, were *obiter dicta*, and were not necessary for the decision, and it is to be observed that the House of Lords, the Court of Session having pronounced for a divorce, reversed the interlocutor. Again, at pp. 318, 319, Lord Brougham in effect says: "That the ground of the remedy is confined to personal violence is not the law of England, and certainly not the law of Scotland. The law is nearly, if not altogether, the same in the two countries. It is not true that the law of England either requires actual injury to the person or threat of such injury." We presume that this means that a reasonable apprehension of danger to life, limb, or health, bodily or mental, will suffice without any actual personal injury or the threat of it, because previously Lord Brougham had said: "Separation of married persons is not justified by conduct on the part of the husband rendering the wife's life miserable and uncomfortable unless such conduct is accompanied by violence, actual or menaced, to her life, limb, or health, or by cruelty and maltreatment rendering it impossible for her to live with him." We cannot think this case can be relied upon as a decision making the conduct of the wife in this case sufficient to constitute legal cruelty. Nor do we find in subsequent cases that it has been cited or allowed to prevail as establishing such an extension of the remedy. Then there is the case of *Kelly* v. *Kelly* (22 L. T. Rep. 308; L. Rep. 2 P. & D. 59), which has gone as far as any case has gone in the direction contended for by the respondent. It was decided by the Judge Ordinary, Lord Penzance, and was in 1870 appealed to the full court, consisting of Channell, B. and the Judge Ordinary. And it was held that if force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it is legal cruelty, and entitles her to a judicial separation. Previous cases were carefully considered, and Channell, B., after reviewing the evidence, says at page 71 of L. Rep. 2 P. & D.: "In conclusion, we have no doubt whatever that the law was correctly laid down on the hearing of this case that the evidence warranted the conclusion of legal cruelty drawn from it; and, satisfied as we are of the extreme peril to which Mrs. Kelly's health was exposed without any adequate fault of her own, we think that the interference of this court was justified and necessary, and the appeal should be dismissed." The Judge Ordinary at page 72 of L. Rep. 2 P. & D. says: "These, then, are the grave misdeeds which, according to the argument of the appellant, are to warrant this court in deciding that Mrs. Kelly is to return to her husband and be subjected again to that discipline which, in the opinion of all who saw her when she last escaped from it (an opinion, be it remembered, that Mr. Kelly does not even in argument question), would end in her paralysis or madness." Again, at page 76 of L. Rep. 2 P. & D.: "The health and safety of the wife is no doubt the leading consideration," and "so much injustice, so much perversion of mind, such abiding rancour for so trifling a cause, so much deliberate oppression under provocation so slight, moral chastisement so severe, administered with so much system, maintained with such tenacity up to the brink of so perilous a danger to health, with so utter a disregard of consequences, and all to extort confession of motives of which there is no proof, and force repentance without consciousness of wrong, will probably never be exhibited again." That the decree proceeded on the ground of the great danger to the health of Mrs. Kelly is beyond controversy. In the case we are now considering no injury to health, or reasonable apprehension of it, is alleged, or proved, or even suggested. If the point had been raised the jury ought to have dealt with it, and it should have been left to them. This court cannot now say that there must be injury to the husband's health and act upon any such inference. *Kelly* v. *Kelly* (*ubi sup.*) therefore cannot be relied upon by the respondent. We do not know of any other case to which it is necessary to refer. The present case is a case where the cruelty alleged is cruelty by the wife towards the husband. The difference of the sexes makes no essential difference in the principles applicable to the case. Dr. Lushington said in *Furlonger* v. *Furlonger* (5 Notes of Eccl. Cas. 422, 425): "Generally speaking, that would be cruelty if practised by a wife towards her husband which would be held to be cruelty if done by him towards her. I say generally speaking, for I think there must be some distinctions necessarily founded on the great difference between the sexes, and the power of the husband in ordinary circumstances to protect himself from the wife's violence, still the same great rule of danger to life or limb must prevail; in these as in all other cases of the same genus necessary protection is the foundation of all separation." Mr. Deane in his very able argument for the respondent ventured on a definition of legal cruelty. He said the test was "whether the spouse complained of had so treated the complaining spouse and so manifested his or her feelings towards her or him as to cause a reasonable apprehension that the duties of married life could not be discharged, but married life must be unbearable if an order was made that married life should be resumed." Mr. Deane admitted that there was no case in the books which had so far extended the doctrine of legal cruelty. We are not prepared, in the face of such a consistent body of authority arrayed against it, proceeding from the most eminent judges who have ever

adorned the tribunals dealing with the subject, to authorise such a departure. If such an extension of the remedy is to be allowed, it seems to us that it is for the Legislature, or at any rate for the ultimate Court of Appeal, to take this important step in advance. It is said this is an exceptional case, and so it may be; but, if it is held that the conduct of the wife here constitutes legal cruelty, it would be difficult logically to say that any spouse who leaves the other spouse and charges him or her, and persists in so doing, with any serious criminal offence—*e.g.*, murder or larceny—without any justification for so doing, was not guilty of legal cruelty for words used without any suggestion of danger to life, limb, or health, and thereby entitled to a divorce *a mensa et thoro*, and if coupled with the adultery of the husband, to a divorce *a vinculo*. Adhering to the definition of legal cruelty which for the purposes of this case we have laid down—viz., that there must be danger to life, limb, or health, present or proximate, by which we mean a reasonable apprehension of it, to constitute legal cruelty—we come to the conclusion that there was in this case no evidence of legal cruelty which ought to have been left to the jury, and that the respondent is not therefore entitled to the decree for a judicial separation which he prays in his answer. We come now to the question of the wife's right to a decree for restitution of conjugal rights. Her case is simply this—viz., that unless her husband is entitled to a decree for divorce or separation she is entitled as a matter of course to a decree for restitution. She contends that the court has no discretion in the matter and cannot by law refuse her relief in the case supposed, however detestable her conduct may have been, and although it is plain that her real object is not to live with her husband, but to procure a separation from him and to compel him to make her an allowance. These are startling propositions, and they require careful examination. It will be convenient first to ascertain the ecclesiastical law on the subject before the passing of the Divorce Act, and then to inquire what modifications in that law were introduced by that Act or have been made since. By the ecclesiastical law of this country, which was founded on the canon law, marriage has long been considered indissoluble. But judicial separation could be obtained by either party for adultery or cruelty on the part of the other. Unless, however, a judicial separation could be pronounced, the obligation of both husband and wife to live together was invariably recognised and was vigorously enforced. There are numerous cases in the books in which restitution of conjugal rights has been decreed at the instance of sometimes a husband and sometimes a wife whose conduct was unbearable, though falling short of cruelty in the technical sense of the word. (See, *inter alia*, *Holmes* v. *Holmes*, 2 Lee Eccl. Rep. 116; *Oliver* v. *Oliver*, 1 Hagg. Cons. Rep. 361; *Dysart* v. *Dysart*, 3 Notes of Eccl. Cas. 324; *Simmons* v. *Simmons*, 1 Rob. Eccl. Rep. 566; *Hayward* v. *Hayward*, 1 Sw. & Tr. 181; *Rippingall* v. *Rippingall*, 24 W. R. 967.) The law on this subject will be found carefully investigated in *Dysart* v. *Dysart* (*ubi sup.*), and in a case which arose in Ireland in 1846, and to which we will refer. It is *Seaver* v. *Seaver* (2 Sw. & Tr. 665), which was decided first in the Consistory Court of Dublin and afterwards, on appeal, in the Court of Delegates. In this case both husband and wife had committed adultery. Neither, therefore, could obtain a divorce (*a mensa et thoro*) from the other, and it was held that the wife was entitled to a decree for restitution of conjugal rights. All the older authorities were there examined, and it was laid down in the clearest language that the ecclesiastical law of England recognised no middle state in the relation of husband and wife between that of *consortium vita* and *divortium a mensa et thoro*. It was in vain contended that in such a case as that before it the court ought not to interfere at the instance of either party against the other. The court held that, although the wife had committed adultery, yet she was entitled to a decree for restitution of conjugal rights so long as the relation of husband and wife subsisted, and no decree for separation could be pronounced against her. Such we take to have been settled law previously to 1857, when the Divorce Act was passed. Cases were referred to in which the court allowed facts to be pleaded in answer to a suit for restitution of conjugal rights, although those facts would not have justified a decree for separation (*Moore* v. *Moore*, 3 Moo. P. C. 84; *Stace* v. *Stace*, 18 L. T. Rep. 740; 37 L. J. 51, P. & M.; and *Woodey* v. *Woodey*, 31 L. T. Rep. 647). But, although there are expressions in the judgments in those cases which point to a difference between suits for restitution and suits for separation, as regards particularity and certainty of pleading, and even cogency of evidence (*Simmons* v. *Simmons*, 1 Rob. Eccl. Rep. 566), those cases do not warrant the inference that the court could or would refuse to decree restitution by reason of conduct falling short of adultery or cruelty in the technical sense. The question whether the ecclesiastical court had a discretion to refuse a decree for restitution on the ground of misconduct short of adultery or cruelty sufficient to warrant a decree for separation has been more than once considered, and we can find no case in which the court ever did refuse a decree for restitution where there was no sufficient ground for separation. In *Seaver* v. *Seaver* (*ubi sup.*) the court considered it had no discretion: (see also *Westmeath* v. *Westmeath*, 2 Hagg. Eccl. Rep. Supp. 1, 57: *Simmons* v. *Simmons*, 1 Rob. Eccl. Rep. 566; *Rippingall* v. *Rippingall*, 24 W. R. 967.) In *Dysart* v. *Dysart* (3 Notes of Eccl. Cas. 324, 369) Dr. Lushington would not go so far as to say that extraordinary and unforeseen combinations of circumstances might not justify the court in holding its hand and not assisting either party, but he said in effect that such a course could only be justified on the improbability of safe cohabitation. Improbability of peace and happiness would not be sufficient. In none of the cases to which we have alluded did the question arise as to the right of husband or wife to a decree for restitution where the petitioner did not *bonâ fide* desire to resume cohabitation. The observations of Dr. Lushington in *Simmons* v. *Simmons* (1 Rob. Eccl. Rep. 566) and in *Dysart* v. *Dysart* (3 Notes of Eccl. Cas. 324, 365) on the motives of the petitioner do not touch this point, which we pass over for the present, although we shall return to it. We pass now to the Divorce Act 1857 (20 & 21 Vict. c. 85). Sects. 2 and 6 transfer the jurisdiction previously exercised by the ecclesiastical courts

in matrimonial matters to the new court created by that Act, and called the Court for Divorce and Matrimonial Causes. A new ground for separation, viz., desertion without cause for two years and upwards, was introduced by sect. 16 and by sect. 17. The new court is empowered upon petition to make a decree for restitution of conjugal rights or judicial separation on being satisfied of the truth of the allegations contained in the petition, and that there is no legal ground why the same should not be granted. The use of the words "may decree," and not "shall decree," suggests an intention on the part of the Legislature to confer on the court a discretion as well as a power; but sect. 22 shows, we think, that no discretion which was not possessed by the ecclesiastical courts was intended to be conferred on the new court. The effect of that section is, that the principles and rules acted on by the old courts in cases of restitution and separation are to be followed by the new court, subject to the creation of the new ground for separation by sect. 16, and to the new procedure by petition introduced by sect. 17, and to any rules which may be made under the authority of the Act. This construction of the sections is in accordance with *Julius* v. *The Bishop of Oxford* (42 L. T. Rep. 546; 5 App. Cas. 214), and with decisions since the Act in suits for restitution of conjugal rights. In *Burroughs* v. *Burroughs* (4 L. T. Rep. 374; 2 Sw. & Tr. 303) Sir Cresswell Cresswell, and in *Scott* v. *Scott* (4 Sw. & Tr. 113) Lord Penzance, held that, in a suit for restitution, nothing short of a ground for separation afforded a defence to the respondent. In the recent Scotch appeal of *Mackenzie* v. *Mackenzie* (1895) A. C. 384), Lord Herschell expressed great doubt whether the rule not to refuse a decree for restitution of conjugal rights where no separation could be decreed was as inflexible and free from exception as the ecclesiastical courts held it to be. But, having regard to the numerous and weighty decisions in those courts, and to sect. 22 of the Divorce Act, and to the decisions upon it, we are not prepared to say that the law can be judicially held to be less rigid than we have stated, except in some cases which will be noticed presently. The only other alterations which have been made in the old law relating to suits for restitution of conjugal rights have been made by the Judicature Acts, and by 47 & 48 Vict. c. 68. The effect of the Judicature Acts has been indirect, but, at the same time, very important. It is, however, confined to separation deeds. These, as is well known, were treated as illegal and void by the ecclesiastical courts: (see *Westmeath* v. *Westmeath*, 2 Hagg. Eccl. Rep. Supp. 1.) But, when it was settled, as it ultimately was (see *Besant* v. *Wood* (40 L. T. Rep. 445; 12 Ch. Div. 605), that the Court of Chancery would restrain a suit for restitution of conjugal rights if brought contrary to a covenant not to institute such a suit, and, when the Judicature Acts made the Divorce Court a division of the High Court, and abolished injunctions to stay actions, and substituted in all branches of the High Court defences instead of such injunctions, it followed that a separation deed containing a covenant not to sue for restitution of conjugal rights became a defence to a suit for such restitution: (see *Marshall* v. *Marshall*, 39 L. T. Rep. 640; 5 P. Div. 19; *Clark* v. *Clark*, 52 L. T. Rep. 234; 10 P. Div. 188, 189.) The Judicature Acts, however, have not altered the general principles on which the ecclesiastical courts acted in suits for restitution except in the particular to which we have alluded; and the alteration in the law as to separation deeds has really no bearing on the present case. We have alluded to it simply to show that we have not overlooked it. There remains for consideration the Act 47 & 48 Vict. c. 68, which was passed expressly to amend the law as to the restitution of conjugal rights in England. The Act in terms relates only to the consequences of not obeying a decree of restitution when made; it does not in terms refer in any way to the grounds upon which such a decree can be refused. The old process of attachment for enforcing obedience to such a decree when pronounced is abolished (sect. 2), In lieu of that process the court is empowered, if the respondent refuses to obey the decree, to order a proper provision to be made for the wife if she is the petitioner (sect. 2), or for the husband if he is petitioner (sect. 3). In addition, however, to this, it is enacted by sect. 5 that a respondent who refuses to obey the decree shall be deemed guilty of desertion without reasonable cause, and that a suit for separation may be forthwith instituted, although two years may not have elapsed since failure to comply with the decree. It becomes most important, therefore, to consider what is the effect of sect. 5 of the Act of 1884. In our judgment it has materially altered the old law as to restitution of conjugal rights, and has given the court a power to refuse a decree which it had not before. By sect. 16 of the Matrimonial Causes Act of 1857 desertion is the first time made a ground for judicial separation, and is not governed by the old ecclesiastical law; but it is no ground for a sentence of judicial separation unless the desertion is without cause. If the wife were petitioning for a judicial separation here on the ground of desertion against her husband, her conduct towards him would disable her from contending that the desertion was without cause, and she would fail in the suit. By sect. 5 of the Act of 1884 disobedience to a decree for restitution of conjugal rights is made equivalent to desertion without cause. If, therefore, the petitioner obtains a decree for restitution of conjugal rights, she will be at once entitled to institute a suit for judicial separation for the statutory desertion created by the Act of 1884, although she could not, under sect. 16 of the Matrimonial Causes Act 1857, have obtained such a decree unless it had been desertion without cause. We cannot think that such a result was ever intended, or that the necessity of proving absence of reasonable cause was intended to be taken away. It seems to us that since 1884, and by necessary implication, the court must have power to refuse a decree for restitution wherever the result will be to compel the court to treat one of the spouses as deserting the other without reasonable cause contrary to the real truth of the case. The practical consequence of this view of the Act of 1884, is that neither party obtains relief. Not the wife, because her conduct justifies the husband in saying that he has reasonable cause for refusing to live with her; not the husband, because his wife's conduct, bad as it has been, does not amount to cruelty in the legal sense of that term when speaking of grounds for divorce or separation. This state of

things is anomalous, for before 1884 it was well settled that a respondent to a petition for restitution of conjugal rights was entitled to a separation if the petitioner failed to obtain relief. But this was because the only ground for failure was cruelty or adultery by the petitioner. Now there is another ground introduced by necessary implication from the language of the Act of 1884, and analogy to the principles on which the ecclesiastical courts acted, at first sight requires us to hold that as the petitioner fails in her application the respondent ought to succeed in his. The language of the Act of 1884 does not, however, warrant the inference that such a consequence as this was intended, and to hold that a respondent to a petition for restitution of conjugal rights is entitled to a judicial separation whenever the petitioner is refused relief would be so seriously to enlarge the grounds for separation that we do not feel justified in going so far. We are satisfied that such a result as that was never intended by Parliament. The court is bound to see that the Act is not used for a purpose for which it was never intended, and this principle, although it introduces an anomaly, compels us to refuse relief both to the wife and to the husband, even at the risk of being thought somewhat illogical. The petition of the wife for restitution of conjugal rights and the counter-claim of the husband praying for a judicial separation must both be dismissed with costs, the costs of the one to be set off against the costs of the other in the court below, and there will be no costs of this appeal.

RIGBY, L.J. read the following judgment:—The alleged cruelty in the case consists of charges of criminal offences of an infamous kind, persisted in after they had been found by the verdict of a jury to be untrue, and, as to the most important of them, brought forward and maintained under such circumstances as to preclude the belief that it was really thought by the wife to be true. No such case has ever before been brought before a court. For myself I can imagine no case of repeated insult or indignity more atrocious, and the question is whether it constitutes a case of legal cruelty. The judgment of Sir William Scott in *Evans* v. *Evans* (1 Hagg. Cons. Rep. 35) is the leading authority on the subject. It has been quoted and relied upon from time to time, and, so far as I know, its accuracy has never been questioned as to any part of it, but it must be taken as a whole, and no one part can safely be left out of consideration. Sir William Scott begins by declining to define cruelty, and stating that it is the duty of the courts to keep the rule extremely strict; that the causes must be grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged; that in a state of personal danger no duties can be discharged, "but what falls short of this is with great caution to be admitted." It is important to notice that he does not say that personal danger is absolutely necessary, and that nothing short of it can be admitted, but only that what falls short is to be admitted with great caution. It is clear that he thinks that there may be cases where there is no personal danger, though such cases would be very exceptional. Lower down he says: "What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced." This involves that, in his opinion, there may be exceptional cases in which, without bodily injury or threat of it, the injury to the mental feelings may be legal cruelty. He does not, of course, attempt to indicate those cases, but I cannot doubt that he would have included a case like the present, since I am unable to imagine a case where the injury to the mental feelings could possibly be greater. Further on he refers to the case of wounding, not the natural feelings, but the acquired feelings arising from particular rank and situation, and states that, though the courts will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed. He made no such statement with reference to the wounding of ordinary mental feelings, and the difference of treatment of the two classes of cases is, in my judgment, significant and important. He then refers to the decided cases, saying: "In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has always been jealous of the inconvenience of departing from it, and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt." Now, as a description of the cases actually decided, this may be, and doubtless is, an accurate description. But it is certain that Sir William Scott did not intend to define legal cruelty; he expressly disclaims such an intention. If, indeed, there had been any decided case in which such charges as in the present case, or verbal outrages of a similar nature, had been considered before his time and treated as not constituting legal cruelty, the words used in this part of the judgment might be considered as a withdrawal of what he had before said. But no such case has been cited, and, indeed, since the time of Sir William Scott there have been, so far as I can find, only two cases in which verbal outrages of a nature at all comparable to those charged and proved in this case have been dealt with. I mean the cases of *Bray* v. *Bray* (1 Hagg. Eccl. Rep. 163), decided by Sir John Nicoll in 1828, and *Gale* v. *Gale* (2 Rob. Eccl. Rep. 421), in which verbal charges of incest were made by a husband against a wife. In the first case Sir John Nicholl says: "It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation (of incest) made by this husband against his wife." Here it is important to observe that the reference to great personal violence makes it impossible to contend that Sir John Nicholl was not using the word "cruelty" in the sense of legal cruelty. In *Gale* v. *Gale* (*ubi sup.*), which was, like *Bray* v. *Bray* (*ubi sup.*), a case for divorce *a mensa et thoro* brought by a wife against a husband, where a charge of incest with a stepfather was made by the husband, Sir John Dodson said that "the charge of having committed incest is not *per se* sufficient to constitute legal cruelty," unless coupled with sub-

stantial acts of violence. I am altogether unable to reconcile that case with *Bray* v. *Bray* (*ubi sup.*) and, for myself, I consider the earlier case as more in accordance with *Evans* v. *Evans* (*ubi sup.*), than the later. Of course, there are numerous cases, including some decided by Sir William Scott himself, in which a general rule appears to have been laid down involving the necessity of violence or injury to health reasonably to be apprehended as a minimum for the establishment of legal cruelty, and there cannot be the slightest doubt that as a general rule covering the great—it may be the overwhelming—majority of cases this is so. It appears to me that the existence of this general rule, which is pointed out by Sir William Scott as a good general outline of the canon law, as distinguished from a definition, accounts sufficiently for all the decisions and judgments referred to which must be considered with reference to the nature of the cases before the court. Nowhere do I find that a single judge has denied in direct language the possibility of extreme cases arising as pointed out in *Evans* v. *Evans* (*ubi sup.*). I do not think that it is necessary for me to mention more than two other cases. The first is *Paterson* v. *Paterson* (3 H. of L. Cas. 308). This was a Scotch case; but, although it was said that in some decided cases the Scotch courts might have gone somewhat further than the English, the courts of both countries apply the same principles of the canon law, and I see no reason to question the statement of Lord Brougham that the law of both countries, so far as it is material for the present purpose, is the same. Lord Brougham's own opinion is plainly shown by his observations (3 H. of L. Cas. at pp. 328-9) to the effect that, "if a husband, without any violence or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, to utter constant insults, vituperation, scornful language, charges of gross offences (utterly groundless) . . . if such a case were to be made out, or even short of such a case—viz., injurious treatment which would make the married state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at present somewhat vague, as to extend the remedy of a divorce *a mensa et thoro* to a case such as I have put." But I wish particularly to call attention to the actual order of the House. The Lord Ordinary had dismissed the action "in respect the libel is laid upon a series of insults and indignities said to have been offered by the defender to the pursuer, unaccompanied with personal violence, or any menace thereof; and that, without an allegation to that effect, it appears to be settled, on authorities which the Lord Ordinary is not entitled to question, that a libel at the instance of a wife against a husband, founded on such averments as those now urged, is not relevant." Lord Brougham said, with reference to this: "That, my Lords, is not the law of Scotland; it is not the law of England; it is an inaccurate statement of the law in both countries; though I will not say that the law of Scotland, as far as decided cases go, may not extend somewhat further than our law in favour of the remedy." The words quoted were ordered to be struck out of the finding of the Lord Ordinary, which was otherwise confirmed. They appear to me to raise the very question whether there may not be a series of insults and indignities, independently of violence or the menace thereof, capable in themselves of amounting to legal cruelty. The other case to which I wish to refer is *Milner* v. *Milner* (4 Sw. & Tr. 240), decided by Sir C. Cresswell in 1852. There, no doubt, there had been an assault, but not one of an aggravated nature such as to create pain or injury to health. The gravamen of the charge was the indignity to the wife of treating her publicly as a prostitute, and it is this, to my mind, which Sir C. Cresswell characterises as "gross and abominable cruelty." That gross and abominable insult can only be called "cruelty" when it is accompanied by an assault not in itself sufficient to constitute legal cruelty, appears to me so revolting a conclusion that I am glad that I do not feel myself constrained by authority to support it. In words taken from the judgment of Sir W. Scott in *Evans* v. *Evans* (*ubi sup.*) I say that the charges established are grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged. Disputes would inevitably arise between this ill-assorted pair, and I have no confidence or belief that, under provocation, a wife of the temper of the petitioner for restitution would not repeat, while I feel certain that the husband would be under the constant and reasonable apprehension of the repetition of, the infamous charges already made. I see no possibility under such circumstances of the duties of married life being fulfilled. It is about as clear as anything future can be that this husband and wife will never live together, even though a decree for restitution were granted. But the only hypothesis on which such a decree can be granted is that they are to do so, and I see no possibility of that taking place with safety either to the one or the other. I go further and say that to force the husband and wife into the intimacy of married life with such charges existing, and not unlikely to be repeated—for I give no weight to withdrawals by counsel at the crisis of a case—would raise a state of personal danger to one or the other of the parties, it matters not which. I think that the jury had good ground for the conclusion at which they arrived, that there was cruelty on the part of the wife, entitling the husband to a judicial separation.

Order varied.

Solicitors for the appellant, *Valpy, Chaplin,* and *Peckham.*

Solicitors for the respondent, *Vandercom, Hardy, Oatway,* and *Doulton.*

June 17, 18, 19, 20, 21, *and Aug.* 6.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Re The London and General Bank Limited; *Ex parte* Theobald. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Misfeasance—Auditor—Officer—Dividends—Payment of—Balance-sheet—Profits—Companies Act 1879 (42 *&* 43 *Vict. c.* 76), *s.* 7—*Companies* (*Winding-up*) *Act* 1890 (53 *&* 54 *Vict. c.* 63), *s.* 10.

It is no part of the duty of an auditor of a banking company, governed by the Companies Act 1879, *to give advice either to the directors or the shareholders as to what they ought to do. His duty is confined to ascertaining and stating to the shareholders the true financial position of the company at the time of the audit; but, in order to discharge that duty, he must take reasonable care to ascertain that the books themselves show the true financial position of the company. On the other hand, his duty does not extend to guaranteeing the accuracy either of the balance-sheet or of the books, provided he has exercised reasonable skill and care. If an auditor fails in his duty as above stated, and loss accrues to the company through payment of dividends out of capital, he may be made liable, jointly with the directors, under sect.* 10 *of the Companies* (*Winding-up*) *Act* 1890, *for misfeasance.*

Order of Williams, J. (72 *L. T. Rep.* 227) *varied.*

A summons was taken out in the winding-up of the above-named banking company, by the official receiver and liquidator, under sect. 10 of the Companies (Winding-up) Act 1890, seeking to make certain directors and the auditors of the company liable for moneys paid as dividends on the capital of the company, on the ground that they were not paid out of profits and were a misapplication of the company's funds.

The summons specified which respondents were sought to be made responsible in respect of each of such dividends. Some of the half-yearly dividends were interim dividends and some dividends paid at the end of financial years.

The summons also asked a similar declaration against the auditors of the company in respect of dividends declared on the ground that they were the auditors who certified and reported the balance-sheets which were laid before the company purporting to show profits in excess of the sum paid as dividends.

The summons also claimed that the directors and auditors were liable to make good to the assets of the company certain sums said to have been advanced without proper security.

It was decided by Williams, J. (72 L. T. Rep. 227) that the directors and auditors were liable.

The directors and auditors appealed. At the opening of the appeals the preliminary question was raised (which had not been specifically dealt with by Williams, J.) whether the auditors could be proceeded against under sect. 10 of the Companies (Winding-up) Act 1890, it being contended that they were not officers of the company, and therefore did not come within that section, an officer being some person who had the control of and was accountable for the assets of the company.

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

Sect. 10 empowers the court to assess damages against any promoter, director, manager, liquidator, "or other officer of the company," who has "misapplied or retained, or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company," by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust.

The Court of Appeal decided (72 L. T. Rep. 611) that the auditors came within sect. 10 of the Companies (Winding-up) Act 1890; and that, although they might not be liable to be proceeded against under that section in respect of a misapplication or misappropriation of the funds of a company, yet they might be rendered liable to make compensation in respect of a misfeasance or breach of trust, and consequently brought within the mischief contemplated by the section.

On the appeals now coming on to be heard on the merits, those of the directors and of one of the auditors were withdrawn, leaving that of the other auditor (W. Theobald) alone to be dealt with.

The further facts of the case are fully stated in the judgments of the Lords Justices.

Cohen, Q.C. and *Cozens-Hardy*, Q.C. (with them *F. Whinney*) for the appellant.—This is the first case in which it has been attempted to apply sect. 10 of the Companies (Winding-up) Act 1890 to an auditor. [Lindley, L.J.—We have held that he is an "officer" within the meaning of that section, and may under certain circumstances be guilty of a misfeasance (72 L. T. Rep. 611).] Yes; but it has never yet been judicially determined what are the exact duties and powers of an auditor. According to sub-sect. 6 of sect. 7 of the Companies Act 1879 his duty is only to state whether the balance-sheet exhibits a true and correct view of the condition of the company's affairs, as shown by the books of the company. An auditor must accept the books of the company as he finds them, and his duty is only to report whether the balance-sheet is consistent with the books. He must see that all the securities and other property mentioned in the balance-sheet are in existence, and he must call for vouchers. But it is not his business to check the directors or to judge of their conduct of the company's affairs. Williams, J. appears to have considered that an auditor has to check the directors. The responsibility would be enormous. He cannot be expected to be a judge of all the transactions which have taken place during the course of the year. If the accounts are so badly kept that he cannot comprehend them, it is his duty to say so. If he neglects to do that, then we admit that he would be liable for a breach of duty. In the present case there are two questions to be decided: (1) Has the appellant been guilty of any misfeasance? (2) Was that misfeasance the cause of the declaration of the dividends? Sect. 10 has not created any new cause of action, but merely provides a summary mode of calling directors and others to account for acts of impropriety:

Re The Canadian Land Reclaiming and Colonising Company Limited; Coventry and Dixon's case, 42 L. T. Rep. 559; 14 Ch. Div. 660.

What has to be seen is, whether an action would lie to recover damages which are the direct result

of the tort. That question lies at the root of this case, and was never dealt with by Williams, J. at all. He assumed that there was a misfeasance. The appellant was so anxious to perform his duty as an auditor that he went beyond the legal limits of such duty. He at first made a special report in Feb. 1892, in which he said he thought no dividend ought to be declared on account of the nature of the securities held by the company. He was, however, advised that it was no part of his duty to make this recommendation, and he struck out the words relating to declaration of dividend. But he took care to warn the directors. It is very important that the court should not judge in 1895 of what took place in 1891 and 1892 by the light of subsequent events. Williams, J. ought to have dealt with the question whether the auditors could, by the exercise of reasonable care, have discovered the facts which the official receiver had since ascertained from the books of the different companies. Williams, J. seems to have thought that an auditor is a kind of permanent official, so that he ought to know all the financial transactions of the company for past years. That could never be regarded as the duty of an auditor. It would involve labour which no auditor would be prepared to undertake for the remuneration he receives. To the directors alone is it left to decide on what securities the moneys of a company shall be invested. Williams, J. has confused the duties of directors and auditors. He seems to have thought that it was the function of auditors to do what was entirely beyond their power. No auditor could take upon himself the responsibility of asserting that directors have or have not done wisely in investing on this or that security. The only case in which this particular point has been considered is

Leeds Estate, &c., Company v. *Shepherd*, 57 L. T. Rep. 684; 36 Ch. Div. 787.

But that case has nothing to do with this case. The function of the directors there was different; the nature of the company was different; and the whole circumstances were different. There is nothing in the judgment there which justifies the finding of the learned judge in the present case. There is another distinction which is absolutely vital. The dividends were declared by the directors in reliance on the balance-sheets audited by the auditors. Therefore the auditors' certificate was not only the *causa sine quâ non*, but the *causa causans*. Here the auditors' certificate was true. It may be that it was inadequate, but there was nothing false in it. It bears no relation to the certificate in the *Leeds* case (*ubi sup.*) which was not only inadequate but untrue. Here the directors did not act in reliance on the certificate of the auditors. All that the directors did was to recommend the declaration of dividends. The shareholders were left to declare them. There is no evidence to show that the shareholders were influenced by the certificate of the auditors, and that the certificate was the *causa causans* of the declaration of the dividends. There is no authority for the decision of Williams, J., and it cannot be justified on principle. We submit, therefore, that there was no legal cause of action against the auditors.

Finlay, Q.C. and *E. S. Ford* (with them *Muir Mackenzie*) for the respondent, the official receiver and liquidator.—The articles of association of this company emphasise the duties which are imposed on auditors by the Act of 1879. Theobald never took the view that his duties were such as the other side contend. He allowed himself to be influenced by the prestige which then attached to Balfour's name. The object of the statutory provisions is, that a check should be provided for the shareholders who are not capable of protecting themselves. And if an auditor allows himself to be so influenced by the prestige of one of the directors as not to perform his duties as auditor, disaster will be likely to result, for which he is responsible. The argument that the dividends which in this case were paid out of capital cannot be considered as the direct result of the auditors' certificate is founded on a complete fallacy. The duty of an auditor is to check the accounts and report to the members of the company, and, if he omits to fulfil that duty, the declaration of dividends out of capital is the direct result of his breach of duty. It is not the result of the act of the members, if merely they act on the recommendation of the directors. Would they have done that if the auditors had withheld their certificate? [LOPES, L.J.—Assuming that the directors are liable, can there be two sets of persons liable for the same wrong, and that not a joint wrong?] Certainly. If a wrong is done by two separate persons, and the act of them both contributed to that wrong, there can be redress against either. How can auditors say that, because the directors have recommended the shareholders to declare dividends, they, the auditors, are not liable since they gave the certificate? [LINDLEY, L.J.—Is there any authority for saying that you can get relief against both? Would not the true rule be that you can sue either, but not both, in the same action? RIGBY, L.J.—*Brinsmead* v. *Harrison* (24 L. T. Rep. 790; L. Rep. 7 C. P. 547) shows that a judgment in an action against one of several joint tort-feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied.] It is true that the case in the House of Lords of *Smurthwaite* v. *Hannay* (71 L. T. Rep. 157; (1894) A. C. 494) decided that, where the causes of action of several plaintiffs were separate and distinct, they could not be joined in one action. But *Mills* v. *Armstrong*; *The Bernina* (56 L. T. Rep. 258; 12 P. Div. 58; on app. 58 L. T. Rep. 423; 13 App. Cas. 1) does not bear out the view that, because the plaintiff obtains relief against one person, he cannot sue another in respect of the same tort. That case overruled *Thorogood* v. *Bryan* (8 C. B. 115). How can the fact that one person is sued be a bar to suing another afterwards? Election does not arise where there are two separate acts for which each person is liable, and the plaintiff might sue both together. [LINDLEY, L.J. referred to *Palmer* v. *Wick* (71 L. T. Rep. 163; (1894) A. C. 318) on the same point.] In this class of case it is a claim in respect of a breach of duty, a misfeasance conducing to the same result, and the cases of tort are really not applicable. The other side contend that the damage does not result from the misfeasance of the auditor. We submit that it does. If his duty is to check, and he does not check, the damage resulting is the direct consequence of his breach of duty.

Cohen, Q.C. replied.—If two persons are guilty of a tort resulting in one and the same damage,

and one of those persons indirectly contributed to that tort, the court has to ascertain which is directly responsible for the damage. A distinction has to be drawn between *causa causans* and *causa sine quâ non*. In the present case the loss which occurred was caused by the payment of dividends out of capital. The act complained of is the misapplication of the funds of the bank. Who caused that misapplication? The payment of money was proximately caused by the directors who signed the cheques. That again was caused by the shareholders declaring dividends. Then that again by the directors' recommendation to the shareholders. It was not the auditors' act of giving the certificate that caused the damage; that was only the *causa sine quâ non*. If the statute provided that dividends should not be declared without the certificate of the auditors, then it would be a different matter. Here the articles say that the shareholders cannot declare dividends without the recommendation of the directors. The auditors have not to express any opinion. The respondent says that there has been a breach of trust not only on the part of the directors but also of the auditors, and that they must be considered jointly liable. I say that there has been no breach of trust. Auditors are not trustees. They might be guilty of a breach of duty. Is there any principle of equity which establishes that, if one person is guilty of a breach of trust and another person is guilty of a breach of duty, those two persons can be made jointly and severally liable?

Cur. adv. vult.

Aug. 6.—The following written judgments were delivered:—

Lindley, L.J.—This is an appeal by Mr. Theobald, one of the auditors of the above bank, which is being wound-up, against an order made by Williams, J. under sect. 10 of the Companies (Winding-up) Act 1890. By this order Mr. Theobald and the directors of the bank are declared jointly and severally liable to pay to the official receiver, as liquidator of the company, two sums of 5946*l.* 12*s.* and 8486*l.* 11*s.*, being respectively the amounts of dividends declared and paid by the bank for the years 1890 and 1891. The grounds on which this order was made on Mr. Theobald are, that these dividends were paid out of capital, and that that payment was made pursuant to resolutions of the shareholders based upon recommendations of the directors of the bank and upon balance-sheets prepared and certified by Mr. Theobald, and which did not truly represent the financial position of the company. Mr. Theobald's appeal was supported by arguments to this effect:—(1) That Mr. Theobald was not an "officer" of the company within the meaning of sect. 10 of the Act of 1890; (2) that the balance-sheets and certificates given by Mr. Theobald were in accordance with the books of the bank, and that his duty as auditor was confined to framing balance-sheets which showed the position of the bank as disclosed by its books; (3) that the dividends in question were not really paid out of capital, and that, however improvident and reckless it may have been to pay them, Mr. Theobald as auditor is not legally responsible for that payment; (4) that, even if Mr. Theobald as auditor failed adequately to discharge his duty, and even if the dividends were paid out of capital, his failure to discharge his duty was the remote, and not the proximate, cause of the wrongful payment of the dividends, and that he consequently is not legally liable to make good the amount so paid; (5) that at any rate the order is wrong in declaring him jointly and severally liable with the directors to repay the dividends in question. The first of these contentions was argued and decided last April, and this court then held that an auditor of a banking company governed by the Companies Act 1879, and by such articles as regulated the present company, was an "officer" of the company within the meaning of sect. 10 of the Winding-up Act of 1890, and was liable to have proceedings taken against him under that section (72 L. T. Rep. 611). This point having been then decided was, of course, not again raised, and nothing further need be said about it. It remains, however, to consider what the duties of an auditor are as respects banking companies governed by the Companies Act 1879, and by such articles as regulated this particular company. It will be convenient to do this before examining the facts relied upon by the liquidator as rendering Mr. Theobald liable to make good the dividends which he has been ordered to pay. The duties of the auditors in this case were governed by sect. 7 of the Companies Act 1879. By sub-sect. 1 of that section—"Once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting." Sub-sect. 2 provides that a director or officer of the company should not be capable of being elected auditor. By sub-sect. 5, "Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and accounts, examine the directors or any other officer of the company." By sub-sect. 6, "The auditor or auditors shall make a report to the members on the accounts examined by him or them and on every balance-sheet laid before the company in general meeting during his or their tenure in office; and in every such report shall state whether, in his or their opinion, the balance-sheet referred to in the report is a full and fair balance-sheet properly drawn up so as to exhibit a true and correct view of the state of the company's affairs as shown by the books of the company." The articles of association of the bank contained the following provisions. Clause 106: "At every ordinary meeting the directors shall lay before the meeting a balance-sheet showing the financial state of the company for the previous financial year, duly audited, and every such balance-sheet shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount which they recommend to be paid out of the profits by way of dividend or bonus to the shareholders, after allowing for any interim dividend which the directors may have declared, and any sum which they may have set aside under art. 116 hereof." Clause 109 provided that (with certain specified exceptions) all auditors should be appointed at the ordinary meeting of the company in each year by the shareholders present thereat. By clause 107, "The accounts of the company shall be from time

to time examined, and the correctness of the statements shall be from time to time ascertained by two or more auditors, in accordance with these presents." By clause 114, "The auditors shall be supplied with copies of the statement of accounts intended to be laid before the meeting, and it shall be their duty to examine the same, with the accounts and vouchers relating thereto." These are the enactments and regulations which bear directly on the duties of the auditors, and although clauses 107 and 114 are in terms more explicit than sect. 7 of the statute as regards the duty of the auditors to examine and ascertain the correctness of the statements laid before them, and of the accounts laid before the shareholders, yet it is tolerably plain from the language of sect. 7, clause 5, that the articles add little, if anything, to the duty imposed on the auditors by the statute alone. In connection with these articles, and in order to save repetition, it should be stated that by the articles of this bank it is the duty of the directors, and not of the auditors, to recommend to the shareholders the amounts to be appropriated for dividends (clause 98), and it is the duty of the directors to have proper accounts kept, so as to show the true state and condition of the company (clause 103). Lastly, it is for the shareholders, but only on the recommendation of the directors, to declare a dividend (clause 115). It is impossible to read sect. 7 of the Companies Act 1879 without being struck with the importance of the enactment that the auditors are to be appointed by the shareholders, and are to report to them directly, and not to or through the directors. The object of this enactment is obvious. It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit. The articles of this particular company are even more explicit on this point than the statute itself, and remove any possible ambiguity to which the language of the statute taken alone may be open if very narrowly criticised. It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question — How is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to show the true position of a company, the auditor has to frame a balance-sheet showing that position according to the books, and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. This is quite in accordance with the decision of Stirling, J. in *Leeds Estate, &c., Company* v. *Shepherd* (57 L. T. Rep. 684; 36 Ch. Div. 787, at p. 802). An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor; he must be honest, *i.e.*, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient; and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. Mr. Theobald's evidence satisfies me that he took the same view as myself of his duty in investigating the company's books and preparing his balance-sheet. He did not content himself with making his balance-sheet from the books without troubling himself about the truth of what they showed. He checked the cash, examined vouchers for payments, saw that the bills and securities entered in the books were held by the bank, took reasonable care to ascertain their value, and in one case obtained a solicitor's opinion on the validity of an equitable charge. I see no trace whatever of any failure by him in the performance of this part of his duty. It is satisfactory to find that the legal standard of duty is not too high for business purposes, and is recognised as correct by business men. The balance-sheet and certificate of Feb. 1892 (*i.e.*, for the year 1891) was accompanied by a report to the directors of the bank. Taking the balance-sheet, the certificate, and report together, Mr. Theobald stated to the directors the true financial position of the bank, and, if this report had been laid before the shareholders, Mr. Theobald would have completely discharged his duty to them. Unfortunately, however, this report was not laid before the shareholders, and it becomes necessary to consider the legal consequences to Mr. Theobald of this circumstance. A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms. Still, there may be circumstances under which information given in the shape of a printed document circulated amongst a large body of shareholders would, by its conse-

quent publicity, be very injurious to their interests, and in such a case I am not prepared to say that an auditor would fail to discharge his duty if, instead of publishing his report in such a way as to ensure publicity, he made a confidential report to the shareholders, and invited their attention to it and told them where they could see it. The auditor is to make a report to the shareholders, but the mode of doing so and the form of the report are not prescribed. If, therefore, Mr. Theobald had laid before the shareholders the balance-sheet and profit and loss account, accompanied by a certificate in the form in which he first prepared it, he would perhaps have done enough under the peculiar circumstances of this case. I feel, however, the great danger of acting on such a principle, and in order not to be misunderstood I will add that an auditor who gives shareholders means of information instead of information respecting a company's financial position does so at his peril, and runs the very serious risk of being held judicially to have failed to discharge his duty. In this case I have no hesitation in saying that Mr. Theobald did fail to discharge his duty to the shareholders in certifying and laying before them the balance-sheet of Feb. 1892 without any reference to the report which he laid before the directors, and with no other warning than is conveyed by the words, "The value of the assets as shown on the balance-sheet is dependent upon realisation." The most important asset on that balance-sheet is put down as "Loans to customers and other securities," 346,975*l.*, and on these a full and detailed report was made to the directors showing the very unsatisfactory state of these loans and securities, and it is impossible to read the oral evidence, the report of Balfour and Brock, dated the 22nd Dec. 1891. and the report of the auditor to the directors of the 3rd Feb. 1892 without coming to the conclusion that the entry of that large sum as a good asset without explanation was unjustifiable. It is a mere truism to say that the value of loans and securities depends on their realisation. We were told that a statement to that effect is so unusual in an auditor's certificate that the mere presence of those words was enough to excite suspicion. But, as already stated, the duty of an auditor is to convey information, not to arouse inquiry, and, although an auditor might infer from an unusual statement that something was seriously wrong, it by no means follows that ordinary people would have their suspicions aroused by a similar statement if, as in this case, its language expresses no more than any ordinary person would infer without it. But Mr. Theobald relies on the fact that he was induced to omit from his certificate all reference to the report which he made to the directors because Mr. Balfour, the chairman, promised to mention such report in his speech to the shareholders, and he did so. But, although Mr. Balfour twice alluded to the report, he did so in such a way as to avoid attracting attention to it. The second time he mentioned it was after a dividend had been declared and when a motion to reappoint the auditors was before the meeting. The truth is, that not a word was said to convey to shareholders the substance of the information contained in the report or to induce them to ask any question about it. The balance-sheet and profit and loss account were true and correct in this sense—that they were in accordance with the books. But they were, nevertheless. entirely misleading and misrepresented the real position of the company. Under these circumstances I am compelled to hold that Mr. Theobald failed to discharge his duty to the shareholders with respect to the balance-sheet and certificate of Feb. 1892. Possibly he did not realise the extent of his duty to the shareholders as distinguished from the directors, and he unfortunately consented to leave the chairman to explain the true state of the company to the shareholders instead of doing so himself. The fact, however, remains, and cannot be got over, that the balance-sheet and certificate of Feb. 1892 did not show the true position of the company at the end of 1891, and that this was owing to the omission by the auditor to lay before the shareholders the material information which he had obtained in the course of his employment as auditor of the company. and to which he called the attention of the directors. But then it is contended that, even if this be so, there was after all no payment of dividend out of capital; and further that, even if there was, still that payment was not the natural or immediate result of Mr. Theobald's certificate and of the accounts which he prepared. Whether payment was made out of capital or not is a question of fact. The payment was professedly made out of profits made by the bank, by charging its customers with interest and commission on loans and discount. The books showed such profits, but the question is, where did the money come from with which the dividends were paid? The money came from cash at the bankers' or in hand, but this cash could not be properly treated as profit, and the directors and auditors knew this perfectly well. This part of the case has been most carefully investigated by the learned judge whose decision we are reviewing, and, after attending closely to the observations of counsel on the reasonings and conclusions contained in the judgment appealed from, I see no reason whatever for dissenting from them. On the contrary, I entirely agree with the learned judge in saying that the profits for the year 1891 never really existed, except on paper, and that, to use his words, "whatever may be the right line to draw as to when profit not received may be carried to profit for the purpose of the annual revenue account, it is plain that there was no justification for so doing in the present case." The real truth is, that the assets of the bank were put down in the balance-sheet at far too high a figure, and this entry, though not misleading if explained (as it was to the directors), was seriously misleading in the absence of explanation. Mr. Theobald says that he regarded the assets of the bank as only locked up, but his report and the schedule to it go far beyond this. The value of the principal asset depended on the probability of the Balfour group of companies and some of the other large borrowers repaying their loans. They were financing each other; their indebtedness to the bank had increased largely during the year; the securities held by the bank for these loans were, to say the least, to a great extent of very doubtful value; and yet the total amount due to the bank in respect of these loans is inserted in the balance-sheet as a good asset, without any deduction and without a word of explanation to the shareholders. We know now that those assets have realised a comparatively small sum.

and we were very properly warned against the danger of doing injustice by being wise after the event. But, disregarding the result of realisation, and attending only to what was known to the auditors in Feb. 1892, the entry in the balance-sheet of the sum of 346,975*l.* as a good asset was wholly unjustifiable, unless explained. We are now in a position to understand the true meaning of the passage contained in the auditors' report to the directors of the 3rd Feb. 1892, and which runs thus: "We cannot conclude without expressing our opinion unhesitatingly that no dividend should be paid this year." I find it impossible to treat this as a statement by the auditors that there are profits divisible amongst the shareholders, but that the auditors cannot recommend a dividend. I can only regard the passage as meaning that there are no funds out of which a dividend can properly be paid, and therefore no dividend ought to be paid this year. A dividend of 7 per cent. was, nevertheless, recommended by the directors, and was resolved upon by the shareholders at a meeting furnished with the balance-sheet and profit and loss account certified by the auditors, and at which meeting the auditors were present, but silent. Not a word was said to inform the shareholders of the true state of affairs. It is idle to say that these accounts are so remotely connected with the payment of the dividend as to render the auditors legally irresponsible for such payment. The balance-sheet and account certified by the auditors, and showing a profit available for dividend, were, in my judgment, not the remote, but the real operating cause of the resolution for the payment of the dividend which the directors improperly recommended. The auditors' accounts and certificate gave weight to such recommendation, and rendered it acceptable to the meeting. It was wholly unnecessary for the official receiver to call a shareholder to say that he was induced by the auditors' certificate to concur in the resolution to pay a dividend. As to this part of the case *res ipsa loquitur*. A point was made that the form of the order was wrong. But there is nothing in this. Mr. Theobald could obviously be sued alone in an action at law for breach of his statutory duty as auditor, and for damages resulting from such breach of duty, and the measure of damages would be the sum which he has been ordered to pay. Whether a similar action at law could be maintained against him and the directors jointly is more open to question. I am by no means satisfied that it could not, seeing that the wrongful payment of the dividend was caused by his improper certificate and accounts, and by the use made of them by the directors. But, be this as it may, there was a clear breach of trust by the directors, facilitated, and indeed only rendered possible, by the auditor who failed in discharging his own duty to the shareholders; and I have no doubt that in equity both he and they could be properly declared jointly and severally liable for the misapplication of the company's money which constituted that breach of trust: (see *Leeds Estate, &c., Company* v. *Shepherd*, 57 L. T. Rep. 684; 36 Ch. Div. 787.) With respect, therefore, to the sum of 8486*l.* 11*s.*, wrongfully paid as dividend in 1892, in respect of the alleged profits made in 1891, the appeal, in my opinion, fails. I agree with Williams, J. in holding that the dividend for 1890 was in fact improperly declared and paid. But the evidence that Mr. Theobald was guilty of any breach of duty in certifying the accounts in Feb. 1891 is far less cogent than that which presses so heavily against him with reference to the accounts of Feb. 1892. The truth is, that the conviction that the bank's affairs were every year getting worse and worse grew upon him year by year. This state of things was shown by the decrease of its investments and reserve capital and the increase of its loans to customers. But the loans to customers and other securities were, speaking roughly, 100,000*l.* less at the end of the year 1890 than at the end of 1891, and, seeing that the accounts prepared by the auditors did accurately represent the position of the company as shown by the books, and that it is not proved that Mr. Theobald really knew, or ought then to have known, that the position of the bank was not correctly shown by the books, I think Williams, J. has gone too far in holding Mr. Theobald liable for this sum. The reasons which induced the learned judge to decide that Mr. Theobald was not liable for the dividends paid in 1889 and 1890 appear to me to apply also to the dividend paid in 1891 in respect of the profits of 1890. No doubt the change made by the auditors in 1886 in the form of the certificate they had previously given is very significant, and, unexplained leads to the inference that the auditors did not believe that the books of the company and the balance-sheet prepared from them correctly showed the position of the bank. But Mr. Theobald's evidence does, in my opinion, show that in Feb. 1891 matters were not known or believed to be so bad as to lead him to the conclusion that there were then no profits out of which a dividend could properly be paid. It is true that the position of the bank was very unsatisfactory in 1890, and the auditors knew it to be so. This, however, appeared from the balance-sheet and accounts which they laid before the shareholders. It is known now that the assets were put down at too high a figure; but it is not proved that the auditors knew it, or ought to have known it. The Balfour group of companies, though dependent on each other, were by no means in so tottering a state as they were a year later. Wilkinson's debt was still treated by the directors as bearing interest and as a good or, at all events, not as a bad debt. Benham's debt was unsatisfactory, but the auditors can hardly be blamed for treating it as good, having regard to the solicitor's statement as to the security held for it. This part of the case is very near the line, but, having carefully considered it, I do not think that the evidence is sufficiently strong to establish a case of misfeasance on the part of Mr. Theobald in Feb. 1891. I am not satisfied that he was then guilty of more than an excusable error of judgment; although, now that all the facts are known, the error is seen to have been very serious in its consequences. As to the sum of 5946*l.* 12*s.*, therefore, the appeal must be allowed. As regards costs, Mr. Theobald's appeal has resulted in reducing the sum for which he has been held liable, but in other respects, and as regards his main contention, it has failed. Under these circumstances he ought not to receive or pay any costs of the appeal, and the only order as to costs will be that the official receiver be paid his costs out of the assets of the company.

LOPES, L.J. expressed his concurrence in the foregoing judgment.

RIGBY, L.J. discussed the evidence against the appellant, which had led him to the same conclusion as Lindley, L.J., whose judgment, his Lordship remarked, he had had the advantage of reading and considering, and then continued as follows:—The main issues seem to be—(1) whether the auditor has been guilty of any misfeasance in relation to the company; (2) whether the misfeasance had occasioned to the company loss for which compensation ought to be directed to be made, which will involve the question whether the dividends were in fact paid not out of profits, but out of capital, and whether such payment was the fault of the auditor; and (3) the amount of compensation which ought to be made. In order to determine the first question it will be necessary to consider in some detail the position and duty of the auditors—what they ought to have done and what they have done. [After reading from the Companies Act 1879, sect. 7, sub-sect. 6, which provides (*inter alia*) that the auditors shall report to the members on the accounts examined by them; and, after referring to articles 106, 107, and 114 of the company, recited by Lindley, L.J., his Lordship proceeded:] The articles of association cannot absolve the auditors from any obligation imposed upon them by the statute, and it may be that, in this case, they do not impose any greater obligations as to the balance-sheet, though they make it clear that similar obligations extend to the accounts placed before the company, including the profit and loss account, as well as the balance-sheet. Under the statute the members of the company are entitled to have the safeguard of an expression of opinion by the auditors to the effect that the balance-sheet is a full and fair balance-sheet, and that it is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs. The words "as shown by the books of the company" seem to me to be introduced to relieve the auditors from responsibility as to affairs of the company kept out of the books and concealed from them, but not to confine their duty to a mere statement of the correspondence of the balance-sheet with the entries in the books. A full and fair balance-sheet must be such a balance-sheet as to convey a truthful statement as to the company's position. It must not conceal any known cause of weakness in the financial position, or suggest anything which cannot be supported as fairly correct from a business point of view. The provision as to its being properly drawn up so as to exhibit a correct view of the state of the company's affairs is taken from, though it does not go quite so far as, art. 9 of table A and the schedule to the Act of 1862. Treated as an addition to the requisition for a full and fair balance-sheet it may not be easy to define the full extent of the obligation which it imposes, nor is it necessary to do so in this case; for it certainly requires a more detailed explanation of the affairs of the company than is contained in any of the balance-sheets of this bank. It will be important to see what information the auditors actually acquired as to the business of this company and the way in which they reported upon the successive balance-sheets. Mr. Theobald and Mr. Timms were auditors of the bank from its incorporation in 1882, and they made the audits for successive years, down to and including the audit for 1891. The reports of the auditors to the members always took the form of a certificate or memorandum written on the balance-sheet for the year. Their reports on the accounts for 1882 and 1883 contained a statement to the effect that, in their opinion, the balance-sheet exhibited a true and correct view of the position of the bank. In their report on the accounts for 1885 a somewhat less emphatic statement to the same effect appears; but in the subsequent reports no such statement is to be found. In a report to the directors, dated the 11th Feb. 1886, dealing with the accounts for 1885, Mr. Theobald, after noticing that the first-class investments, kept by bankers for quick realisation in case of need, stood at a considerably reduced sum, and that more than the whole capital of the company was invested in four accounts—namely, the Liberator Society, the Lands Allotment Company, the House and Lands Company, and the Building Estates Company—and that these investments would not be easily realised in critical times, proceeds to say: "You are doubtless aware that it is a rule with bankers to have at hand, in cash or easily realisable securities, an amount equal to at least one-third of the customers' current accounts. Considering the small amount of uncalled capital, I think that in this case the proportion is scarcely sufficient." There can be no doubt that, even at that time, Mr. Theobald was aware that the state of affairs of the bank was unsatisfactory, in the important points of lock-up of capital and consequent deficiency in realisable securities. The reports of the auditors to the members for the years 1886-1890, both inclusive, are simply to the effect that the cash and bills receivable were correct, that securities had been produced for the investments and loans (no information being given as to the amount of the securities), and that the balance-sheet agreed with the books of the company. The report on the accounts for 1891 states that the balance-sheet is a correct summary of the accounts recorded in the books, and contains, for the first time, the statement, "The value of the assets, as shown in the balance-sheet, is dependent on realisation." Great stress has been laid by counsel for the appellant on the statement last quoted. They argued that it was sufficient to put members upon inquiry, and that from the course taken at the trial they were debarred from giving the evidence of experts as to its importance and signification. But I may say at once that it was the duty of the auditors to convey in direct and express terms to the members any information which they thought proper to be communicated; that the words of the statement, though perfectly clear in their meaning, are also entirely unimportant, amounting to a mere truism; and that no evidence of experts would have been of the slightest use for the purpose of giving to the words a greater importance or signification than they possess in themselves, even if such evidence were admissible. To me it appears that all the reports from 1886 onwards were imperfect, and that the auditors, in giving reports in such a form, failed entirely to fulfil the statutory duties imposed upon them. Counsel for the appellant argued that such a failure would not amount to misfeasance but only to negligence, and that the appellant is not charged on the summons with negligence. I cannot admit the

cogency of that argument. The reports were made in order to fulfil the statutory obligation, and to be read to the meetings in accordance with the statutes. Mr. Theobald says, with reference to this: "My certificate means the same as the Act," and further, "I was not aware that it was considered necessary for me to give the certificate (for 1891) either in the words of the Act or not at all." Mr. Theobald's interpretation of his own certificate cannot be received, either in his favour or against him, and we should not unduly press against him apparent admissions made in the course of a very trying cross-examination; but his evidence does, I think, go so far as to show that the certificates were, in fact, given as reports under the Act; and, independently of the evidence, I think there can be no doubt that they were intended to be, and were, received and acted upon as reports under the Act. I consider the giving of the certificates, assuming them to be to the knowledge of the auditors, misleading certificates, to be a misfeasance within the meaning of sect. 10 of the Act of 1890, and not a mere act of negligence; and that this was the meaning of the charge contained in the summons. I can have no doubt, having regard to the terms of the certificates given and the explanations of Mr. Theobald himself, that there was a strong and growing feeling of dissatisfaction in his mind at the state of the bank's affairs, as shown by its books, and I find no sufficient communication of facts causing this dissatisfaction. The balance-sheets, when examined, do not, in my opinion, fulfil the statutory requirements of being full and fair balance-sheets, and are not properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company. [His Lordship then dealt with the evidence establishing this in relation to the years 1889, 1890, and 1891, which showed (*inter alia*) that the proportion of what might be called the outside business of the bank to that with the Balfour companies, and on the special accounts, might, roughly speaking, be put down as two-thirds at the end of 1889. one-third at the end of 1890, and one-fourth at the end of 1891; while the paid-up capital had increased in 1890 by about 76,944*l.*, and in 1891 by about 43,642*l.* After dealing with other points in the case, and with Mr. Theobald's suggested belief in the solvency of the Balfour companies, his Lordship proceeded:] Assuming all the Balfour companies and Benham and Wilkinson to have been able to pay the whole of the sum owing by them except the amounts debited in 1891 for interest and commissions, not only the profits available for dividend would be swept away, but of the reserve fund itself little or nothing would remain. Such an assumption would, however, in my opinion, be extravagantly favourable to the auditors, and it only required that one of the debts owing by Wilkinson or by almost any one of the Balfour companies should be proved to be bad to exhaust everything belonging to the bank that was not capital. It turned out that each one of the Balfour companies and Wilkinson and Benham, as well as other debtors of the bank, were insolvent; and it is established that the bank had no funds out of which dividends could, in any point of view, be properly paid. I wish to make it plain, as far as I can, that I am only relying upon matters which Mr. Theobald, as auditor, knew, or must reasonably be assumed to have known. The auditors must have known, and did know, that the balance-sheet for 1891 was not properly drawn up so as to show the state of the bank's affairs. That the dividend was, in fact, paid out of capital cannot, I think, admit of doubt. It has been argued that the payment of the dividend was not the proximate result of the auditors' report, as the recommendation of the directors and the vote of the meeting had to intervene. This appears to me, however, to misrepresent the state of things. The report of the auditors was a continuing representation, made, indeed, before, but in law and in good sense to be treated as repeated after, the recommendation of the dividend. It was perfectly well known to Mr. Theobald (at any rate, at the meeting where he was present and heard the reading of the report recommending a dividend, and the speech of Mr. Balfour) that this report of his was intended to be relied upon as justifying the recommendation, and as an invitation to the shareholders to vote the dividend. Not only was the report a *causa sine quâ non* of the vote, but it was, in my judgment, a *causa causans*. How far the judgment should go against the appellant is a question which has given me considerable difficulty. A great deal of the reasoning which has led me to hold that the auditors reporting on the accounts of 1891 as they did was a misfeasance in relation to the company applies only to the case of that last report. The learned judge in the court below has held Mr. Theobald liable, not only for the 1891, but also for the 1890, dividend. I am far from saying that he is clearly wrong, but I cannot satisfy myself that he is clearly right. In the case of the 1890 dividend it is not, upon the evidence, made out to my full satisfaction that the auditors knew the balance-sheet to be substantially misleading, and I think it safer to confine the order to the dividend in respect of 1891.

Order varied.

Solicitor for the appellant, *E. C. Rawlings.*

Solicitors for the respondent, *Phelps, Sidgwick,* and *Biddle.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 27 and Aug. 1.

(Before Stirling, J.)

Re Lamson Store Service Company Limited.

Re National Reversionary Investment Company Limited. (*a*)

Company—Reduction of capital—Diminution of liability in respect of unpaid capital—No debts—Settling list of creditors—Power of court to dispense with list—Companies Act 1867 (30 & 31 *Vict. c.* 131), *s.* 13.

Where a company has passed special resolutions for the reduction of its capital which involve a diminution of liability in respect of unpaid capital, the court has no jurisdiction, on a petition presented for its sanction to such resolutions, to dispense with the settling of the list of creditors required by sect. 13 *of the Companies Act* 1867.

(*a*) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

PETITIONS.

These were two petitions presented by the Lamson Store Service Company Limited, and the National Reversionary Investment Company Limited respectively, to obtain the confirmation by the court of special resolutions which had been duly passed and confirmed by the respective companies for the reduction of their capital.

The resolutions in the case of the first-mentioned company provided for the reduction of the capital of the company by the cancellation of 500 shares which had not been taken or agreed to be taken, and for the payment off as capital in excess of the wants of the company the capital paid up on 4000 of the shares which had been purchased by the company, and for the extinguishment of the liability in respect of uncalled capital upon certain of the 4000 shares which had not been fully paid up; and further, by the payment off of the capital paid up on 2000 other shares of the company by in effect returning the money to the shareholders and borrowing it from them on debentures.

The resolutions in the case of the second-mentioned company provided for the reduction of the capital of the company by the cancellation or extinguishment of 4025 shares, some fully and others only partly paid up, which had been from time to time purchased by the directors in pursuance of special resolutions passed by the company, and paid for out of the capital of the company in excess of its wants.

Both the companies were in a very prosperous condition, and in neither case was the reduction of capital necessitated by loss of capital.

In the case of the Lamson Store Company the capital of the company was far in excess of its requirements.

In each case the chief clerk had made an order directing that the petition should be in the paper for hearing on a certain day, that the notices required by the Companies Act 1867 should be inserted in certain papers, and that proceedings for settling the list pursuant to the General Order of the 21st March 1868 should be dispensed with.

An affidavit had been filed by the secretary of the Lamson Store Company, in which he deposed that the company was not indebted to anyone.

No similar affidavit, however, had been made in the case of the National Reversionary Company, but it was alleged that the debts of that company were, if any, of trifling amount.

The Companies Act 1867, sect. 13, provides:

> Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction and to be entered in the list of creditors who are so entitled to object.
>
> The court shall settle a list of such creditors, and for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of such creditors and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be so entered, or to be excluded from the right of objecting to the proposed reduction.

Buckley, Q.C. and *Whinney*, for the Lamson Store Service Company's petition, submitted that, inasmuch as the company had no debts, the court had jurisdiction to dispense with the settling of the list of creditors required by sect. 13 of the Companies Act 1867. They also referred to

> Companies Act 1867, s. 11;
> General Order of the 21st March 1868, rr. 6—14, 24.

Hastings, Q.C. and *Gregson* for the National Reversionary Investment Company's petition.

Cur. adv. vult.

STIRLING, J. stated the facts and continued:—The question is, whether the order made by the chief clerk was a proper one. The petitions do not fall within sect. 4 of the Companies Act 1877, which provides that, where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital, the creditors of the company shall not, unless the court otherwise direct, be entitled to object or required to consent to the reduction. The proceeding, therefore, must be conducted with regard to the provisions of the Companies Act of 1867, and the rules thereunder. [His Lordship read sect. 13 of the Act of 1867, and continued:] The language of the early part of the second portion of that section is imperative, "The court shall settle a list of such creditors"; and the chief clerk's order dispensing with that is, in my opinion, wrong in form, and ought not to have been made. The next portion of the section is also imperative: "And for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of such creditors, and the nature and amount of their debts or claims." To a certain extent, that has, in the first case, been complied with, as there was evidence before the court by which, without following the forms required by the rules, the creditors were to a certain extent ascertained. The last part of the section is not imperative, but directory only. Rules were made in 1868 which regulate the mode of conducting the proceedings in chambers. Those I take not to be imperative, but directory, and the court has a discretion whether to require certain things to be done or not. The question is, whether the orders made by the chief clerk, being wrong in form, are not wrong also in substance; and I do not think that these cases, having regard to the objects of the reduction which I am asked to sanction by the petitions, are cases in which the rule need not be complied with. The settling of the list of creditors seems to me to be a thing which is required by the Act, and the rule must be followed. The matter must go back to chambers, with directions to issue advertisements according to the rule, and, if necessary, that may be proceeded with in the vacation. Upon the merits I give no opinion, as the matter may not come before me for decision; but, as at present advised, I think that what is purported to be done comes within the scope of the Act.

Solicitors: for the Lamson Store Service Company, *Harwood* and *Stephenson*; for the National Reversionary Investment Company, *Iliffe*, *Henley*, and *Sweet*.

July 18 *and* 26.

(Before KEKEWICH, J.)

Re DUKE OF CLEVELAND'S ESTATE; HAY *v.* WOLMER. (*a*)

Apportionment between capital and income — Tenant for life and remainderman—Rate of interest.

Moneys belonging to the residuary estate of a testator, which had been paid away under an order of the court, were subsequently recovered on appeal but without interest.

Held, that the moneys recovered must be divided between the tenants for life of the residuary estate and the remaindermen on a fair basis, according to the principle in Turner *v.* Newport (2 *Ph.* 14), *but that in calculating the interest* 3 *per cent. must be substituted for* 4 *per cent. as being more agreeable to the facts of present experience.*

ADJOURNED SUMMONS.

Under an order of the court made by Kekewich, J. in *Re Duke of Cleveland's Estate; Viscount Wolmer* v. *Forester* 69 L. T. Rep. 807; (1894) 1 Ch. 164), certain sums of money belonging to the residuary estate of the Duke of Cleveland, who died in 1891, were paid to Captain Forester and Lord Barnard as tenants for life of the Somerset estates and the Raby Castle estates under the duke's will. The order having been varied by the Court of Appeal (69 L. T. Rep. 808; (1894) 1 Ch. 176), the sums of money were repaid but without interest, which it was conceded was irrecoverable. The amount repaid was in the case of the Somerset estates exactly ascertained, and, in the case of the Raby Castle estates, was settled by compromise. This was a summons taken out by the plaintiffs, the tenants for life of the residuary estate, to which the trustees and executors of the duke's will and the persons entitled in remainder to the residuary estate were made defendants to have it ascertained whether the plaintiffs were entitled to any and what apportionment as between capital and income in respect of the sums of money recovered.

Renshaw, Q.C. and *C. Ashworth* for the plaintiff. —The tenants for life are entitled to a fair proportion of the moneys recovered as interest:

Re Foster, 63 L. T. Rep. 443; 45 Ch. Div. 629;
Re Moore, 52 L. T. Rep. 510; 33 W. R. 447;
Ackroyd v. *Ackroyd*, 18 Eq. Cas. 313;
Re Earl of Chesterfield's Trust, 49 L. T. Rep. 261; 14 Ch. Div. 643.

E. Beaumont for the trustees and executors.

B. Eyre for the persons entitled in remainder.—The moneys consist of principal only. As such they were paid away by mistake, and as such they were recovered. The tenants for life are not therefore entitled to any part of the moneys as interest.

KEKEWICH, J.—The only reason why I took time to consider this case was that Mr. Eyre insisted, with some truth, as well as force, that the money now to be disposed of consisted of principal only, and not at all of interest, and that, therefore, no part thereof ought to be paid to the tenants for life. That the money recovered in respect of the Somerset estate consists of principal only is absolutely true, the amount due having been exactly ascertained, and it having been conceded that interest was irrecoverable; and it is true also, I think, of the money recovered in respect of the Raby Castle estates, notwithstanding that it was arrived at not by arithmetical calculation, but by compromises. Nevertheless, I think that the tenants for life are entitled to a fair proportion. There is no occasion now to consider how it came to pass that these sums were recoverable, and were recovered on behalf of the residuary estate. Suffice it to say that they were sums originally belonging to the residuary estate, and, as a matter of fact, not recovered until some time after that residuary estate became divisible, that is, after the expiration of twelve months from the testator's death. On general and broad principles sums so recovered must be divided between the tenant for life and the remainderman on a fair basis. Those principles are expounded by Lord Cottenham in *Turner* v. *Newport* (2 Phil. 14), and are the foundation of the cases cited in argument, to which I need not further refer. Except that I shall substitute 3 for 4 per cent. as being more agreeable to the facts of present experience, I shall follow *Turner* v. *Newport*, and the amount receivable by the tenants for life will be calculated accordingly.

Solicitors: *Williams* and *James*; *Jennings* and *Finch*; *Horn* and *Francis*.

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

QUEEN'S BENCH DIVISION.

Tuesday, Aug. 6.

(Before GRANTHAM and LAWRANCE, JJ.)

CARTER WOOD *v.* LONDON COUNTY COUNCIL. (*a*)

Street — Meaning of — Carriage traffic — London Building Act 1894 (57 *&* 58 *Vict. c.* 213), *s.* 7.

The quadrangle of a block of mansions, having only one entrance from the public highway and that closed in by gates, and intended exclusively for the use of the residents in the mansions, is not a street within sect. 7 *of the London Building Act* 1894 (57 *&* 58 *Vict. c.* 213).

CASE stated by De Rutzen, Esq., a metropolitan magistrate sitting at Westminster Police-court, under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33.

The case stated that the appellant in the present instance was the owner of certain land having a frontage to Victoria-street, Westminster. This land had formerly been occupied by a large brewery which had recently been pulled down, and the appellant had commenced to erect on the site a large block of buildings which was to contain some forty-two residential flats. He intended to reserve in the centre of the block a considerable open space which was to be laid out as a garden with a foot and carriage way around it giving access to the various flats in the building. There was only one entrance from the public thoroughfare to this open space, and it was under an archway which was closed at the end next the thoroughfare by lofty gates. The open space was "for the use of the tenants of the flats in the proposed new buildings and the tradesmen and others visiting them on business or pleasure with or without carriages, and the public at large were to be entirely excluded therefrom."

The appellant began operations without apply-

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

ing for or obtaining the sanction of the London County Council, and at their instance he was summoned for that "he did unlawfully commence to form and lay out a certain street for carriage traffic without having first made an application in writing to the respondents for and obtained their sanction to the formation and laying out of such street for carriage traffic, contrary to the provision of sect. 7 of the London Building Act 1894."

This summons was heard on the 8th and 15th May 1895, when the magistrate convicted the appellant, but granted a case for the opinion of the court. He "found as a fact that the roadway round the quadrangle was a street," and he "held further that it was laid out for carriage traffic within the Act."

By sect. 7 of the London Building Act 1894 (57 & 58 Vict. c. 213) it is enacted that:

> Before any person commences to form or lay out any street, whether intended to be used for carriage traffic or for foot traffic only, such person shall make an application in writing to the council for their sanction to the formation or laying out of such street either for carriage traffic or for foot traffic (as the case may be): Every such application shall be accompained by plans and sections with such particulars in relation thereto as may be required by printed regulations issued by the council, and the council shall forthwith communicate every such application to the local authority. And no person shall commence to form or lay out any street for carriage traffic or for foot traffic without having obtained the sanction of the council.

By sect. 5 (1) a street within the Act is thus defined:

> The expression "street" means and includes any highway and any road, bridge, lane, mews, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, mews, footway, square, court, alley, or passage.

And by sect. 200 (1) any one who commences to lay out a street within sect. 7 without obtaining the sanction of the council is liable on summary conviction to a penalty not exceeding ten pounds for every such offence and to a daily penalty not exceeding forty shillings.

Lawson Walton, Q.C. and *E. Morten* for the appellant.—The question is, whether a courtyard or quadrangle to be used exclusively by the residents in surrounding buildings is a street laid out for foot or carriage traffic within the London Building Act. The point is practically concluded by recent decisions:

Davis v. *London County Council*, 43 W. R. 574.

The magistrate seems to have held it to be a street because the house was a composite house, that is, divided into separate tenements. It has, however, been decided under old Acts that this does not make a private way a street. The definition of street is the same there as in the new Act:

Metropolitan Board of Works v. *Nathan*, 54 L. T. Rep. 423.

Very recently it has been held that a sewage pipe under a courtyard common to two houses is not a sewer but a drain, on the ground that both houses were within the same curtilage:

Pilbrow v. *Vestry of the Parish of St. Leonard, Shoreditch*, 72 L. T. Rep. 135; (1895) 1 Q. B. 433.

Cripps, Q.C. and *Avory* for the respondents.—Two questions arise in this case. First, whether this space as laid out is or is not a street; secondly, whether, if a street, it is or is not laid out for carriage traffic. Both are questions of fact and both were decided against the appellants by the magistrate. The first was decided by the magistrate expressly as a fact. As to the second, it is not necessary, in order to bring the street within the Act, that the carriage traffic should be public carriage traffic:

Daw and Son v. *The London County Council*, 62 L. T. Rep. 937.

Both questions, however, are questions of fact, and as such for the magistrate to decide:

Reg. v. *Shiel*, 50 L. T. Rep. 590.

All that the cases cited by the other side show is that the court will not set aside magistrates' decisions. They were all appeals against magistrates' decisions, and in every case the court refused to quash such decisions.

GRANTHAM, J.—In this case we are asked by the learned magistrate to say whether or not his decision was right in holding that this was a street, and that the appellant had, under the circumstances, commenced to form and lay out a street for carriage traffic within the meaning of sect. 7 of the London Building Act 1894. In answer to that question of the learned magistrate, my learned brother and I think without any hesitation that he was wrong. The learned gentleman who has last addressed us argued very strongly that we ought not to interfere in this case because the learned magistrate had found as a fact that it was a street, and that the appellants were commencing to lay it out; and he was bold enough to say that, although other magistrates had all of them come to a contrary view yet this decision was not to be impugned. It was not a question of law in any way, but a question of fact, and as such must be left to the *ipse dixit* of each magistrate hearing the case. The result of accepting this contention would be that you would have as many different decisions as there were magistrates sitting in London. We do not at all agree with the view taken by the learned counsel. We will not say that each particular magistrate can decide this in accordance with his own fancy. We think he must decide it according to what are the legal definitions of the words used, or at any rate he is not to find as a fact that which the law would not allow to be the fact in the particular case. He has found as a fact that because the owner of the land proposes to deal with it in a certain way, this brings him within sect. 7. That is a matter of law. We hold that it does not bring him within that section. That section is only intended to apply to a different set of circumstances from those with which we have here to deal. In this particular case the owner of the property had used it for a great number of years for a particular purpose. It is a large space of ground, and there were then roads or rather ways in it which were used by him for his horses and carts and drays. These were used as streets far more then than they will be probably now, because it was a very large brewery where an immense number of horses, vans, and waggons were employed. The owner proposes to pull down the stables and waggon sheds and brewhouse, and build mansions on the site. He proposes to improve the centre of the new place by making a garden or lawn, leaving round this lawn sufficient space for the cabs or the carriages of the people who will live in the mansions, or who come to call

upon those living there. The whole thing from beginning to end is as private as it can possibly be. It is true that it is proposed to let the mansions out in flats, but the owner reserves to himself the absolute right over the whole of this piece of land, and people simply have the rights which he chooses to give them. Now this being so, can this quadrangle or courtyard be called a street, or be said to be laid out for carriage traffic within sect. 7 of the London Building Act 1894? That section applies equally to streets intended for carriage and foot traffic. Accordingly, if the argument of the learned counsel for the county council is correct, the footway up to a house seems to me to come within the definition of a street, because a portion of the ground which the owner has for building his house on is used for foot traffic—that is for people going to and from the house. I do not see where you are to draw the line. If the owner is not to be allowed to keep private a courtyard as has been done in this case, I cannot see how the owner can deal with any portion of his land which is devoted to the passing to and fro of people going to the house, or can reserve to himself the right of making that carriage-way or that footway which he thinks most suitable for communication. In this particular case the claim is made under a provision which would compel the owner to devote forty feet of his land to this road where used for carriage traffic, and twenty where used for foot traffic—under the circumstances, an absolute waste of space. Although I agree that we cannot say the *The London County Council* v. *Davis* is a direct authority here since that case was the converse of this, the magistrate finding that the ground there was not a street, and the courts refusing to upset his decision, yet we are entitled to say this: In that case as in nearly every other case of a similar kind, the judges have used in argument such an example as this as an instance to show what would not be a street within the Act. Therefore we are entitled to call in aid the arguments used, and the statements of the judges of what their views would be in a case like this. I quite agree with the contention of the learned counsel who appears for the London County Council, that the word "street" has never been absolutely defined. There are, however, many cases deciding what is not a street. In this case we are not asked to lay down a definition of what a street is—some day perhaps some one may be able to do that—but we are asked whether or not this particular roadway is a street within the meaning of this particular section upon which the learned counsel relied, and we have both come to the conclusion that it is not. Therefore we allow the appeal with costs, and the conviction is quashed.

Lawrance, J.—I am of the same opinion.

Appeal allowed.

Solicitors for the appellant, *Godden, Son,* and *Holme.*

Solicitor for the respondent, *W. A. Blaxland.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Monday, July 22.

(Before the President (Sir F. H. Jeune.)

In the Goods of Ann Dodsworth (deceased). (*a*)

Will—Married woman — Executor — Husband — Lapsed specific bequest—No residuary clause—Administration to husband refused.

Where a married woman dies leaving a duly executed will and appointing an executor, if the executor survive the testatrix, although no property pass under the will, the executor must take probate, and an application by the husband for administration must be refused.

Motion on behalf of Joseph Dodsworth, the husband of the deceased, Ann Dodsworth, for a grant of letters of administration notwithstanding the fact that the deceased left a will and appointed an executor who survived her.

Ann Dodsworth made the following will:

This is the last will and testament of me, Ann Dodsworth, wife of Joseph Dodsworth, of 13, York-place, Scarborough, in the county of York. Whereas there are due to me from the estate of my late brother, Thomas Bainbridge, the two several sums of 19*l.* 17*s.* 11*d.* and 300*l.* on the security of promissory notes dated respectively the 18th day of March 1868 and the 3rd day of June 1878. Now I give and bequeath the two said sums, together with all interest that may be due thereon, to my brother Wm. Bainbridge, of Croft Ends, near Appleby, farmer, whom I appoint sole executor of this my will. In witness whereof I the said Ann Dodsworth have to this my last will and testament set my hand this 10th day of May 1890.

Signed and acknowledged by the said Ann Dodsworth as her last will and testament in the presence of us, who in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.—J. P. Shepherd, solicitor, Appleby. John Dobson, his clerk.—Ann Dodsworth.

On the back of the will appeared the following

I, the within-named Joseph Dodsworth, have read over the within-written will of my said wife, Ann Dodsworth, and hereby give my assent to her execution of the same, and approval of the contents thereof.—Witnesses to the signature of the said Joseph Dodsworth: George Rownton, Scarborough; S. North, Scarborough.—Joseph Dodsworth (X) his mark.

It appeared, from affidavits filed, that the sums mentioned in the will had been repaid two years before the testatrix died.

The executor was served with notice of the motion, but did not appear.

Bargrave Deane moved for administration to the husband, notwithstanding the will.—There is an absolute intestacy. Nothing passes to the executors under the will, as there is no residuary gift. He referred to

Rider v. *Wager*, 2 P. Wms. 331, cited in Williams on Executors, 9th edit., part 2, 1184.

The husband says he never gave his sanction to this will.

The President (Sir F. H. Jeune).—The rule seems to me to be a very wise one, namely, that in the case of a married woman's will, where there is an executor, the executor takes the probate. I

(*a*) Reported by H. Durley-Grazebrook, Esq., Barrister-at-Law.

do not like to break into that rule. The executor must take probate, for what it is worth.

Solicitors: *Iliffe, Henley*, and *Sweet*, agents for *Tasker Hart*, Scarborough.

Monday, July 1.

(Before the PRESIDENT (Sir F. H. Jeune.)

In the Goods of ANN HOCKIN (deceased).

Administration with will annexed—Sole executrix and residuary legatee a lunatic not so found by inquisition—Citation of other next of kin—Probate Act 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Limited grant to nominee of guardians.*

The sole executrix and residuary legatee of a testatrix, who was also one of her next of kin, did not prove the will, and, some time after the death of the testatrix, became and remained chargeable to the rates as a pauper lunatic not so found by inquisition.

The Court required that the other next of kin should be cited, and, upon this being done, and no appearance being entered on their behalf, made, under sect. 73, *a grant of letters of administration with the will annexed in favour of the nominee of the guardians of the union, for the use and benefit of the lunatic executrix, limited to the duration of her lunacy.*

In the Goods of Shoosmith (70 *L. T. Rep.* 809; (1894) *Prob.* 23) *distinguished*

ANN HOCKIN, late of Hartland, in the county of Devon, died on the 28th Aug. 1891, a spinster, and without parent her surviving, leaving a duly executed will bearing date the 19th March 1863, whereby she appointed her sister, Elizabeth Hockin, as her sole executrix and residuary legatee.

The said Elizabeth Hockin did not prove the will, and, on the 12th Jan. 1895, was duly received into the County Lunatic Asylum at Exminster as a person of unsound mind not so found by inquisition, and had there since remained chargeable to the common fund of the Bideford Union as a pauper lunatic. It was stated, upon affidavit, that she was quite unfit to manage her own affairs, and unlikely to get better.

By her will, Ann Hockin, the testatrix, bequeathed to her brother, Edward Hockin, the sum of 10*l.*, "provided that he shall come to England and personally claim the same from my executrix within five years after my decease; and I expressly declare that unless he shall so come to England and personally claim the said legacy within such time, the same shall not become payable."

The testatrix made a similar conditional bequest of 10*l.*, with a similar proviso, in favour of her other brother, John Hockin.

Subject to these two conditional legacies and to the payment of debts and funeral and testamentary expenses, the testatrix gave all her property, both real and personal, to her sister and sole executrix, Elizabeth Hockin.

The estate of the deceased at the date of the present motion consisted of the following items:—

	£	s.	d.
Certificate for 81*l.* 12*s.* 9*d.* Two and Three-Quarter per Cent. Consols at 106	86	10	5
Seventeen dividends of 11*s.* 2*d.* each	9	9	10
Post-office annuity to date of death	11	5	0
100*l.* mortgage on cottages	100	0	0
Interest thereon from 13th June 1891 to 3rd July 1895, at 3 per cent.	12	3	6
Piece of garden ground at Hartland	30	0	0
Rent of garden from Lady-day 1891 to Lady-day 1895, at 13*s.*	2	12	0
One quarter's rent to Midsummer 1895 ...	0	3	3
	£252	4	0

There appeared to be no debts, and, from two receipts found among the papers of the executrix, the latter seemed to have paid 1*l.* 10*s.* for the testatrix's grave, and 3*l.* 15*s.* in connection with her funeral.

From an affidavit filed by a person who had known the Hockin family all his life, and had lived close to them in Hartland, it appeared that the father of the testatrix had four children only, namely, Ann Hockin, the testatrix Elizabeth Hockin, Edward Hockin, and John Hockin; that some fifty years ago there was a family quarrel, when the two daughters went into service and the two sons went to sea; that Edward Hockin had been at Hartland on only two occasions since he went to sea, the latter of these occasions being about eight years ago, when, in the course of conversation with the deponent, he said that the property would come to him some day, that he was disgusted with the state the property was in and with the state in which his sisters were living, and that he should never set foot in Hartland again. Edward Hockin also stated to the deponent that his brother John was trading at Port Hope, in America, that he was in delicate health and never expected to come to England again, and that neither of them were married. John Hockin would be about sixty-four and Edward Hockin over seventy years of age, if now alive. After the conversation deposed to, Edward Hockin left Hartland with the intention of rejoining his ship at Liverpool, and the deponent had not heard of him since.

The father of the Hockins committed suicide on the 1st March 1863, after his wife's death and while of unsound mind.

An advertisement was inserted in the *Bideford Weekly Gazette* of the 7th May 1895, headed, "In Lunacy; *Re* Elizabeth Hockin," calling upon the brothers and next of kin to come in and claim their legacies, but no answer was received to that advertisement.

On the 18th June 1895 the guardians of the poor for the Bideford Union duly nominated and appointed their clerk, Charles William Hole, solicitor, of Bideford, in the county of Devon, to apply for letters of administration with the will of Ann Hockin annexed, for the use and benefit of Elizabeth Hockin during her lunacy.

Notice of motion was formally served on Elizabeth Hockin, on the 20th June 1895.

Durley-Grazebrook, on behalf of the guardians, now moved the court to decree letters of administration with the will annexed, to their nominee, for the use and benefit of Elizabeth Hockin during her lunacy. The two brothers of the lunatic, who are the only other next of kin of the testatrix, have been advertised for in a local paper.

(*a*) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law.

Their interest is extremely small. *In the Goods of Shoosmith* (70 L. T. Rep. 809; (1894) Prob. 23) is an authority for passing them over without citation. That was a stronger case than this: the property was larger, and the person passed over was the husband of the testatrix. If, however, the court thinks that the next of kin must be cited in the present instance, leave should be given to cite them by advertisement.

The President.—I think you must cite the next of kin. The circumstances in the case referred to were very special. I prefer to follow the practice laid down in the case of *The Guardians of the Poor of the Hamlet of Mile-End Old Town* v. *Findlay and others; In the Goods of Jane Findlay (deceased)* (3 Sw. & Tr. 265), in which the next of kin were cited. I give you leave to cite the next of kin, in the present case, by advertisement to be settled in the registry in the usual way. You need not come to the court again; but, upon the next of kin being duly cited to the satisfaction of the registrar, and if there should be no appearance on behalf of either of the next of kin, the grant of administration with the will annexed may go, under sect. 73, to the applicant, as the nominee of the guardians, for the use and benefit of the lunatic so long as she shall remain of unsound mind.

Solicitors: *Peard* and *Son*, agents for *Hole* and *Peard*, Bideford.

Monday, Aug. 5.

(Before the President (Sir F. H. Jeune.)

In the Goods of Horace Douglas Scott (deceased). (*a*)

Administration — Intestacy — French domicile—Widow and infant children—Application by widow—French sureties allowed—Practice.

The practice with regard to applications by proposed administrators to dispense with sureties resident within the jurisdiction of this court, and for leave to give foreign sureties to administration bonds, is now regulated by the formal directions issued under date May 10, 1893; *and, accordingly, such applications are to be made by summons in chambers, and not by motion.*

The deceased, whose domicile of origin was English, acquired a French domicile of choice, and died intestate, domiciled in France, leaving a widow and three infant children him surviving. The only property in this country consisted of a sum in the hands of trustees subject to a mortgage. There were no other debts.

The widow applied for administration, but was unable to find sureties in this country, although a guarantee society had been applied to.

The Court accepted two French subjects as sureties to the administration bond.

This was a motion by Mrs. Virginie Josephine Cardon Scott, widow of Horace Douglas Scott, deceased, for leave to give as sureties to an administration bond French subjects instead of English bondsmen.

Horace Douglas Scott, late of Courbevoie, near Paris, in the Republic of France, died at that place on the 31st July 1889, intestate, domiciled in France, leaving Virginie Josephine Cardon Scott his lawful widow and relict, and three children, all minors, him surviving.

The said deceased was of English origin, but settled in France when quite young, making that country his home, and acquired and thereafter retained a French domicile.

The intestate's estate in England consisted of a sum of 2023*l.* 19*s.* 5*d.*, being his share under the marriage settlement of his parents, subject to a mortgage upon the said share amounting, with principal and interest, to about 1035*l.* Beyond this mortgage, there were no debts here. The trustees of the said settlement would only hand over the balance of 988*l.* 19*s.* 5*d.*, being the net amount of the intestate's property in this country, to a person duly constituted in England as the legal personal representative of the intestate. Under these circumstances, the widow applied for administration, but, finding it impossible to procure English bondsmen, by reason of being unacquainted with any person in this country, she now asked for liberty to give the names of two French subjects as sureties to the administration bond.

It was stated by counsel that a guarantee society had been applied to, but had declined the suretyship.

Searle, on behalf of the applicant, supported the motion.

The President (Sir F. H. Jeune).—I made a direction some time ago about foreign sureties, with the express object that these applications should be made in chambers instead of in court. This application ought, therefore, to have been made by summons in chambers; but, as you are here, I will make the order you ask. It must, however, be understood, now that attention has been drawn to the printed directions, that similar applications must not, in future, be brought into court upon motion, but are to be made upon summons in chambers.

Solicitor, *Edward Hilder.*

Note.—The directions are as follows:

"10th May 1893.

"*Sureties to Administration Bonds.*—The President has given the following directions to be observed with regard to bonds, in lieu of those of the 15th Nov. 1892:

"1st. The administrator of a foreign subject resident abroad may, (*a*) if it shall be proved by affidavit that the deceased left no debts in England, or (*b*) by leave of a judge at chambers, be allowed to give bond with foreign sureties.

"2nd. In all other cases, sureties residing in the United Kingdom, the Channel Islands, or the Isle of Man, shall be required except by leave of a judge at chambers. D. H. Owen, Senior Registrar."

Monday, Aug. 12.

(Before the President (Sir F. H. Jeune.)

Newcomb v. Newcomb. (*a*)

Wills—British subject domiciled in Kentucky—Property in England—Decree of foreign court—Administration, with last will annexed, revoked—Probate of earlier will.

A British subject, domiciled in Kentucky, died leaving several wills, the last of which was proved in one of the inferior courts of that State,

(*a*) Reported by H. Dudley-Grazebrook, Esq., Barrister-at-Law.

(*a*) Reported by H. Dudley-Grazebrook, Esq., Barrister-at-Law.

and thereupon administration, with the will annexed, was granted to the attorney in England of the widow, who was the sole executrix. Subsequently, the superior courts of Kentucky upset the will, and the widow commenced a suit for revocation of the said letters of administration, and for probate of an earlier will. Upon affirmative proof of the testamentary capacity of the deceased:

The Court revoked the letters of administration, and granted probate of the earlier will, now propounded by the plaintiff.

PROBATE SUIT.

The plaintiff, Mary Newcomb, as executrix of the will, dated the 1st March 1890, of Eleazer Burbank Newcomb, who died on the 18th July 1890, claimed to have the said will established. In the alternative, she claimed to have the will of the 16th July 1888, of the said Eleazer Burbank Newcomb, deceased, established, of which last-mentioned will she was also executrix.

The defendant, Wm. Singleton Newcomb, was one of the sons and one of the next of kin of the deceased, and he was personally served with notice of the writ in this suit at Henderson, in the State of Kentucky, in the United States of America, on the 20th May 1895.

The statement of claim set forth that the plaintiff was appointed sole executrix under the two wills above mentioned; that the deceased died on the 18th July 1890; that he was a British subject; that at the time when he made the said wills and at the time of his death he was domiciled in the State of Kentucky in the United States of America; and that the said wills were duly executed and valid wills according to the law of the place where the same were made, namely, the said State of Kentucky.

The statement of claim went on to allege that a will or paper writing purporting to be a will of the said deceased, and to bear date on the 4th March 1890, was declared by a court of competent jurisdiction in Kentucky to be invalid, and not the will of the deceased, and the probate thereof, which had been granted to the plaintiff in Kentucky on the 28th Aug. 1890, was revoked by the said court. Further, that before the revocation of the said probate and before the said will was pronounced against as aforesaid, a grant of administration with the said will annexed had been issued by the principal registry of this honourable court to Algernon Edward Gilliatt, as attorney of the plaintiff. And in addition to claiming a decree of probate of the will of the 1st March 1890, or, in the alternative, of the will of the 16th July 1888, the plaintiff asked the court to revoke the said grant of administration with the will of the 4th March 1890 annexed.

No defence was put in.

The testator, Eleazer Burbank Newcomb, was born at Belgrade, Maine, in the United States of America, in the year 1822, his parents being American citizens. He established himself at Henderson, in Kentucky, where he carried on the business of a tobacco merchant until 1862, save for an interval of five years during which time he was engaged in business at another place in the same State of Kentucky. During the American Civil War he removed to a town in Canada, where he became formally naturalised as a British subject. In 1864 he married the plaintiff at Toronto, in Canada. After the war was over, he returned, in Nov. 1868, to Henderson, in Kentucky, resumed his business there, and even went so far as to make a preliminary application to enable him to become, once more, a citizen of the United States. The other steps necessary to effect this were not however taken, and he remained a British subject, though he undoubtedly acquired afresh a domicile in Kentucky. He died in Paris on the 18th July 1890, and on the 25th Aug. 1890 the plaintiff, his widow and executrix and residuary legatee, proved his will dated the 4th March 1890, in the County Court at Henderson, in Kentucky. On the 14th Jan. 1891 letters of administration, with the will of the 4th March 1890 annexed, were granted by the Probate Division of Her Majesty's High Court to the attorney of the widow, limited till such time as she should herself apply for and obtain probate of the said will in this country. The estate in Kentucky amounted to about 6000 dollars, and in this country to about 15,000*l.*, represented by consignments of tobacco in the hands of Messrs. J. K. Gilliatt and Co., of Crosby-square, London.

The testator left surviving him the defendant, who was a son by a former marriage, and a son and daughter by his marriage with the plaintiff.

In 1891 proceedings were commenced by the defendant against the plaintiff and her two children in the Circuit Court of Henderson, in Kentucky, those proceedings being in the nature of an appeal from the Henderson County Court, and the jury found the will of the 4th March 1890 not to be the will of the testator. The Court of Appeals subsequently affirmed the verdict and judgment of the Henderson Circuit Court.

The wills were entirely in the handwriting of the testator, and were signed by him.

The above facts were proved by the plaintiff. Mr. Howard Gilliatt deposed to an interview which he had with the testator in Paris, on the 18th April 1890, after the date of the last will, when the testator was of sound mind, though feeble in body; and Mr. Robert Newton Crane, a member of the American and English Bars, gave evidence to the effect that the will of the 1st March 1890, being entirely in the testator's handwriting, and signed by him as his will, was a valid testamentary document, according to the laws of the State of Kentucky, though not witnessed, the testator being, at the time he made the will (or at the time of his death), domiciled in Kentucky.

Searle for the plaintiff.

The COURT revoked the grant of letters of administration with the will of the 4th March 1890 annexed, and decreed to the plaintiff probate of the will of the 1st March 1890 in solemn form.

Solicitors for the plaintiff, *Murray, Hutchins, Stirling*, and *Murray*.

ADMIRALTY BUSINESS.

July 2 *and Aug.* 8.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J.)

THE WHITTON. (*a*)

Salvage — Gas float moored in a river — Ship or boat — Definition of ship — Navigation — Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 2, 458, 460.

A gas float moored as a beacon to direct the course of navigation in a tidal river is in the same position as regards salvage services as a ship at anchor within the meaning of sects. 2, 458, *and* 460 *of the Merchant Shipping Act* 1854,

APPEAL by the defendants from a decision of the learned judge of the Kingston-upon-Hull County Court.

The plaintiffs were Jesse Wells and Edward Hall, waterside men, and the defendants were the Corporation of the Trinity House of Kingston-upon-Hull.

The facts and arguments appear in the judgment.

July 2.—Sir *Walter Phillimore* and *Sutton* for the appellants.

Butler Aspinall for the respondents.

Aug. 8.—The PRESIDENT.—This is an appeal from a judgment of the learned judge of the Kingston-upon-Hull County Court. The question at issue is whether the plaintiffs can claim in respect of salvage services alleged to have been rendered to what is termed in the pleadings the defendants' "Gas Float *Whitton No.* 2." There can be no doubt that, if the *Whitton No.* 2 is in law a subject of salvage in a river, salvage services were rendered in respect of it. It was stationed near Brough, in the Upper Humber, for the purpose of a beacon, and on the 21st or the 22nd Dec. 1894, by reason of a violent gale it got adrift and was driven on the 22nd towards the Lincolnshire coast, first touching Reed's Sand, and eventually taking the ground on the Lincolnshire coast near a point with a rocky bottom, to which it was said the tide would have carried it. The plaintiffs, who are waterside men, fastened ropes to it, gave it a lead away from the rocks, and so held it till the Trinity yacht came, on the 22nd. After several efforts, in which the defendants aided, the Trinity yacht succeeded in getting it off on the 29th. The first question to be decided turns on the nature and character of the *Whitton No.* 2. The *Whitton No.* 2 is used as a lighted buoy. It is a valuable structure costing about 600*l.* From a sketch produced of it I should say that its hull bears some resemblance to that of a ship or boat. It is 50 feet long and 20 feet broad, and its two ends, which are the same, are shaped like the bow of a vessel. It is made of iron, and had no mast, stern-post, fore-post, or rudder. Its interior is occupied by a gas cylinder, built in it, with the entrance of a man-hole only. The light is rigged on a pyramid of pieces of wood about 50 feet high, and the gas in the cylinder, by its own elasticity, supplies the light day and night for about six weeks. No one is ever stationed on it. Capt. Fowler, chairman of the buoy committee of the Trinity House, gave evidence which was not contradicted, that it could not be used for any purposes of navigation, and that it was next to impossible to tow it. The learned County Court judge has held that the *Whitton No.* 2 is a ship or boat within the meaning of the 458th section of the Merchant Shipping Act 1854, which was the Act in force at the time of the salvage. If so, under that section there is jurisdiction in the Admiralty Court to award salvage for services rendered in respect of her. The definition of ship in sect. 2 of the Merchant Shipping Act 1854 does not assist us, because it is only "The word ship shall include every description of vessel used in navigation not propelled by oars." It does not, as Lord Coleridge said in *The Mac* (46 L. T. Rep. 907; 4 Asp. Mar. Law Cas. 555; 7 P. Div. 128), exclude other meanings of the word. Nor is there any conclusive authority upon the point. In *Ex parte Ferguson* (24 L. T. Rep. 99; 1 Mar. Law Cas. 8; L. Rep. 6 Q. B. 280) it was held that a coble was a ship within the meaning of the Merchant Shipping Act 1854. It is impossible, I think, to read the judgment of Blackburn, J., and have any doubt on the matter. The learned judge said: "But the point which remains is this: It is said on behalf of the master and mate that the fishing coble cannot be a ship. She is 24 feet long; she is not entirely decked over; she has two masts and a rudder, which are removable, and she may be propelled by four oars. She goes out well to sea; and though the oars are used to get her out of harbour, they are merely auxiliary to the use of sails. It is said, on behalf of the Board of Trade, that that is a ship. The chief argument against that proposition is by referring to the interpretation clause (sect. 2 of 17 & 18 Vict. c. 104), which says, '"Ship" shall include every description of vessel used in navigation not propelled by oars.' And the argument against the proposition is one which I have heard very frequently, viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship, unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars. Most small vessels rig out something to propel them, and it would be monstrous to say that they are not ships. What, then, is the meaning of the word 'ship' in this Act? It is this, that every vessel that substantially goes to sea is a 'ship.' I do not mean to say that a little boat going out for a mile or two to sea would be a ship; but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purposes of this Act. Whenever the vessel does go to sea, whether it be decked or not decked, or whether it goes to sea for the purposes of fishing or anything else, it would be a ship. I take it that this was what the justices thought. The facts stated are that this vessel, though of small size (of only 10 tons burthen, and only 24 feet long), yet goes out twenty or thirty miles to sea, does go there almost entirely with sails, does stay out many hours, as the affidavits state, and I think it is probable that it goes out for days and nights. This makes it impossible to say that it is not a sea-going vessel, and consequently a 'ship,' coming within the Act, without the aid

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

of the interpretation clause." *The Mac* (*ubi sup.*) was a case which referred to a hopper barge. This barge had a cabin at each end, a bow, stern, and rudder, and was "steerable." It had no mast or sails, except a pole which could be used for a small sail, or to hold a light on. It was usually moved by a tug, and was used for dredging purposes—that is to say, to carry out to sea and deposit the mud raised by dredgers. Sir Robert Phillimore held that there was no evidence that this hopper barge was used in navigation, and that therefore she was not a ship. But the Court of Appeal decided that she was a ship within the language of the Merchant Shipping Act 1854. The view of their Lordships was, I think, that she was a ship in the common meaning of the word. Lord Coleridge said this, in terms referring to the definition of a ship in Johnson's dictionary, "formatum aliquid, in contradistinction from a raft for the purposes of conveying merchandise, &c., by water, protected from the water and the weather." Brett, L.J. said: "This case comes within the words of sect. 458 of the Merchant Shipping Act 1854, if they are read in their ordinary sense, and without the assistance of the interpretation clause; but, as it seems to me, it falls also within that clause. In sect. 458, the words 'ship' and 'boat' are used, but it seems plain to me that the word 'ship' is not used in the technical sense as denoting a vessel of a particular rig. In popular language ships are of different kinds, barques, brigs, schooners, sloops, cutters. The word includes anything floating in or upon the water, built in a particular form, and used for a particular purpose. In this case the vessel, if she may be so called, was built for a particular purpose, she was built as a hopper barge; she has no motive power, no means of progression within herself. Towing alone will not conduct her; she must have a rudder, and, therefore, she must have men on board to steer her. Barges are vessels in a certain sense, and as the word 'ship' is not used in a strictly nautical meaning, but is used in a popular meaning, I think that this hopper barge is a 'ship.' She is not propelled by oars. The interpretation clause of the Merchant Shipping Act 1854 (sect. 2) does not limit the meaning, it enlarges it. This hopper barge is used for carrying men and mud; she is used in navigation—for to dredge up and carry away mud and gravel is an act done for the purposes of navigation. Suppose that a saloon barge capable of carrying 200 persons is towed down the river Mersey in order to put passengers on board vessels lying at the mouth, she would be used for the purposes of navigation, and I think it equally true that the hopper barge was used in navigation." Cotton, L.J., in the course of his judgment on this case said, "The first contention is that the hopper barge is not a 'ship.' The interpretation clause does not confine the meaning of the word, it does not confine it simply to what is used in navigation. I think that the hopper barge is a 'ship,' both within and without the interpretation clause. 'Ship' is a general term for artificial structures floating on the water; this is plain upon looking at the meanings given in Johnson's dictionary; and it is to be observed that one of the meanings of 'boat' is therein stated to be 'a ship of a small size.' I think that the proper meaning is 'something hollowed out.' Some expressions of Blackburn, J. in *Ex parte Ferguson* (*ubi sup.*) may appear to support a different view; that learned judge seems at first sight to have been of opinion that a 'ship' meant a sea-going vessel; but I think that the remarks which he made must be read with reference to the subject-matter before him, and that he was merely explaining that the vessel in question was a ship. It is plain to my mind that, in order to be a 'ship' within the Merchant Shipping Act 1854, a vessel need not be sea-going; it is only necessary to refer to sect. 19 of that statute which provides that British ships must be registered, except 'ships not exceeding fifteen tons burthen employed solely in navigation on the rivers or coasts of some British possession within which the managing owners of such ships are resident.' I think that this shows that the hopper barge was a 'ship' within the Act. The question cannot depend on the circumstance whether she carries a cargo from port to port. She was propelled by towing, and she carried mud with a crew on board." On the other hand, a raft of timber was held by Dr. Lushington not to be a ship within the meaning of 3 & 4 Vict. c. 65, where the words are "ship, or sea-going vessel": (*The Raft of Timber*, 2 W. Rob. 251.) In the *Mayor of Southport* v. *Morris* (68 L. T. Rep. 221; (1893) 1 Q. B. 359) the court appear to have regarded it as essential that a vessel should be engaged in navigation within the ordinary acceptance of the term in order to bring it within the provisions of the Merchant Shipping Act 1854. Now, whether the question be, Is the *Whitton No.* 2 a ship in the ordinary meaning of the term, or Is she used in navigation in the ordinary meaning of the term? the answer must in either case, in my opinion, exclude her from the Merchant Shipping Act 1854. I think that it is an essential part of the idea of a ship that she should be used, or intended to be used in navigation—that is to say, in the transport of persons or things. I do not say that every structure used for transport is a ship because a raft may be a means of transport, but transport of some kind seems to me *sine quâ non*. It does not appear to me enough that the object in question should be used for purposes connected with navigation. It is possible that the view of the learned judge in the court below that she was used for the purposes of navigation, because she contained gas for purposes which are useful for navigation was based on the words of Brett, L.J., quoted above, that "to dredge up and carry away mud and gravel is an act done for purposes of navigation." But I think the Lord Justice's language was intended to convey that the hopper barge, in carrying away the mud and gravel, was used in navigation, and in that sense expressed is a proposition, to my mind, unquestionably correct. But the *Whitton No.* 2 is not used, or intended to be used, for the transport of anything. In this respect I cannot see how it differs from an ordinary lighted buoy. There may, of course, be questions, and in some cases difficult questions, whether a vessel which has been, or may be, used in navigation, becomes divested of that character by disuse or non-use. As to a lightship which may have been used in or constructed for navigation, it may be a question whether she has ceased to be a ship when she becomes an inhabited beacon. A coal hulk (see *European and Australian Royal Mail Company* v. *P. and O. Company*, 14 L. T. Rep. 704),

or a training ship, after having once been actively employed, may, or may not, according to their use, pass out of the category of ships. H.M.S. *Victory* has long been a curiosity and a memorial. I do not say whether she has ceased to be a ship. But, if being navigated, or having been constructed for the purpose of navigation, or being capable of navigation, be the test, the *Whitton No.* 2 never was, is not, and could not be a ship. Then it was argued that the *Whitton No.* 2 might be regarded as wreck within the meaning of sect. 458. But this would, I think, give a more extended meaning to "wreck" than is consistent with the authorities. The definition in *Constable's* case (Coke, 3 Rep. pt. 5, p. 216) is "wrecum maris significat illa bona quæ naufragio ad terram appellantur"—that is to say, wreck is something which formed part of a ship, including her apparel or her cargo. In Mr. Stuart Moore's book on "Foreshore and Seashore" can be found extracts from many charters from which the same conclusion as to the meaning of the word wreck is to be drawn. In *Palmer* v. *Rouse* (1 H. & N. 505) timber floating at sea was considered not to come within any of the classes of wreck, as not having been at sea in a ship and separated from it by some peril. Many more authorities to the same effect might be referred to. But this does not exhaust the case. It remains to be considered whether the *Whitton No.* 2 is not the subject of salvage apart from the jurisdiction conferred by sect. 458 of the Merchant Shipping Act 1854. It is no doubt true that the Admiralty Court Jurisdiction Act of 1840, sect. 6, gave, as was held by Dr. Lushington in the case above referred to, jurisdiction within the body of a county only in the case of ships or sea-going vessels. But by the Act 9 & 10 Vict. c. 99, s. 40, this limitation was removed (see Edwards on the "High Court of Admiralty," p. 189) and sect. 476 of the Act of 1894 provides as follows: "Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas or within the body of any county, or partly in one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea and partly on land." Probably this section did not give to the Court of Admiralty jurisdiction within the body of a county in respect of any goods or articles in respect of which it had not previously jurisdiction on the high seas. In *The Johannes* (Lush. 182) Dr. Lushington said of the 476th section, "I believe that this section was intended for the purpose only of giving the Court of Admiralty jurisdiction in certain cases in which that jurisdiction had been before disputed, by reason that the services had been performed wholly or in part on land in the body of a county." But this section certainly extended the jurisdiction of the Admiralty Court in salvage to places within counties in respect of all property over which it had jurisdiction at sea. This jurisdiction of the High Court of Admiralty was extended to the County Courts by the 3rd section of the County Courts Admiralty Jurisdiction Act 1868. It was argued by Sir Walter Phillimore that, even if under sect. 476, the High Court of Admiralty could have had jurisdiction in respect of the *Whitton No.* 2 at sea, such a structure being placed and used in a river never was, and is not, a subject of salvage. In support of this view he chiefly relied on the case of *Nicholson* v. *Chapman* (2 H. Blackstone, 254). In this case, which was decided in 1793, it was held that a person who found, and conveyed to a place of safety, timber which having been placed in a dock on the bank of a navigable river, was carried by the tide and left at low water on a towing-path, had no lien at common law upon it for his trouble or expense. This case appears to have been decided with reference only to the nature of the locality in which the property was lost or found. In the judgment of the court occurs the following passage: "The taking care of goods left by the tide on the bank of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved; goods carried by the sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilised and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service. Such are the grounds upon which salvage stands; they are recognised by Holt, C.J. in the case which has been cited from Lord Raymond and Salkeld. But we see how very unlike this salvage is to the case now under consideration. In a navigable river, with the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together at convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls, and it leaves it again somewhere upon the banks of the river. Such an event as this gives the owner the trouble of employing a man, sometimes for an hour, sometimes for a day, in looking after it until he finds it, and brings it back again to the place from whence it floated." From the subsequent reference to craft moored in the river it would seem, and it is worthy of remark, that the court did not intend to base its judgment on the fact that the goods in question were not in the nature of ships, boats, or cargo. The reference to the position and risks of property lying in rivers as opposed to those at sea seems to be intended to explain why salvage services are not recognised by the common law in the same way as they are by the law maritime. But the fact that they are not seems, as the law then stood, sufficient ground for the decision of the courts. A lien implies that in some way the amount of the reward, on account of the non-payment of which the lien is allowed, can be ascertained. But how could any payment due for saving the timber in the case of *Nicholson* v.

Chapman be ascertained or enforced? It could not be enforced at common law, as there was no contract, express or implied. It could not be enforced in the Court of Admiralty, because the salvage services were performed in the body of a county. The case, therefore, seems to decide only this, that although the common law, as Holt, C.J. held in *Hartfort* v. *Jones* (1 Ld Raym. 393), recognises a lien for salvage in some cases, it will not do so when no payment for the services rendered is legally due, and that for services voluntarily rendered in preserving property astray in a river no payment is legally due, any more than for such services if rendered to property in a similar position on land. If this view of *Nicholson* v. *Chapman* is correct, it would follow that the extension of Admiralty jurisdiction to inland waters has materially altered the law which it enunciates. I cannot help thinking that this is the real meaning of the observation attributed to Willes, J., in *Vivian* v. *Mersey Board* (5 L. Rep. 28 C. P). It is true that the case of *The Carrier Dove* (2 Moore P. C. N. S. 243), referred to by that learned judge as showing that, notwithstanding the case of *Nicholson* v. *Chapman* there is no distinction between river and sea salvage, bears only on the quantum of salvage recovered, but it may well be that the learned judge intended to point out that *Nicholson* v. *Chapman* did not now express the law in the case of river salvage, and that, in truth, the distinction between river and sea salvage has, by the extension of the Admiralty jurisdiction, been abolished. In such cases as that of *The Zeta* (33 L. T. Rep. 477; 3 Asp. Mar. Law Cas. 73; L. Rep. 4 A. & E. 460)—a barge which drifted from her moorings in the Thames—it is clear that salvage could now be obtained, whereas according to the language employed in *Nicholson* v. *Chapman* it could not. I think also that Blackburn and Lush, JJ., in pointing out in *Hingston* v. *Wendt* (34 L. T. Rep. 181; 3 Asp. Mar. Law Cas. 126; 1 Q. B. Div. 369), that in *Nicholson* v. *Chapman* the plaintiff was a mere volunteer in saving the goods indicated their opinion that what that case decided was that such a person did not acquire a lien at common law, and I attribute the same effect to the observations of Lord Blackburn in *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755). If, then, the estuary of the Humber may in all respects for the purposes of Admiralty jurisdiction in salvage be treated as the high seas, the question which remains is, Can an article of property, not being a ship or cargo, be the subject of salvage on the high seas? There is, so far as I am aware, no direct English authority to this effect, although textwriters of eminence have indicated opinions pointing in that direction: (Kennedy on Salvage, p. 2.) There was a case in which the caisson of a dock which got adrift in Gravesend Reach (*Shipping Gazette*, May 10, 1876) was dealt with as the subject of salvage. But, apart from the consideration that no question of jurisdiction was in that case raised on the pleadings, it would appear that this caisson before being lost was in tow of a steamer, and may probably, therefore, have been considered as cargo. The rule that salvage is applicable to Royal fish is perhaps too special to form the subject of a general inference, but it is to be remarked that in the case of *The Lord Warden of the Cinque Ports* v. *The King* (2 Hagg. Adm. 438), Dr. Phillimore bases this right of salvage on the legal theory that Royal fish before, and at the time of, their capture are the property of the King. In a case in the District Court of the United States for the Southern District of New York (*A Raft of Spars*, 1 Abbott, 485), it was held that an Admiralty suit could be sustained in respect of a raft of 16 spars, which had floated out of a basin on the East river and was drifting to sea half a mile from the shore. The learned judge, Betts, J., who tried the case, and who was, as I have been informed, a careful judge, and one of very great experience in Admiralty matters, appears to have had no doubt that the English courts would award salvage in such a case. I find also in the United States Digest the following note: "A raft of timber found drifting with the tide on deep water, in a harbour, and out of the control of the owners, is a subject of salvage: (*Bywater* v. *A Raft of Piles* (D. C. D. Wash.) 42 Fed. Rep. 917.) But I have not been able to verify this note by reference to the report itself. On the other hand there is no authority, as far as I can ascertain, to show that the jurisdiction of the Admiralty as to salvage is limited so closely to a ship and her cargo as to exclude a structure used in connection with navigation, and exposed in the ordinary course of its use, to the perils of the sea; and it appears to me probable that the exclusive mention of ship and cargoes as subjects of salvage, is due to the fact that the case of anything else of a nautical character, except a buoy or lightship, being in need of salvage service on the high seas, is almost, if not quite, unimaginable. The rule, not perhaps a strictly logical rule, that the personal property of passengers is not the subject of salvage, seems to rest on the identification of the passenger with his articles of personal use: (see *The Willem III.*, 25 L. T. Rep. 386; 1 Asp. Mar. Law Cas. 129; L. Rep. 3 A. & E. 487.) It is not necessary to go as far as the American courts appear to have gone, and to hold all property imperilled in waters over which the Admiralty Courts have jurisdiction, to be the subject of salvage. But it appears to me that no reasonable distinction can be drawn between a ship and a structure moored in the sea to direct the course of ships. Both are property connected with navigation, the one directly, the other indirectly no doubt, but to such a degree that beacons at sea have always been under the government of the Admiralty: (*Cross* v. *Biggs*, 1 Kel. 575.) Both are necessarily exposed to sea peril, which may subject those who serve them to special exertion or danger. The gas float is in this respect in exactly the same position as a ship at anchor. It is certainly in the interests of navigation and commerce that beacons, valuable in themselves and for their utility, should be preserved from destruction. I think, therefore, that the *Whitton No.* 2 would have been a subject of salvage if stationed on the high seas, and is not less so because moored in the estuary of the Humber. The appeal must therefore be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*

Solicitors for the respondents, *Pritchard and Sons.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 3, 6, 8, *and* 12.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

HICKMAN *v.* BEERENS. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Counsel—Statement by—Proceedings on compromise — Misunderstanding — Compromise set aside.

A summons was taken out by one of the parties to an action to set aside an agreement, signed by the respective counsel on the hearing before the official referee, as to the mode in which certain accounts, the subject of the action, should be taken. The ground of the application was, that the terms as drawn up did not express the true intention of the parties at the time, according to the view of their counsel.

For this purpose the statement of counsel as to what occurred on the occasion before the official referee was relied on.

It was decided by Kekewich, J. that this statement ought to be made by counsel verbally in court, but not as a witness; and on the facts of the case his Lordship decided that there was no ground for setting aside the compromise. On appeal:

Held, that the evidence showed that there had been a misunderstanding, the counsel not being ad idem; *and that, as there had been a mistake, it was in accordance with the practice of the court to set aside the compromise, especially as the agreement had not been embodied in an order.*

Holt *v.* Jesse (3 *Ch. Div.* 177, *at pp.* 183, 184) *approved and applied.*

Decision of Kekewich, J. reversed.

APPEAL by the plaintiff from a decision of Kekewich, J.

The facts of the case sufficiently appear from the judgments.

On the 3rd April 1895 the following judgment was delivered by

KEKEWICH, J.—This is a matter of professional interest as regards the practice of the courts, quite independently of the merits of this particular case. When the summons first came before me I had not the advantage of Mr. Levett's assistance, and without objection on either side the whole of the shorthand notes were read aloud by counsel or followed by me when they passed over certain passages, and those shorthand notes included a statement of what was said by Mr, Levett before the official referee. No doubt anything falling from counsel, speaking with all the responsibility of one of Her Majesty's counsel, deserves the most earnest consideration of the court. But it struck me, and on reflection I adhere to the opinion, that it is unsatisfactory to have what was stated by counsel brought before the court merely by reading shorthand notes. What is said by counsel verbally in addressing the court from his place at the bar, is, I repeat, entitled to the gravest consideration. I do not mean that what is reported by means of shorthand notes would not be also entitled to consideration, if one were to receive it. But I do do not think one ought to receive it. It may be erroneous, because we know perfectly well that, not only is there room for error in transcribing, but that the words, from the particular mode of emphasis or the particular way in which they are spoken, lose their effect in a transcript of shorthand notes. Therefore I suggested that the case should stand over in order that I might have Mr. Levett here; and my suggestion certainly was that Mr. Levett, not appearing as counsel, should be here as a witness. It did not occur to me at the moment that there was a solution which certainly was not in my power, that Mr. Levett should be added as counsel and should speak as counsel. No sooner had my suggestion been made than my attention was called to an unreported case on this point of *Kempshall* v. *Holland*, which came before the Court of Appeal. In that case the Court of Appeal accepted counsel's statement of what occurred, and if they did not actually refuse to have an affidavit made, at any rate they preferred the statement of counsel, and did not wish to have the affidavit. Under these circumstances I again communicated with the parties in the present case, without putting the case into the paper, suggesting that Mr. Levett should be instructed and should give his statement verbally to me. That struck me as being perfectly satisfactory. It may be interesting to mention incidentally, as this case is one of great importance, that in the meantime the subject has formed matter for investigation to some extent in an article in the LAW TIMES Journal (*a*) of the 23rd March last. It is a matter of considerable interest and the article appears to me to deserve attention. I followed the precedent of the case in the Court of Appeal which I have mentioned, and it seems to me that that was the right course to pursue. I have now had the advantage of hearing Mr. Levett's statement. It appears to me that I am not dealing here at all with the question of the authority of counsel independently of the instructions of the client, which I understand was the question that arose in the unreported case in the Court of Appeal to which I have just referred. That is the subject which is discussed in the article in the LAW TIMES Journal (*ubi sup.*). It is a subject which has often been discussed of late years, and of course was more largely discussed in that case in the Court of Appeal, which was a case of a disputed will, than perhaps in any other. I have not to deal with that here. I have no case of counsel relying upon his mere authority as counsel to do what is best for his client in the conduct of the litigation. I can get rid of that so far as the present case is concerned. Nor have I here the case where the client has given specific instructions and then counsel has departed from them. That was what occurred in the case which came before me of *Lewis's* v. *Lewis* (63 L. T. Rep. 84; 45 Ch. Div. 281). It was a peculiar case where a great deal depended upon the use of a particular word. It will be seen from the reports that the offer on the part of the defendant was to concede the use of the name "Lewis's" either alone or jointly with

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

(*a*) "The Authority of Counsel to Compromise," 98 L. T. 489.

any initials. Then the proposed order was to prevent trade being carried on by the defendant under the name of "Lewis's" or "Lewis," or any other name resembling it, nothing being said about initials. The result would have been that that use would have been restrained whether with or without initials. That was objected to, and then counsel made, what I confess struck me as a reasonable arrangement, that the defendant should be restrained from using that name "Lewis's" without prefixing the initials J. M., or the names James or Mossop, or both; that is to say, his own initials or names. To that there was an objection, and it was, I thought, established (I thought so, and there was no appeal) that what the plaintiffs insisted upon was an injunction to restrain the use of the name "Lewis's" without any modification whatever. The result was that the plaintiffs' counsel in taking a less stringent injunction, had departed—honestly, and as he thought in the interests of his client, but still departed—from the specific instructions of the client. I have, I repeat, no case of that kind to deal with here. In the present case the question arose respecting discounts—cash discounts and trade discounts. It seems to me not to matter whether there were sometimes two or sometimes three discounts. The fact that there were two and not one is, of course, important. I have a specimen of the accounts before me, in which the discounts were set out, and it is common ground that these accounts were before the court and before the counsel, and that the question whether there should be a compromise or not was based on these accounts. There was a considerable discussion on the morning of the 11th July 1894 before the official referee when unfortunately Mr. Levett's duties detained him elsewhere. The case went on up to the usual, or nearly the usual, time for the adjournment, and at any rate during the latter part of the discussion it seems to have been conceded that nothing could really be done until Mr. Levett's assistance could be secured. It appears that he came into court about the moment of the adjournment—too late to take any part in the discussion before, but just in time to be informed of what was going on. What happened during the adjournment I am not told, and I have not inquired. Probably other demands had to be satisfied, and not all the time was occupied in considering this question. On the other hand, it is more than probable that some portion of the time was so occupied. But at two o'clock the discussion was resumed with Mr. Levett there and with some of the other parties—Mr. Reed representing the other side. Mr. Levett's client was present throughout the morning, and also when Mr. Levett came later. The accountant was likewise there. The solicitor of the plaintiff was not there. He was represented by a clerk who appears to have had no authority, and to have, at any rate, not taken any part in what occurred. The accountant, so far as I can make out, took very little part in it, and probably I think it is fair to assume had no authority whatever. He may have been referred to, but whatever was done in the way of discussion was not done through him. The important part is what the client did. Here I will refer to the case of *Holt* v. *Jesse* (3 Ch. Div. 177), in which I appear to have been engaged as counsel. My client in that case—the lay client—had unfortunately some difficulty in hearing, and Malins, V.C. was, I venture to say, entirely wrong in concluding that the client knew anything of what was going on. I am perfectly sure, and I was sure at the time, that he did not. That was a mistake. Mr. Glasse and I made what we thought was a very good compromise, and a very good compromise it was, and to that the Vice-Chancellor held the client bound on the ground that he knew what the nature of the compromise was. That was clearly a mistake, and that takes it out of the class of cases where there is any doubt whether the client knew what was being done, or whether counsel were acting on their own authority. Now what was the position of the client here? I know from Mr. Levett that he objected to the compromise; that he objected to any compromise at all, and it was only under pressure properly exercised by counsel that he assented to it. According to the affidavit, he from that time forward took no prominent part in the discussion. He says he did not see the actual signed document until later, and did not appreciate (very likely he did not) what was intended to be done. But it seems to me clear beyond all doubt that, even if he did not know the exact terms of the proposed compromise, he knew the subject-matter of the compromise. He knew that what was to be avoided was the taking of these accounts item by item—there being a very large number of items as regards the question of discount. In each case costly and troublesome discussion over the different items would have been necessary, and, to avoid that, some concession had to be made. What the concession was, he may probably not have been informed. The only inference I can draw from the facts before me is that he intended—and, I think, wisely intended—to leave that matter in the hands of his counsel. Having once agreed that it was a case for a compromise, he intended to trust to his counsel, as he properly might, to make the best terms that he could as regards that particular dispute. That seems to me to dispose of the suggestion of the client not having been informed or misapprehending what was done. I think he did apprehend what was done sufficiently, because he knew Mr. Levett was doing the best for him with the assistance of Mr. Bramwell Davis, and possibly the accountant. Now the question is, whether Mr. Levett was misled. Here I am in a position of very great difficulty. Mr. Levett says that he did not understand this agreement; that is to say, he did not understand what the effect of it would be. My conclusion is this, that he did not understand precisely how far that concession which I have alluded to would go. He did not appreciate what a large concession he was making—that is to say, how much it would work out against his client on taking the accounts. But that is the very essence of a compromise. You cannot "compromise"—in the proper sense of that word—rights which you fully appreciate and understand. Take the common case of ejectment. If there is no will the heirship is clearly proved, there is no room for compromise. The heir may make some concession to the party whom he is seeking to eject; that is to say, he may say "I will not insist on costs, or you shall not go out till next year, or you shall be at liberty to do this, that, or the other." That is a unilateral concession, not a

compromise. The essence of a compromise is that the two parties come together and agree to give and take, because they are not quite certain what, in the ultimate result if they fight the matter out and go to the House of Lords, their strict legal rights will be declared to be. I accept Mr. Levett's statement without doubt. I accept the statement of the witnesses in their affidavits that they did not see what large sums would have to be allowed under the compromise. But that is a mere question of amount, and it has unfortunately worked out more disadvantageously to the plaintiff than was expected. That is not the essence of the compromise. The parties desired to avoid, and properly desired to avoid, this troublesome, lengthy, and costly investigation with disputes as regards every item, and it was necessary that one of them should give up something more than he was bound to give up—perhaps both, but that at any rate one of them should. They have done that. and miscalculated the pecuniary value of the concession. Now it has been urged upon me very strongly that Mr. Levett objected to these terms of compromise. I do not doubt that he did object, and that he canvassed it very carefully. The agreement of compromise ultimately took the form in which it was signed. That was arrived at by the discussion with the assistance of counsel on both sides, and also the assistance of the official referee. In one sense it may be that they have made a mistake, but I cannot hold that they have made a mistake in assenting to these terms. They have taken their chance of how it would work out. As at present advised, it seems to me that the compromise was an exceedingly beneficial one, and my present impression is that Mr. Levett not only endeavoured, as I am sure he did, to do his very best for his client, but that he succeeded in that. The result is, that the application fails, and the plaintiff must pay the costs.

From that decision the plaintiff, by leave, now appealed.

Crackanthorpe, Q.C. and *R. B. P. Cator* for the appellant.—There are two authorities which govern the question raised by this appeal:

Harvey v. *Croydon Union Rural Sanitary Authority*, 50 L. T. Rep. 291; 26 Ch. Div. 249;
Holt v. *Jesse*, 3 Ch. Div. 177, at pp. 183, 184.

[Lopes, L.J.—There is also a case, which perhaps is not quite so strong, of *Lewis's* v. *Lewis* (63 L. T. Rep. 84; 45 Ch. Div. 281). Lindley, L.J.—There is authority to be found in cases relating to specific performance. One of the strongest I know is *Watson* v. *Marston* (4 De G. M. & G. 230).]

Herbert Reed, Q.C. and *Maugham* (with them *McKenna*) for the respondents.—One party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract, or any of the terms in which it is expressed:

Fry on Specific Performance, 3rd edit. p. 356, sect. 765, citing
Stewart v. *Kennedy*, 15 App. Cas. 108, 118;
Hart v. *Hart*, 45 L. T. Rep. 13; 18 Ch. Div. 670.

Crackanthorpe, Q.C. replied.

Cur. adv. vult.

July 12.—The following judgments were delivered:—

Lindley, L.J.—This is an appeal by the plaintiff from a decision of Kekewich, J. refusing, in substance, to relieve the plaintiff from the terms of a consent order, or compromise as it was called, relating to the taking of some accounts. The real object of the action is to compel the defendants to account to the plaintiff for certain sums which the plaintiff says he is entitled to, and which have not been paid over to him or accounted for to him. There have been accounts between the parties running on for a great number of years, but in particular the plaintiff says that the defendants have got discounts, commissions, and charges of which he, the plaintiff, has not had his fair share. The whole object is to ascertain whether that is so or not. Romer, J. made an order on the 21st July 1892, referring it to the official referee to take an account of all dealings and transactions between the plaintiff and the defendants under the agreement of the 1st Aug. 1867—that is, the agreement under which they began to trade and did trade—"regard being had to the terms of the said agreement and to the course of business existing between the parties." That, of course, lets in any course of business to which both parties assented, and which they both carried on with the full knowledge of the circumstances and of what they were doing. Then comes this, which has given rise to the difficulty: "And in taking the said accounts the defendants are to be allowed any discounts which they have *bonâ fide* obtained for cash payments made by them." Now, when the matter came before the official referee—which it did soon after the order was made—there was a considerable discussion about the mode of taking these accounts. It soon became obvious that there would be very great difficulty in the matter unless some kind of arrangement could be come to, or some kind of understanding could be come to, which would render it unnecessary for the official referee to investigate every item from 1867 downwards. The real trouble, as I have already said, turned upon the last part of the order to which I have alluded. It appears that Mr. Levett was counsel for the plaintiff at the time (July 1894) when this compromise was signed, and Mr. Herbert Reed was counsel for the defendants. The agreement was signed after a great deal of discussion between the parties. It is unnecessary to refer at length to the details of that discussion. I will read what the counsel signed: "Ascertain the amount in excess of 5 per cent. retained by the defendants in respect of discount for the years 1884 to 1890. Items to be dealt with separately. Ascertain what percentage the total amount so retained bears to the total turnover from 1884 to 1890, and take this percentage for earlier years from date of agreement." I understand that provision to refer to the fact that before 1884 a good many of the books had either been destroyed or mislaid or lost, and the materials for taking the account were by no means so perfect as they are between the years 1884 to 1890, which is possible enough. Then come these words, "defendants to account to plaintiff for 45 per cent. of the excess retained by them over 5 per cent as so ascertained." Well, that seems tolerably plain so far as the language of it goes, although there is some little ambiguity

upon the terms even of that document. For example, one ambiguity is about the expression, "Items to be dealt with separately." There is a little ambiguity as to whether the items there refer to the items to be accounted for or to the items of discount. There may be a controversy about that, as was pointed out in the course of the argument. I pass on to state what happened. On the 12th Oct. 1894 the defendants brought in some objections (I will pass over immaterial matters) to the accounts which were brought in after the compromise or consent was sanctioned, and at the same time the defendants sent this notice with their objections and corrections delivered pursuant to the order of the official referee. It says: "The objections and corrections delivered herewith pursuant to the order of the official referee of the 12th July 1894 are delivered only pursuant to such order, and are without prejudice to the defendants' claim that, in accordance with the agreement and the course of business, the plaintiff is not entitled to any amounts whatever in respect of the claim made by him." That is a remarkable notice, because that means this: "Notwithstanding the arrangement which has been come to between us we shall still dispute your title to anything." That must mean, and I understand was conceded to mean, this: "That we shall say that every discount which you claim is a *bonâ fide* cash discount." If so, it appears to me that the compromise or consent, or whatever it is called, is absolutely worthless. Now a summons was taken out by the plaintiff asking to be relieved from the terms of this consent upon the ground that the two parties who signed it were really thinking of different things and had their minds addressed to different things, and that they did not understand or agree to the same thing. That is the short ground upon which it is put. The plaintiff has taken out the summons upon this ground. He says that what his counsel were aiming at in signing this document and entering into this arrangement for taking the accounts was this: They assumed that there were certain discounts which they called trade discounts, which could not possibly be disputed, which nobody would ever suggest could be, what are called cash discounts, or, in the language of the order, *bonâ fide* payments for cash—the expression in the order being "discounts which they have *bonâ fide* obtained for cash payments." The plaintiff says, "My counsel's attention was addressed to that which he considered could be disputed, and he never thought of saying or agreeing to anything which could possibly relate to matters as to which he conceived at all events there could be no possible dispute." Now I am bound to say that the language of the document signed is more extensive than that. The real difficulty which we have to ascertain and to solve is this, whether when the plaintiff says what I have mentioned (and Mr. Levett, who has made a statement to Kekewich, J., says in substance also what I have mentioned), that is really the truth, or whether he has been inaccurate to this extent that what he finds now is that this document has a consequence which he did not foresee. If that was all there would be no ground, in my opinion, for relieving him of it. But, on looking at the case and hearing both sides, the conclusion at which I have arrived is, that the plaintiff's version is accurate, and that the two parties did not mean the same thing. I think that the counsel for the defendants meant exactly what the document expresses. They were bent upon what I may call a compromise of all these items in the account. The plaintiff's counsel, on the contrary, never addressed his mind to that possible view of the case. He addressed his mind to a much narrower view of the case, and I am convinced, on looking at the evidence, that he is right—I mean from his point of view. He put it in this way. He says: "Here are three discounts, a large discount, and two others." He says: "I concede that those small discounts were disputable amounts. They might be *bonâ fide* cash discounts, or they might not. I did not intend to raise any dispute about such things as these. It never occurred to me as possible that what I was signing and alluding to could be construed so as to apply to matters which I did not suppose could ever be disputed, that is to say, the large trade discounts of 30 or 40 per cent." Well, looking at the evidence, and notwithstanding Mr. Reed's very cogent argument in support of his view, I have come to the conclusion that there was that misunderstanding. I think, therefore, that we are acting quite in accordance with the course of the court in relieving the party who has made it from the consequence of it, bearing in mind that this document has never been formulated into any order or anything of the kind. The principle upon which we act is the principle upon which the court acted in *Holt* v. *Jesse* (3 Ch. Div. 177, at pp. 183, 184), which is to the effect that, if counsel does sign a document like this, and comes and tells the court that it must have been a mistake of the kind which I have alluded to—that is to say, either a mistake of fact, which I do not think there was here, or that the parties were not *ad idem*, and that he was compromising or thinking he was compromising one thing whilst he inadvertently expressed himself so as to enlarge the subject-matter of the compromise—it is almost a matter of course to set that compromise aside and not to hold the client bound to it. It appears to me, therefore, that this case is made out, and that the plaintiff is entitled to an order that the accounts shall be taken under Romer, J.'s judgment without regard to this signed consent. Now, as regards the costs, that is a very difficult matter. It is obvious to my mind that there has been a misapprehension, and a misapprehension upon the part of the plaintiff and his counsel, but that the defendants and their counsel were under no misapprehension except in supposing that the plaintiff was *ad idem* with them. The plaintiff ought to pay the costs of the summons and of the application, and of the hearing before the official referee to set that blunder right. It was his blunder. The order of Kekewich, J. of course must be discharged, and we think that it ought to be discharged *in toto*, and that there should be no costs of either side either of the application to him or of the appeal to us. We take that to be as near justice in the matter of costs as is possible. It is quite impossible to make an order as to costs which shall be mathematically accurate and just. But, dealing with it as a matter of convenience, we think that that is fair and right.

LOPES, L.J.—I have very little to add in this case. The matter we had to consider was a most

involved state of things. It was most difficult and complicated, and a matter for grave consideration, but, after very careful consideration, I, with the other members of the court, have come to the conclusion that the learned counsel were not *ad idem* with regard to this compromise. I am of opinion that they had different views in their minds as to the meaning of the compromise at the time when it was signed. It has never been formulated or perfected in any way. Mr. Levett, I think, thought that there were trade discounts—I mean indisputable trade discounts—and that such indisputable trade discounts were not to be covered or affected by this compromise. He thought it was to extend to what I will call *bonâ fide* cash discounts and doubtful ones only. On the other hand, I have not the slightest doubt that Mr. Reed thought that the compromise was to cover all discounts, and that there were not any discounts at all, either large trade discounts or otherwise, that were in dispute. It seems to me, therefore, that the learned counsel approached the compromise from different directions. They had different views as to the subject-matter which was to be affected by that compromise. If that is so, there is plenty of authority for the court doing that which it is about to do, namely, set aside the compromise. What was said by Malins, V.C. in *Holt* v. *Jesse* (*ubi sup.*) appears to me to be very applicable, assuming that I am correct in the conclusion which I have arrived at, namely, that the learned counsel were not *ad idem*. I find in that case (p. 183) this passage: "Therefore I entirely concur with what the Master of the Rolls has said in the passage which Mr. Kekewich has pressed upon me, and I also would desire to say this, that where there has been a misapprehension on the part of counsel, where the case has been complicated or difficult, where either the materials have not been sufficiently before the counsel, or being before him he does not fully comprehend them, or may be excused for not having comprehended them, and consent has been given prejudicial to the client, I should entirely agree with the observation of the Master of the Rolls: 'If the counsel says, I made a concession under a misapprehension, it never has been, and I trust it never will be, the course of the court to bind the counsel to that mistake.'" Then the learned Vice-Chancellor goes on in his own words: "I say precisely the same thing in precisely the same terms, that, if consent has been given under a misapprehension or from a misstatement or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it never has been the rule of this court, and I also trust it never will be the rule of this court, that the unfortunate client should be bound by such misapprehension." I am of opinion that there was a misapprehension here such as I have described, and that this compromise ought to be set aside. I also agree with what has been said by my learned brother with regard to the costs.

RIGBY, L.J.—I am of the same opinion. If this were an attempt to get rid of a compromise because it turned out to be pecuniarily very onerous to the parties seeking relief, I think it ought not to be entertained, or at any rate it ought not to succeed. But I do not look upon it in that light at all. I consider that it is made quite plain that Mr. Levett, in signing that document, had not present to his mind that it was intended to cover every conceivable case, but that he thought that he was compromising doubtful cases only, and not of course giving up some things that were not doubtful but plain. If that were the real state of his mind—and I am satisfied it was—then the compromise was thought by one party to have been more extensive than the other party intended it to be; that is to say, they were not agreed upon the subject-matter of the compromise. In that case I conceive it is right that the compromise should be dealt with as if it had never been entered into. With regard to the costs, Mr. Levett quite frankly said it was his mistake, and so undoubtedly it was. Well, in that case he goes to the official referee, and if the official referee had decided in his favour, I think he might very well have made him pay the costs, inasmuch as it was a difficulty raised by his want of clear apprehension as to what he was supposed to be doing. If our view be correct of course the official referee ought to have given that relief. After that it becomes a mistake, as it were, of the official referee, and we think also that Kekewich, J. did not make the right order. I do not think that it is right to make the applicant pay the costs either of the hearing before Kekewich, J. or of that before this court. That is quite a different thing from saying he should get them, because after all this particular litigation has been caused by a mistake, and the nearest approximation to justice appears to be that the applicant should pay the costs before the official referee, and that there should be no costs of either side.

Appeal allowed.

Solicitor for the appellant, *Herbert Bentwitch.*

Solicitors for the respondents, *McKenna* and *Co.*

Aug. 5 *and* 6.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

CROSLAND *v.* WRIGLEY. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Life assurance—Policies for benefit of wife and children—Domicile of assured—Foreign assurance company—Lex loci contractûs—Lex loci solutionis.

Policies of assurance on his life were effected by a domiciled Englishman with an American assurance company through their English branch office. The moneys assured were expressed to be payable to the wife of the assured, for her sole use if living, "in conformity with the statute," and, if not living, to the children of the assured, or their guardian for their use, or if there should be no such children surviving, then to the executors, administrators, or assigns of the assured.

Held (*affirming the decision of Kekewich, J.*, ante *p.* 60), *that the policies, in accordance with the intention of the parties, must be construed, so far as related to the distribution of the assurance moneys, in accordance with the* lex loci solutionis, *the law of the place of domicile of the assured.*

Held also (*reversing the decision of Kekewich, J.*), *that all the children of the assured took vested interests as tenants in common.*

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Robert Skilbeck, an Englishman domiciled in Yorkshire, effected three policies of assurance on his life with the Equitable Life Assurance Society of New York, U.S.A., through their branch office, in London, England.

In the policies the moneys assured were, in consideration of annual payments to be made at the office of the society in London, expressed to be payable to Eliza Jane Skilbeck, wife of Robert Skilbeck, for her sole use if living, in conformity with the statute, and if not living to the children of Robert Skilbeck, or their guardian for their use, or, if there should be no such children surviving, then to the executors, administrators, or assigns of Robert Skilbeck, at the office of the society in London, sixty days after notice and the proof required of the death of Robert Skilbeck at the society's office in New York.

The above words "in conformity with the statute" referred to a statute of the State of New York relating to the property of married women.

E. J. Skilbeck predeceased her husband on the 3rd Sept. 1892.

At the time of the assurances being effected Robert Skilbeck had two children only (daughters) living, one of whom died in his lifetime, on the 12th Sept. 1892, intestate.

Robert Skilbeck died on the 14th Jan. 1894, whereupon the moneys assured were, by consent, paid to the surviving daughter F. A. Wrigley.

This action was brought by John Pearson Crosland, the husband and administrator of the deceased daughter, against F. A. Wrigley, by which he claimed one half of the moneys paid under the policies to F. A. Wrigley.

The questions raised were: First, whether the provisions of the policies were to be construed according to the law of England, the domicile of the assured, where the assurance moneys were to be paid; or according to the law of the State of New York, the domicile of the society. Secondly, whether, according to the law of the country which governed the contract, the two daughters shared as tenants in common or as joint tenants; or whether the children entitled to share in the assurance moneys were only such as survived the assured, the effect of which latter construction would be to vest the whole of the assurance moneys in the defendant.

On the 30th May 1894 the action came on for trial before Kekewich, J., when his Lordship decided (*ante*, p. 60) that the policies must be construed in accordance with the law of the place of domicile of the assured; and that, on the construction of the policies, "children" meant children surviving the assured, so that the defendant was entitled to the whole of the assurance moneys.

From that decision the plaintiff now appealed.

Marten, Q.C. (with him *Vaughan Hawkins*) for the appellant.—The first question is, whether the law applicable to this case is the law of the place where the contract was made, that is to say, the law of the State of New York, the domicile of the assurance society; or the law of this country, the domicile of the assured. I submit that, if it is held that English law is applicable, the two daughters became entitled on the death of their mother as tenants in common; and that therefore the appellant, as legal personal representative of the deceased daughter, shares in the policy moneys equally with the surviving daughter, the respondent. [He was stopped by the Court.]

Renshaw, Q.C. and *W. A. Peck* for Mrs. Wrigley.—We contend that this case is governed by the *lex loci solutionis*, that is, by English law. The authority of *Ex parte Dever*; *Re Suse and Sebeth* (18 Q. B. Div. 660) disposes of any difficulty which may be attributed to the words "in conformity with the statute." English law is applicable to this case, the *locus solutionis* being in this country:

Hamlyn v. *Talisker Distillery*, 71 L. T. Rep. 1; (1894) A. C. 202.

The respondent is alone entitled to the policy moneys, for she only survived till the date of distribution, that is, the death of the assured. If our contention is wrong as regards that, we say that the children became entitled as joint tenants, and therefore the share of the deceased daughter survived to the respondent:

Winn v. *Fenwick*, 11 Beav. 438, 441;
Stevens v. *Pyle*, 30 Beav. 284.

No reply was called for.

Lindley, L.J.—I cannot quite construe this policy as Kekewich, J. has done. It is a curious document. It is a policy of assurance and a voluntary post-nuptial settlement in one. [His Lordship read the policy and stated the facts of the case and continued:] The words "in conformity with the statute" refer to a statute of the State of New York relating to the property of married women. Those words mean, therefore, in accordance with American law. That is the policy part of the document, but is not the part of the document with which we are concerned. We are concerned with the voluntary post-nuptial settlement part. We have to ascertain the true construction of that part. First of all, I do not think that American law has anything to do with it, and in that I agree with the view taken by Kekewich, J. It is a voluntary post-nuptial settlement by a married man of a policy of assurance on his own life for the benefit of his wife and children. It is a settlement of the moneys assured by the policy in trust to pay the same to the wife for her sole use. If she is alive she is to have the policy moneys for her sole use. If she is not alive then the trust is to pay the policy moneys to the children of the assured for their use. The trust is to pay to his children, not her children, nor even his children by her. So far, therefore, as it is a voluntary settlement on his children, it includes all his children. Consequently any children by his wife Eliza Jane Skilbeck or any other wife would be benefited. That shows that the children to be benefited may not all come into existence until after the wife is dead. Then another case is provided for: If when the policy falls in there be no children surviving, then the policy moneys are to be payable to the executors of the assured. What is the effect of that? All his children are to take—not necessarily those surviving the wife, nor those surviving him. They all take vested interests. That is what it says. So far I am in no doubt. Then the question is, whether the children take as tenants in common or as joint tenants. On this point we differ from Kekewich, J. In my opinion all the children of the assured take vested interests as tenants in common, subject to being divested if

none survive the assured. The appeal must therefore be allowed as to this part of the case.

LOPES, L.J.—It is only the settlement part of this policy that we are concerned with. The limitations are not clear, but I must construe them according to the language used. It seems to me that all the children of the assured are to take vested interests subject to be divested if none survive the assured. If none take, then the policy moneys are to go over to the executors of the assured. That is the best construction that I can put on the language of the policy. Then do the children take as tenants in common or as joint tenants? I think that they take as tenants in common. Therefore the surviving daughter of the assured and the legal personal representative of the other daughter who has died will share equally in the policy moneys.

RIGBY, L.J. delivered judgment to the same effect.

Order varied.

Solicitors for the appellant, *Ramsden, Radcliffe, and Co.*, agents for *Ramsden, Sykes,* and *Ramsden,* Huddersfield.

Solicitors for the respondent, *Iliffe, Henley,* and *Sweet,* agents for *Laycock, Dyson,* and *Laycock,* Huddersfield.

Friday, July 19.

(Before KAY and SMITH, L.JJ.)

PALMER *v.* BRAMLEY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Landlord and tenant—Distress—Suspension of right to distrain—Bill of exchange given for rent—Agreement to suspend right to distrain.

The taking by a landlord of a bill of exchange from his tenant for rent is evidence of an agreement by the landlord to suspend his right of distress for that rent until the bill has become payable.

THIS was an appeal by the defendant from the judgment of the Divisional Court (Wright and Kennedy, JJ.) ordering a new trial of the action which had been tried by the judge of the County Court at Leicester.

This was an action of replevin. The defendant was the landlord of certain premises which had been demised by him to one Knight, as yearly tenant, at a rent of 80*l.* a year, payable quarterly on the usual quarter-days. The rent due at Christmas 1894 was not paid, and on the 14th Feb. 1895, Knight, upon the suggestion of the defendant, gave the defendant a bill of exchange for 40*l.*, payable two months after date, in respect of the rent which had become due at Christmas 1894, and of the rent which would become due and payable on the following 25th March.

On the 20th Feb. 1895 Knight made an assignment to the plaintiff of all his property for the benefit of his creditors.

On the 19th March the defendant distrained for the quarter's rent due at Christmas 1894.

The plaintiff brought an action of replevin in the County Court. At the hearing of this action before the County Court judge and a jury, the learned judge held that the mere giving of the bill of exchange was no evidence of an agreement by the landlord to suspend his right of distress, upon the authority of the case of *Davis* v. *Gyde* (2 A. & E. 623), and withdrew the case from the jury, and entered judgment for the defendant.

Upon appeal to the Queen's Bench Division, the Court (Wright and Kennedy, JJ.) made an order directing a new trial. Leave to appeal was given.

The defendant appealed.

T. H. Walker for the appellant.—The mere fact that the tenant gave, and the landlord accepted, a bill of exchange for the rent which was in arrear is no evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill:

Davis v. *Gyde*, 2 A. & E. 623.

There must be some other evidence that there was such an agreement. The bill of exchange was only a collateral security, and, though it might suspend the right of action for the rent in arrear, it could not affect the right of distress. The case of *Baker* v. *Walker* (14 M. & W. 465) is not applicable. He referred also to

Drake v. *Mitchell*, 3 East, 251;
Davidson v. *Allen*, 20 L. Rep. Ir. 16.

A. T. Toller, for the respondent, was not called upon to argue.

KAY, L.J.—In this case I am of opinion that we ought to uphold the decision of the Divisional Court. The defendant took a bill of exchange for rent in arrear, and for the rent for the current quarter, which bill became due and payable after the expiration of the current quarter. Upon that bill he would have a proper remedy for the rent due to him. It may be inferred from that, that the landlord agreed that his remedy by distress should be suspended upon the bill being given. The taking of the bill of exchange is some evidence of such an agreement; I do not say that it is conclusive evidence. That being so, the County Court judge ought not to have withdrawn the case from the jury, and all the facts ought to have been left to the jury, including the fact of the taking of the bill of exchange. As to the case of *Davis* v. *Gyde* (*ubi sup.*), that case was decided upon demurrer to a plea that a promissory note not then due had been given for rent. It was not averred that the note was accepted in satisfaction, or that by special agreement it suspended the right of distress, and the plea was held to be insufficient. It was not decided that the giving of a bill or note was no evidence of such an agreement, if such an agreement had been averred. The order of the Divisional Court, directing a new trial, was therefore right, and this appeal must be dismissed.

SMITH, L.J.—It is not necessary for us to overrule the case of *Davis* v. *Gyde* (*ubi sup.*), which was rightly decided upon the pleadings as they stood. In that case it was held that the averments in the plea were insufficient, because it was not averred that the note was taken in satisfaction, or that there was any agreement to suspend the right of distress. In *Baker* v. *Walker* (*ubi sup.*) Parke, B. said, "where a man who has a judgment debt"—and rent is on the same footing as a judgment debt—"takes from his debtor a promissory note for the amount payable at a certain time, it

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

must be inferred that he thereby entered into an agreement to suspend his remedy for that period." It is clear, therefore, that it may be inferred that there was such an agreement, and that is sufficient to make it necessary to leave the question to the jury. It cannot be that, in the absence of other evidence than the giving of the bill, it must be held that the bill was taken as collateral security only. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Tibbitts* and *Tickner*, for *Harvey* and *Clarke*, Leicester.

Solicitors for the respondent, *Pitman* and *Sons*, for *Hadley*, *Partridge*, and *Waring*, Leicester.

July 17 *and* 30.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Metropolitan District Railway Company v. Fulham Vestry. (*a*)

Metropolis Management Acts—Paving new street—Apportionment of expenses—Mode of apportionment—Discretion of local authority—Metropolis Local Management Act 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77.

In apportioning the expenses of paving a new street among the owners of land abutting thereon, under sect. 77 *of the Metropolis Management Act* 1862, *the local authority have a discretion as to the mode of apportionment, and, if made* bonâ fide, *the apportionment cannot be questioned.*

This was an appeal by the Metropolitan District Railway Company from the judgment of the Divisional Court (Grantham and Wright, JJ.) upon a case stated by a metropolitan police magistrate.

The vestry of Fulham summoned the Metropolitan District Railway Company for nonpayment of a sum of money charged on them as owners of certain lands abutting on a new street, in respect of the expenses of certain paving works to be carried out under the provisions of the Metropolis Management Acts.

Upon the hearing of the summons before a metropolitan police magistrate, it was proved that certain persons were charged, as owners of land abutting upon the new street, with amounts representing two-thirds of the estimated expense of paving the footway and one-half of the carriageway opposite to and adjoining their respective lands; that this charge was made pursuant to a resolution of the vestry that it was just and expedient to make it; and that the Metropolitan District Railway Company were charged as owners of land abutting on the street with an amount representing the full estimated expense of paving the footpath and one-half of the carriage-way opposite to and adjoining their land.

The appellants objected that the apportionment was bad; but the magistrate made an order for payment of the amount charged upon the appellants.

Upon a case stated by the magistrate, the Divisional Court (Grantham and Wright, JJ.) affirmed the order of the magistrate.

The Metropolitan District Railway Company appealed.

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

Courthope Munroe for the appellants.—The Metropolis Local Management Act 1862, by sect. 77, empowers the local authority, in apportioning the expenses of paving a new street, to charge the owners of land in a less proportion than the owners of houses. This enactment was passed in order to make the owners of land liable to contribute to the expenses of paving a new street, as well as the owners of houses, and then further provides that owners of land may be charged in a less proportion than owners of houses:

Plumstead Board of Works v. *British Land Company*, 32 L. T. Rep. 94; L. Rep. 10 Q. B. 203.

If the local authority have a general discretion as to the way in which they will apportion such expenses, then the latter provision of sect. 77 would be quite unnecessary. When the vestry have fixed the proportion in which owners of land and owners of houses are to be charged, then the expenses must be apportioned rateably among the owners in each class. The case of *Stotesbury* v. *Vestry of St. Giles* (59 L. T. Rep. 473), in which it was held that the local authority had a general discretion, was wrongly decided and ought to be overruled. The action of the local authority in apportioning the expenses can be appealed against:

Whitchurch v. *Fulham Board of Works*, 13 L. T. Rep. 631; L. Rep. 1 Q. B. 233;

Reg. v. *Marsham*, 65 L. T. Rep. 778; (1892) 1 Q. B. 371;

Stroud v. *Wandsworth District Board of Works*, 70 L. T. Rep. 190; (1894) 2 Q. B. 1.

Channell, Q.C. and *R. Cunningham Glen* for the respondents.—The local authority have a discretion as to the mode in which the expenses of paving a new street shall be apportioned There is nothing in sect. 77 of the Act of 1862 to restrict that discretion, and there is no statutory provision of any kind under which a local authority in the metropolis are directed to apportion according to frontage or in any other way. The case of *Stotesbury* v. *Vestry of St. Giles* (*ubi sup.*) governs this case, and was rightly decided. The apportionment of expenses made by a local authority cannot be made the subject of appeal in any court upon the ground that it is unequal:

Nesbitt v. *Greenwich Board of Works*, 32 L. T. Rep. 762; L. Rep. 10 Q. B. 465;

Davis v. *Board of Works for Greenwich District*, 72 L. T. Rep. 674; (1895) 2 Q. B. 219.

Courthope Munroe replied. *Cur. adv. vult.*

July 30.—The following judgments were read:—

Kay, L.J.—Before the passing of the Metropolis Local Management (Amendment) Act 1862, the local authority intrusted by the Metropolis Local Management Act 1855 with the duty of paving a new street, and recovering the expenses from the owners of the houses forming such street, had no power to charge the owners of land abutting on the street, nor any express power of apportioning the expenses. The object of sect. 77 of the first-mentioned Act was to supply these deficiencies in the power of the local authority. The question in this case is whether, when an apportionment has been made in which some owners of land have been charged with a larger proportion of the expenses than others, the magistrate, or the High Court, in the absence of *bona*

fides have any right to interfere. In other words, does the Act impose an obligation upon the local authority to make the apportionment rateably, or upon any other principle? At once the question arises, what is meant by rateably or principle? Is the apportionment to be according to length of frontage, value of land, or what is to be the basis of it? Length of frontage can hardly be in all cases the basis. One owner might have land only a few yards deep on which no valuable building could ever be erected. The next might, with the same frontage, have a considerable depth of land which might be available for the erection of large buildings, and might be of much greater value. I should expect that the Legislature would leave a large discretion in the local authority to consider all the circumstances of each case, and make what would be, in their opinion, a fair apportionment having regard to all such considerations. The appellants are owners of land adjoining a new street in the parish of Fulham. They complain that, in the apportionment of the expenses of paving that street, other owners of land abutting upon the street have been charged only two-thirds of the estimated expense of paving the footpath and half the carriage-way opposite their respective pieces of land, whereas the appellants have been charged with the full cost of the paving opposite their land. Sect. 77 of the Act of 1862 provides, first, that the owners of land abutting upon a new street "shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein." It is not said whether the contribution is to be according to length of frontage, value of land, or what is to be the ratio. But the next words do create some difficulty, "provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do," and any such costs or expenses are to be apportioned by the vestry or board. The proviso seems to imply that the vestry could not have charged the owners of land in a less proportion than the owners of houses without that express provision. In other words, that the statute means owners of houses and land must *primâ facie* be charged rateably, but, as between land and houses, land may be charged in a less proportion than houses. Therefore it is argued, as between owners of houses and as between owners of land, the charge must be rateable, though the one set of owners may be charged in a less proportion than the other set. The charge upon each set must be rateable *inter se*. But the difficulty still remains, what does rateable mean. The word is not used in the Act; but, if implied, it must be intended that the local authority is not to divide the charge according to length of frontage only. No express principle of division is laid down. It seems to me that this is intentionally avoided for the very purpose of giving the local authority a large discretion. In *Stroud* v. *Wandsworth District Board of Works* (*ubi sup.*) the Court of Appeal had to consider the 3rd section of the Metropolis Management (Amendment) Act 1890, which empowered the local authority from time to time to execute "any necessary works of repair" upon a carriage-road; and upon a consideration of the scheme and object of these Acts the court came to the conclusion that, although that was not expressed in distinct words, the necessary implication was that the question whether the repair was necessary or not was left to the discretion of the local authority, and that the magistrate or court could not interfere. In *Stotesbury* v. *Vestry of St. Giles* (*ubi sup.*) the same question that arises in the case before us came before a Divisional Court. The difficulty upon the words of sect. 77, to which I have referred, does not seem to have impressed the Divisional Court, although it is noticed in the judgment of one of the learned judges. They held that a *bonâ fide* apportionment among different owners of land could not be interfered with by the magistrate. In my opinion, a large discretion as to apportionment is intentionally by the statute vested in the local authority, and, so long as it is exercised *bonâ fide*, as in this case, the magistrate or court has no jurisdiction to interfere.

SMITH, L.J.—The question in this case depends upon what is the true meaning of sect. 77 of the Metropolis Local Management (Amendment) Act 1862 (25 & 26 Vict. c. 102), and is, whether, when a local authority has paved or is about to pave a new street within the metropolis, that authority has a discretion as to how it will apportion the expenses of so doing between the owners of land abutting thereon, or whether it is bound to apportion the expenses equally between each owner of land, either as regards frontage, or rateable value, or on some other defined principle, wholly irrespective of the varying amenities the different plots of land may possess, and the different advantages they may derive from the paving of a new street. I agree that an apportionment made by a local authority is unimpeachable upon appeal in a court of law (*Nesbitt* v. *Greenwich Board of Works* (*ubi sup.*), unless that authority has exceeded its jurisdiction in doing what it has done: (*Reg.* v. *Marsham* (1892) 1 Q. B. 371.) Unless, therefore, sect. 77 enacts that the local authority shall have no discretion as to how it shall apportion the expenses of paving a new street between the abutting landowners, then the apportionment in this case must stand, for the local authority has acted within its jurisdiction in apportioning as it has done the expenses of paving between different landowners. In the year 1855, by the Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 105, it was enacted that the owners of houses forming a new street shall on demand pay to the local authority the estimated expenses of paving such street. This section in no way directs in what manner the expenses were to be borne by the different house owners, nor did it provide for any apportionment being made by the local authority between them. So matters rested till the year 1862, when the Act of 1855 was amended by the Metropolis Local Management (Amendment) Act of that year (25 & 26 Vict. c. 102). By sect. 77 of this Act, owners of land abutting upon a new street were placed under contribution towards these paving expenses as owners of houses had theretofore been, and the section enacts that, "when any vestry or district board under the powers of the Act of 1855 had paved or were about to pave any new street, the owners of the land abutting upon such street should be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses

therein; provided that it should be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do," and any such expenses should be apportioned by the vestry or district board, who were empowered to recover the same from the owners, or, at their discretion, to accept payment of the amount apportioned in respect of each house or premises by instalments. It is clear that this apportionment of the expenses is to be made between the owners of houses and of lands abutting upon the new street, and it will be noticed that the section in no way enacts how this apportionment is to be made, whether according to frontage or to rateable value, or to any defined principle. This is left to the discretion of the local authority. It is not suggested in this case that the local authority, in the apportionment which they have made, have charged the owners of land more than the owners of houses, but what the authority have done, and what is complained of by the appellants, who are landowners, is, that they have not apportioned the expenses equally between each landowner. To test the point taken, suppose the case in which there is no landowner, and nothing but house owners in a new street. Is there anything in this section, which was passed to bring landowners under contribution, and to give the right of apportionment to the local authority, to compel that authority to apportion the same amount between one house owner in a street who has, say, a house with a twenty-foot frontage and a depth of eighteen feet, and the next house owner who has a house with a like frontage, and treble or quadruple its depth? It certainly was not so enacted by the Act of 1855, and I cannot find it in the Act of 1862; and, indeed, the case of the *London School Board* v. *St. Mary, Islington* (33 L. T. Rep. 504; 1 Q. B. Div. 65), would tend to show that there is no such restriction. It is true that the point now taken was not argued, though it stood out clearly upon the case. If the local authority have a discretion as to how to apportion the expenses of paving between the different house owners in a new street, it seems to me that they have a like discretion as regards the different landowners therein. But it was said the words in sect. 77, which made it lawful for the local authority to charge owners of land a less proportion than owners of houses, show that this is the only inequality tolerated by the section, and it is upon this that the appellants rest their case. If this be the meaning of the Legislature, in my judgment it would not have been left in this ambiguous manner, but there would be found some provision that the local authority were to apportion the expenses, either upon frontage (as in sect. 150 of the Public Health Act 1875), or upon rateable value, or upon some other principle of equality; but, instead of this, we find that the apportionment is left wholly to the vestry to decide without fetter or restriction, except these words have the effect contended for. In my judgment this is not the true interpretation of these words, which were inserted, not for the purpose of showing how an apportionment upon owners of houses was to be made, for they have no relation thereto, but to make it clear that landowners, when brought under contribution, might be charged less than owners of houses as regards paving expenses, if the local authority thought fit, and that the discretion which is otherwise given to the local authority by the rest of the section is not taken away by these words. For these reasons, as well as those given in the judgments of my brothers Wills and Grantham, in the case of *Stotesbury* v. *The Vestry of St. Giles* (*ubi sup.*), in the year 1888, to review which the present appeal is brought, I am of opinion that it fails, that the local authority have acted within the jurisdiction given them, and that this appeal must therefore be dismissed.

Lord ESHER, M.R. concurred.

Appeal dismissed.

Solicitors for the appellants, *Baxter* and *Co.*

Solicitor for the respondents, *Thomas Blanco White.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, June 26.

(Before NORTH, J.)

Re JEFFERY; ARNOLD *v.* BURT. (*a*)

Will—Gift for such members of a class as attain twenty-one — Intermediate income — Infants — Contingent interest — Maintenance — Conveyancing and Law of Property Act 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

A testator gave his residuary real and personal estate upon trust for all and every the present and future-born children of his son and two daughters, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares, and settled the shares of those born in his lifetime upon them for life, with remainder to their children. Some of the beneficiaries had attained twenty-one, and others were infants; and the class was capable of increase by the birth of other members.

Held, on an originating summons taken out by the trustees of the will for the determination of the question who were entitled to the accumulated income of the estate, that it was divisible into as many shares as there were members of the class in existence, that one such share was payable to each adult member, and that the share of each infant member was applicable towards its maintenance under sect. 43 of the Conveyancing Act of 1881.

ORIGINATING SUMMONS, taken out on the 21st March 1895, for the determination of the question whether the whole surplus income of the residuary estate of William Jeffery belonged to such of his grandchildren as had for the time being attained twenty-one, in exclusion of those grandchildren who had not attained that age; or whether the latter also were entitled to contingent shares in such income, and if so, whether such contingent shares were applicable to their maintenance under sect. 43 of the Conveyancing Act of 1881.

William Jeffery, who died in 1887, by his will gave his residuary real and personal estate to trustees upon trust for sale and conversion, and for investment as therein mentioned, and subject to the payment, out of the income thereof, of certain life annuities, the testator declared that his estate should be held in trust for all and every the

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

present and future-born children of his son Clayton William Jeffery, all and every the present and future-born children (except William Charles Burt) of his daughter Matilda Jane Burt, and all and every the present and future-born children of his daughter Paulina Mary Burt, who, whether in his lifetime or after his decease, being a son or sons, should have attained or should attain twenty-one, or being a daughter or daughters should have attained or should attain that age, or should have married or should marry, and if more than one in equal shares, the respective shares of granddaughters born in his lifetime to be for their separate use. The respective shares of the testator's grandchildren born in his lifetime were then settled upon them for life with remainder to their children.

By an order, dated the 13th Nov. 1890, made upon an originating summons taken out by some of the beneficiaries under the will of the testator, it was declared that, according to the true construction of the will, the beneficiaries thereunder who had for the time being attained twenty-one were entitled in equal shares to the whole of the surplus income accrued up to the 9th Nov. 1890, after payment thereout of the annuities, but no declaration was made with regard to future income: (*Re Jeffery*; *Burt* v. *Arnold*, 64 L. T. Rep. 622; (1891) 1 Ch. 671.)

Since the 9th Nov. 1890 surplus income not affected by the order of the 13th Nov. 1890, to the amount of 422*l.* 3*s.* 2*d.*, had accrued in the hands of the trustees of the will.

The testator's son Clayton William Jeffery was still childless. The testator's daughter Matilda Jane Burt had died on the 14th Dec. 1894, leaving, besides William Charles Burt, two children, both of whom had attained twenty-one, and were alive but unmarried. The testator's daughter Paulina Mary Burt, who was living apart from her husband, had nine children born in the testator's lifetime, still alive, of whom six had attained twenty-one, and also three infant grandchildren.

The summons was taken out by the trustees of the will, the defendants being the children (other than William Charles Burt) of Matilda Jane Burt, and the children and grandchildren of Paulina Mary Burt.

Curtis Price for the plaintiffs.—The order of the 13th Nov. 1890 relates only to a sum of surplus income accumulated on the 9th Nov. 1890. The question is whether, after the decision of the Court of Appeal in *Re Holford*; *Holford* v. *Holford* (70 L. T. Rep. 482; Ib. on app. 777; (1894) 3 Ch. 30), that beneficiaries under age are entitled to contingent shares in the income of settled property, the surplus income accumulated since the 9th Nov. 1890 is to be divided among such of the testator's grandchildren as have for the time being attained twenty-one, or whether the infant grandchildren also are entitled to contingent shares in such income. In the latter case I submit that the trustees can apply the contingent shares of the infants toward their maintenance, by virtue of sect. 43 of the Conveyancing Act of 1881.

Coltman for the adult children of Matilda Jane Burt and Paulina Mary Burt.—The matter is *res judicata*. The order of the 13th Nov. 1890, made with respect to the surplus income of the testator's estate in a proceeding between practically the same parties which has not been appealed against, is conclusive. The decision in *Re Holford* (*ubi sup.*) does not apply here, since in that case the class of beneficiaries was completed, while here it is capable of increase. If the infant members of the class of beneficiaries are entitled to share in the income of the settled property, then the rights of unborn members of the class must be provided for.

Wright Taylor for the infant children of Matilda Jane Burt and Paulina Mary Burt.—The former order did not apply to future income; and the decision in *Re Holford* (*ubi sup.*) shows that the infant beneficiaries are entitled to contingent shares in the sum of income accumulated since the 9th Nov. 1890.

Seddon for the infant grandchildren of Paulina Mary Burt.

NORTH, J.—What I must do is clear. I took a certain view of the law in *Re Jeffery*; *Burt* v. *Arnold* (*ubi sup.*) and in *Re Adams*; *Adams* v. *Adams* (68 L. T. Rep. 376; (1893) 1 Ch. 329). I decided in *Re Jeffery*; *Burt* v. *Arnold* (*ubi sup.*), how the surplus income which had then accrued due was to be applied. I am now asked to decide as to income which had not then accrued due. I there laid down a principle which I should have followed now and come to a similar conclusion, but for the fact that the Court of Appeal in *Re Holford*; *Holford* v. *Holford* (*ubi sup.*), on, no doubt, a different will, came to a different decision, and two of the three judges expressly said that *Re Jeffery*; *Burt* v. *Arnold* (*ubi sup.*), was wrongly decided in confining the income to those beneficiaries who had attained twenty-one, and excluding those born who had not attained twenty-one. Mr. Coltman endeavoured to distinguish the present case from *Re Holford*; *Holford* v. *Holford* (*ubi sup.*), because here the class is capable of increase, while there it was not. But I do not see any reasonable distinction in that fact. The Court of Appeal having held that my former decision was wrong, I do not intend to follow it now. As to what I did then decide there has been no appeal, and I cannot now vary it. That could only be done by the Court of Appeal. But there is no *res judicata* in what is now before me, and I must do what I think the Court of Appeal would do in this case, having regard to what was said in *Re Holford*; *Holford* v. *Holford* (*ubi sup.*). I decide that the income is not to be divided among those beneficiaries only who have attained twenty-one.

Wright Taylor.—Since the infant beneficiaries have been held entitled to share in the income, their contingent shares of income are applicable for their maintenance under sect. 43 of the Conveyancing Act of 1881, and the fact that the class is capable of increase by the birth of other children is immaterial:

Mills v. *Norris*, 5 Ves. 335.

NORTH, J.—In *Re Holford*; *Holford* v. *Holford* (*ubi sup.*), Lindley, L.J. says: "There is good sense in saying that the income of property given contingently to a class of persons belongs to its members for the time being as against persons who are only entitled if and when the class ceases to exist; but there is no sense in saying that one of a class takes the whole income in which other persons belonging to the same class have already a contingent interest which may become absolute. In *Mills* v. *Norris* (*ubi sup.*) and *Scott* v. *Scar-*

borough (1 Beav. 154) the question for decision was, whether some members of a class were entitled to the income of property given to them and others of the same class who were not yet born, and the answer was 'yes.' The decision was obviously reasonable and just. To treat the future possible rights of unborn persons as existing rights, even if only contingent, would have been to depart from sound principles for no sufficient justification." The income must be divided into eleven shares, there being eight adult and three infant beneficiaries. The trustees must pay one share to each of the adults, and I declare that they have power under sect. 43 of the Conveyancing Act of 1881 to apply the remaining three shares towards the maintenance and education of the three infants respectively. This will be so, as long as the number of beneficiaries remains unaltered.

Solicitors: *Whitehouse* and *Etherington*, for *Tylee* and *Mortimer*, Romsey; *J. J. Harlow*, for *Goater* and *Blatch*, Southampton.

June 26 and 27.

(Before KEKEWICH, J.)

MELVILLE *v.* MIRROR OF LIFE COMPANY. (*a*)

Copyright—Photograph — Infringement — Author —Proprietor—Penalties—Fine Arts Copyright Act 1862 (25 *&* 26 *Vict. c.* 68), *ss.* 1, 6.

In 1894 *A. took the photograph of B. a well-known athlete. On the* 28*th Sept.* 1894 *A. was registered as the proprietor of the photograph of B. On the* 20*th Oct.* 1894 *the defendants copied the photograph of B. in their paper.*

Held, that the author of a photograph is the person who arranges the whole taking of the photograph, and not the person who does the manual operations, and that the plaintiff was entitled to a penalty of 5*l.*

THIS was an action brought by the plaintiff, as proprietor of the photographs of two well-known athletes, namely, George Crossland and F. E. Bacon, for infringement of copyright. On the 28th Sept. 1894 the plaintiff was registered at Stationers' Hall as the proprietor of the photograph of Crossland. The defendant company were the proprietors, and the defendant A. H. McWade was the printer and publisher of a weekly paper called the *Mirror of Life*. The plaintiff alleged that the defendants on the 6th Oct. 1894 had repeated and copied the photograph of Bacon in the *Mirror of Life* of that date, and on the 20th Oct. the photograph of Crossland, and had published and distributed a very large number of copies of their paper of those dates.

The plaintiff claimed an account of the number of copies of the *Mirror of Life* of the said dates published and sold by the defendants; delivery to the plaintiff of all copies of the *Mirror of Life* containing such wrongful copying and repetition then in possession of the defendants, and a penalty of 10*l.* for each copy so published and sold.

At the trial of the action the plaintiff failed to establish his case as to the photograph of Bacon.

As to Crossland, the plaintiff said he was in the habit of taking and selling to the public the photographs of well-known athletes, and Crossland allowed the plaintiff to take his photograph. The plaintiff made no charge for taking the photograph, but gave a certain number of copies to Crossland, and sold certain additional copies to him. There was no written agreement, but Kekewich, J. found as a fact that the plaintiff was entitled to sell copies of the photograph.

The plaintiff and his son were both present when the photograph was taken. The son put Crossland in position, and the father stood by, but held up his hand to show the direction in which Crossland was to look.

The defendants wrote to the plaintiff asking for a copy of the photograph, and for permission to print and publish it in the *Mirror of Life*. The plaintiff did not answer the letter. The defendants then obtained a copy of the photograph from a friend of Crossland, and reproduced it in the *Mirror of Life* of the 20th Oct. 1894. It was stated that 8000 copies of that number were sold.

Sect. 1 of the Fine Arts Copyright Act 1862 provides:

The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration the person so selling or disposing of, or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorised, shall have been made to that effect.

Sect. 6 of the Act provides:

If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition copy or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit or distribute, or offer for sale, hire, exhibition or distribution, or cause or procure to be imported, sold, published, let to hire, distri-

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

buted, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations, made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies shall be forfeited to the proprietor of the copyright.

Le Riche for the plaintiff.—The defendants ought to pay penalties for every copy sold, but they are willing to limit the penalties to twenty-five copies:

Ex parte Beal, 3 Q. B. 387;
London Stereoscopic and Photographic Company v. *Kelly*, 5 Times L. Rep. 169.

Eve for the defendants.—The plaintiff is not the registered proprietor of the copyright within sect. 6 of the Fine Arts Copyright Act 1862, nor was he the author of the photograph within sect. 1 of the Act; the son did all the work of posing Crossland. If the plaintiff was the author of the photograph, there was no agreement in writing as required by sect. 1. It is clear that the photograph was executed for good or valuable consideration. Then the plaintiff is not entitled to get penalties from the defendants; if anyone is liable to penalties it is Crossland. He referred to

Pollard v. *Photographic Company*, 60 L. T. Rep. 418; 40 Ch. Div. 345;
Tuck and Sons v. *Priester*, 57 L. T. Rep. 110; 19 Q. B. Div. 48, 629;
Nottage v. *Jackson*, 49 L. T. Rep. 339; 11 Q. B. Div. 627.

Le Riche replied.

KEKEWICH, J. stated that in the case of Bacon there had been no infringement of the plaintiff's right, and continued:—In the case of Crossland, I have, in the *Mirror of Life* of the 20th Oct. 1894, a reproduction of the registered photograph of the plaintiff. Of that there can be no doubt. The two portraits are substantially the same, and intended to be the same. It is taken from a copy supplied to the *Mirror of Life* by Crossland himself through his friend. The person who sues for the penalties in respect of the multiplication of copies is Mr. Melville, sen., the photographer, carrying on business, not apparently in partnership with, but together with, his son. The father being the principal photographer, the question is whether he is to be held to be the author of this photograph. The evidence is somewhat conflicting; but my conclusion is that the son assisted the father—that whatever the son did was merely as assistant of the father; he was throughout the agent, and not the principal; the father was the principal throughout. Whether the son arranged the furniture, posed the subject, went to the dark room for the plate and put it into the camera, or eventually took off the cap, seem to me to be matters of detail. What I have to inquire into is the real relation of the father to the son in the matter. I have no doubt that the son, though according to his own view perfectly competent to do it all himself, did, as regards this particular portrait, act under the direction and as agent of his father. It seems to me that that makes the father the author of the photograph directly within such definition as is to be found in *Nottage* v. *Jackson* (49 L. T. Rep. 339; 11 Q. B. Div. 627; and takes the father outside the criticism of the Master of the Rolls and the Lords Justices in that case, which would go to show that an agent is not an author within sect. 1 of the Fine Arts Copyright Act 1862, and that the principal cannot be the author unless he is the active principal. In that case, no doubt, the principal was the gentleman who sent someone to Kennington Oval to take the photographs of the Australian cricketers playing there, and the court did not see its way to saying that a gentleman sitting in his room in Regent-street could be the author of a photograph which was being taken at Kennington Oval. Then there is the case of *Kenrick and Co.* v. *Lawrence and Co.* (25 Q. B. Div. 99), in which *Nottage* v. *Jackson* was cited and considered. I think the right conclusion is that the plaintiff, Mr. Melville, sen., was the author of the photograph. That being so, he is clearly entitled to the copyright, unless the proviso in sect. 1 of the Fine Arts Copyright Act 1862 is applicable. Mr. Eve has contended that the proviso is applicable because a valuable consideration passed between Crossland and Melville. The wording of the section is far from clear, but upon the whole I am of opinion that Mr. Eve's contention is right on that point. The evidence as to what took place is somewhat conflicting, but my conclusion, after weighing the evidence carefully, is that the real agreement between Crossland and Melville was that Melville should be at liberty to sell, though he made no charge for taking the photograph. It is part of Melville's business to sell the photographs of sporting celebrities, and merely to be allowed to take this photograph of Crossland, with the right of selling it, was an advantage to him. I think, therefore, that there was good or valuable consideration within the meaning of the proviso. But then, in order that the proviso should apply, it is necessary that the negative should have been made or executed by the photographer for or on behalf of some other person. I cannot see how the negative of this photograph can be said to have been executed for or on behalf of Crossland. It was a photograph of Crossland; but it is not pretended that he was to have the negative, or any right of property in it. It seems to me that a man cannot be said to make a photograph for or on behalf of another, when that other is not entitled to have the negative of the photograph when made. My conclusion therefore is, that though the photograph was of Crossland, yet, as the negative was not made or executed for or on behalf of him, the proviso has no application to the present case. Then comes the question as to the effect of sect. 6. I see no reason why I should not give to the words "any other person" their full grammatical meaning, and hold that they include every person other than the author of the photograph, and consequently include the person photographed, if he is not the author of the photograph. I think that the person photographed, as well as all the rest of the world, is excluded from multiplying copies of a photograph of himself of which he is not the author. It may be, therefore, that in this case Crossland himself is liable to penalties. But that does not, in my opinion, excuse the defendants, the Mirror of Life Company. They, however, appear to have acted in a straightforward manner. They applied by letter to Melville for this photograph, and, receiving no answer, they applied to Crossland

himself, and got it through his friend. They cannot plead ignorance as an excuse; but they have not acted in such a way as in my judgment to expose themselves to any serious penalty. Upon the whole I think that, if I award a penalty of 5*l.* to the plaintiff, the justice of the case will be satisfied.

Solicitors: *Victor Thomasset*, for *Joseph Sims*, Manchester; *T. Trimnell.*

Tuesday, July 2.

(Before KEKEWICH, J.)

JOHN HARPER AND Co. LIMITED *v.* WRIGHT AND BUTLER LAMP MANUFACTURING COMPANY LIMITED. (*a*)

Design — Infringement — Patents, Designs, and Trade Marks Act 1883 (46 *&* 47 *Vict. c.* 57), *sect.* 58.

The plaintiffs were the registered proprietors of two designs for oil stoves, consisting of a church window with tracery above and below. The defendants sold similar stoves, and adopted the design of a church with tracery above and below, but the two church windows and tracery were different in character. The plaintiffs brought an action for an injunction.

Held, that only the actual design, and not the idea, was protected by registration; and as the defendants' design was essentially different from those of the plaintiffs the action failed.

THIS was an action brought by the plaintiffs for an injunction to restrain the defendants from manufacturing, selling, offering for sale, or in any manner dealing with stoves to which the plaintiffs' registered designs, or any part thereof, or any obvious or colourable imitation thereof, had been applied, and from infringing the rights of the plaintiffs in their said designs. They also claimed damages or an account of profits.

The plaintiffs were the registered proprietors of two designs for oil stoves, sold by them under the name of the "Cathedral Stove"; the design consisting of a church window with tracery above and below. The design of the church window and tracery was placed upon the sides of the frame of the stove which contained an oil lamp.

The defendants also sold oil stoves of a similar description, and also adopted a design of a church window with tracery above and below, but the defendants' church window and tracery was quite different to the church window and tracery of the plaintiffs.

The defendants' designer admitted that he had one of the plaintiffs' stoves before him, but that he was instructed to make an original design, which he had endeavoured to do.

Warrington, Q.C. and *J. H. Fisher* for the plaintiffs.—The defendants have appropriated the design of the plaintiffs, and the defendants' design is a "fraudulent or obvious imitation" within the meaning of sect. 58 of the Patents, Designs, and Trade Marks Act 1883:

Hecla Foundry Company v. *Walker, Hunter, and Co.*, 61 L. T. Rep. 738; 14 App. Cas. 550;
Grafton v. *Watson*, 51 L. T. Rep. 141.

Marten, Q.C. and *W. N. Lawson*, for the defendants, were not called on.

KEKEWICH, J.—The first and great difficulty in arriving at a conclusion on a question of infringement of design is to know what the design is. I have to say what constitutes this design of the plaintiffs for their Cathedral stove, and without disregarding details on the one hand, or attaching too much importance to them on the other, to ascertain whether the essential character of the design has been infringed or not. Now what is the essential part of this design? To my mind there can be no doubt whatever about it. The essence of the whole thing is a window borrowed from ecclesiastical architecture of a class which is to be found in cathedral churches or ancient halls, or among modern windows modelled on the old architecture. That is the essential part, with the tracery above and below. The idea was one of considerable novelty, and was carried into effect with considerable novelty of design. It is said that the defendants have imitated this design. They certainly have made another article which is extremely like that made by the plaintiffs. But two things may be extremely alike, and yet one may not be an imitation of the other. I was struck with the straightforwardness with which the designer employed by the defendants said that he was instructed by them to make an original design for a similar article. With one of the plaintiffs' stoves before him he endeavoured to make an original design for a similar stove. He knew from those who instructed him that the Cathedral stove with the church window and tracery had been a success and attractive to the public eye, and that it was desired to make another stove very similar, also with a church window, also with tracery, and also original. Let me reduce that to a practical test. A man engaged on designs for any class of article makes a design according to a window on one side of Westminster Abbey. Another man sees how captivating this is to the public, and he makes a design of another window on another side of the Abbey. There is no difficulty, either at Westminster Abbey or at any other fine old church, in finding windows of a different character. To my mind there can be no harm in the conduct of the second man. The idea of the first man is taken, but it is not the idea which is registered. The plaintiffs, unfortunately, have lost the benefit of their original idea; but they have lost it through another design which is original except in so far as the idea of it was borrowed from their design. I have had the opportunity of looking at the two stoves, and the more I have looked at them the more I have been convinced that they are different. The tracery above and below is different, and the two windows themselves are essentially different, since they belong to entirely different periods of architecture. The sole question is whether there has been an infringement in the sense of imitation such that the two stoves are really the same in point of design. I am of opinion that they are not, and that there has been no infringement of the plaintiffs' design by the defendants. The action therefore fails.

Solicitors: *E. Flux, Leadbitter*, and *Paterson, Slater*, and *Co.*, Darlaston; *Burton, Yeates*, and *Hart*, for *Johnson, Barclay, Johnson*, and *Rogers* Birmingham.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Wednesday, July 17.

(Before KEKEWICH, J.)

BISHOP v. SMYRNA AND CASSABA RAILWAY COMPANY. (a)

Company — Capital — Revenue—Depreciation of investment—Appreciation.

A company purchased its debentures at par. The debentures fell in value, and the depreciation was debited in the half-yearly accounts to revenue. The company went into liquidation, and the debentures had then risen in value. The liquidator, therefore, in his accounts credited the amount of the rise in the debentures to revenue as appreciation.

Held, that the liquidator was right in crediting this sum to revenue, instead of applying it in reducing the deficit on the capital account.

THIS was a motion on behalf of the plaintiff and all other the preference shareholders in the company, for a declaration that no part of a sum of 6937*l.* could properly be applied in paying dividends to the ordinary shareholders; and for an injunction to restrain the company and the liquidator from distributing such sum, or any part thereof, in payment of such dividends.

Article 61 of the company's articles of association was as follows:

> The approval by a general meeting of the balance-sheet and accounts shall constitute a complete discharge for the board;

but this article was subsequently altered by resolution as follows:

> The approval by a general meeting of the balance-sheet and accounts shall be deemed conclusive as to their accuracy, and they shall not be afterwards re-opened.

It appeared that in 1890 the Smyrna and Cassaba Railway Company purchased some of its debentures at about par. These debentures were entered in the account for the half year ending the 30th June 1890, as an asset under the description of an investment on "capital account." The account was approved at the subsequent half-yearly meeting of the company.

The debentures having depreciated in value, in subsequent accounts a sum equivalent to the depreciation was written off, and the amount was debited to the revenue account. On the 31st Dec. 1893 the company held 96,400*l.* debentures, their book value being put in the accounts at 89,463*l.*, being a depreciation to the amount of 6937*l.*

The company went into liquidation on the 16th July 1894 for the purpose of carrying into effect the sale of the company's undertaking to a syndicate. At that date the debentures had risen in value, and in his revenue account for the period ending the 26th July 1894 the liquidator took the debentures at their par value, and treated the 6937*l.* as an "appreciation on investments." The liquidator proposed to distribute this sum among the ordinary shareholders on account of their dividends, but the preference shareholders objected that the 6937*l.* should be treated as capital, the debentures having been treated by the company in their accounts as capital. The case was reported on another point 72 L. T. Rep. 773; (1895) 2 Ch. 265.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Renshaw, Q.C. and *P. S. Stokes* for the plaintiff. —This sum of 6937*l.* should be treated as capital, and applied in reducing the deficit on capital account; it always was treated by the company in their accounts as capital. Article 61 provides that the approval by a general meeting of the balance-sheet and accounts shall be deemed conclusive as to their accuracy, and they shall not be afterwards re-opened.

Warrington, Q.C. and *F. M. S. Cassel* for the defendant company and the liquidator.—The sum of 6937*l.* represents undrawn profits set apart as a reserve fund:

Re Bridgewater Navigation Company, 64 L. T. Rep. 576; (1891) 2 Ch. 317;

Lee v. *Neuchatel Asphalte Company*, 61 L. T. Rep. 11; 41 Ch. Div. 1.

The depreciation was taken into account in ascertaining the revenue, and therefore the appreciation should now be taken into account.

Renshaw, Q.C. replied.

KEKEWICH, J. — Mr. Renshaw's objection, founded on the terms of the 61st clause of the articles of association, really goes to the root of the case; and if it is to be allowed as entirely sound, that seems to dispose of the argument on the other side. What he says is this, that the 61st article, as altered, provides that "The approval by a general meeting of the balance-sheet and accounts shall be deemed conclusive as to their accuracy, and they shall not be afterwards re-opened;" and that therefore, because in 1891 the company in general meeting approved a half-yearly balance-sheet, and accounts which allowed for a depreciation on this investment, no question can ever hereafter be raised whether that investment was worth the sum at which it was written into those accounts, notwithstanding that it may since have either increased or diminished in value. To my mind that is not the meaning of the article. Mr. Renshaw says the adoption by the company of the accounts settles them once for all. I think the introduction of those words makes a considerable difference, because they import a meaning of the words which is not to be found in the article itself. What I understand the article to mean is this: No one shall ever thereafter question the accuracy of that balance-sheet and those accounts; no one shall ever say that these debentures were not originally worth so much, that by depreciation they had not fallen to so much, and that the division of profits ought not to proceed on the footing of that depreciation. Nobody now says that that balance-sheet and those accounts are otherwise than accurate, or that they should be in the slightest degree interfered with. What is said is, that since that date events have happened which have caused an appreciation of the debentures, and that there is no reason why you should not now consider the appreciated value in the same way as before you considered the depreciated value, and even if you introduce those words "once for all," I do not myself see that they prevent any appropriation of the appreciated value at the present time, notwithstanding that the balance-sheet and accounts deal with the depreciation in value. Indeed, I do not myself see any answer to Mr. Cassel's argument, that, if it is right as a matter of account to bring into account the depreciation, it is also right to bring into account the appreciation. But perhaps

a little confusion has been introduced into this case by this being called an investment, this having been treated as a purchase of debentures still existing. The truth is that it is an entire mistake to call it an investment. It is nothing of the kind. Whether it was competent for the company to make this purchase or not is immaterial for the present purpose: I am not concerned to inquire, and do not mean to inquire, into that. What they really did was to sink a certain amount of capital, but they chose to treat it in the accounts as if it was a purchase of investments. Then, finding the debentures had fallen in value, they charged this fall in value to depreciation. Now they have risen in value again, and what had been written off for the purpose of these accounts has now been made good by the increase in value. It has been said that the sum representing this increase in value answers to a reserve fund; but it does not seem to me to be anything like a reserve fund. I am not sure that it is strictly undrawn profits, but I think it is much more like undrawn profits than a reserve fund, because, if the allowance for depreciation had not been made, of course the profits from time to time divisible would have been so much larger. But whether that is so or not, what we have now is not the mere increase in value of an item of investment, but the rehabilitation of the value of the investment. It is writing back what was before written off, and I cannot for myself see why, since the amount written off was treated as a deduction from profits in former accounts, the amount that is now written up should not be treated as profits in the same way. It seems to me to be not an accretion of principal, but a restitution of what was before taken away—taken away from profits, and, therefore, a restitution to profits. It is quite possible that this mode of looking at the amount now written up is no more really accurate than calling it a reserve fund or calling it undrawn profits; but it seems to me it is in accordance with fact and with what was really done. Moreover, it is, I think, according to principle, and quite—as I read the case—in accordance with *Re Bridgewater Navigation Company* (64 L. T. Rep. 576; (1891) 2 Ch. 317), which I agree is not strictly in point in the sense of being on all-fours with the present case, but yet does lay down a principle which is useful here. I think therefore, that, in accordance with that case, this sum is divisible as profits and not as capital.

Solicitors: *Parker, Garrett,* and *Parker*; *Bircham* and *Co.*

July 1, 18, *and Aug.* 5.

(Before ROMER, J., sitting for WILLIAMS, J.)

Re COMMON PETROLEUM ENGINE COMPANY; ELSNER AND MCARTHUR'S CASE. (*a*)

Company—Winding-up—Fully paid-up shares—Registered contract — Companies Act 1867 (30 *&* 31 *Vict.* 151), *s.* 25.

By a contract in writing made between the A. company and a trustee for the B. company then in course of formation, the B. company agreed to purchase from the A. company certain patent rights for 2550*l. in shares of the B. company, or cash, and to allot and issue to every shareholder in the A. company who should apply for the same, three shares of* 1*l. each in the B. company with* 19*s. per share credited as paid up, in respect of every two shares of* 5*l. held by him in the A. company. The B. company upon registration duly confirmed and adopted the contract by deed indorsed on the contract, and the contract with the indorsed deed were duly registered. X. and Y., who were not shareholders in the company, applied for and were allotted shares as the nominees of shareholders in the A. company, and on payment of* 1*s. per share were registered as the holders of fully paid-up shares in the B. company.*

Held, that the contract and the indorsed deed constituted a sufficient agreement within the meaning of sect. 25 *of the Companies Act* 1867, *notwithstanding the fact that neither of the documents was executed by X. or Y.*

SUMMONS.

The Common Petroleum Engine Company Limited was incorporated on the 17th March 1892, with the object of adopting and carrying out a contract dated the 15th Feb. 1892, and made between Spiel's Patent Petroleum Engine Company Limited (hereinafter called Spiel's Company) of the one part, and J. Elsner as trustee for the company of the other part, for the purchase of an invention and patent rights for improvements in gas, petroleum, and hydrocarbon motors. The capital of the company was 20,000*l.* divided into 20,000 shares of 1*l.* each.

By the memorandum of association it was provided that 2550 shares numbered 8 to 2557 inclusive might be issued as fully paid pursuant to the contract of the 15th Feb. 1892, and 17,443 shares numbered 2558 to 20,000 inclusive might be allotted and issued with 19*s.* per share credited as paid up thereon respectively. The articles of association provided (art. 4) for the issue of the shares to the Spiel's Company, so as to free the holders from liability beyond the 1*s.* per share, and stated (art. 5) that subject to the contract and to art. 4 the shares might be issued on such terms as the directors might determine.

By the contract above referred to, it was provided that the company should purchase from Spiel's Company the exclusive benefit of the invention.

Clause 2 was as follows:

The consideration for the said sale shall be the sum of 2550*l.*, which shall be paid and satisfied by the issue to Spiel's Company or their nominees of 2550 fully paid shares of the new company of 1*l.* each, such shares to be numbered in the books of the new company, and in the share certificates for the same 8 to 2557 inclusive, or at the option of the new company as to the whole or any part of the said sum of 2550*l.* by payment in cash in lieu of shares. The new company shall allot and issue to every shareholder in Spiel's Company who shall be willing to accept and shall apply for the same, three shares of 1*l.* each of the new company credited with the sum of 19*s.* as paid up on each of the shares so to be allotted and issued in respect of every two shares of 5*l.* each held by him in Spiel's Company, and such share of the new company so to be allotted and issued as last aforesaid, shall be numbered in the books of the new company, and in the share certificates for the same 2558 to 20,000 inclusive. Every such shareholder in Spiel's Company shall apply for such shares in the new company within the time limited by notice to be given

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

to him of his right to apply for and accept the same, and undertake in writing to pay up the 1*s.* per share remaining unpaid on such shares either prior to or at the time of the allotment and issue of such shares to him, or by such instalments and at such times as may be fixed for the payment of the issue. If any such shareholder who may so apply for shares as aforesaid shall hold an odd number of shares in Spiel's Company, he shall only have the right to apply for and have allotted and issued to him in respect of such odd share one share of the new company of 1*l.* so credited as aforesaid. All of the said shares of the new company not applied for by shareholders in Spiel's Company within the time so limited as aforesaid may be sold, when and to such persons and on such terms, or may be otherwise dealt with by the new company as the new company may think fit.

The contract further provided (clause 3) that "the purchase of the said premises shall be completed on the 15th March 1892, when the said purchase price should be paid and satisfied in manner aforesaid, and thereupon Spiel's Company and all other necessary parties" should execute the necessary conveyances; (clause 4) that the contract or some other proper and sufficient contract should be filed with the Registrar of Joint Stock Companies, before the issue of any of the above shares under the contract; and (clause 5) that in consideration of the purchase price Spiel's Company should pay all costs of bringing out the new company.

By an indenture dated the 19th March 1892, indorsed on the contract and made between Speil's Company of the first part, Elsner of the second part, and the new company of the third part; the new company ratified and adopted the contract and declared the same to be binding on the new company as if it had been incorporated before the date of the contract, and had entered into it instead of Elsner. The contract with the indorsement thereon were duly filed with the Registrar of Joint Stock Companies.

By an indenture dated the 30th March 1892, after reciting an agreement that the 2550*l.* should be paid, 350*l.* in cash and 2200*l.* in shares, Spiel's Company assigned to the new company the property in question in consideration of 2550*l.* paid as aforesaid.

In March 1892, Elsner and W. McArthur, who were neither of them shareholders in Spiel's Company, applied as the nominees of shareholders who were entitled to exercise the option given by clause 2 of the contract, for 250 and 50 shares respectively in the new company, with 19*s.* per share credited as paid up. The form upon which Elsner made his application was ones similar to those which had been sent to shareholders in Spiel's Company only, and which referred to the "extra shares," or shares which had not been taken up by the shareholders in that company. The form used by McArthur was also one similar to those which had only been sent to shareholders in Spiel's Company.

On the 25th March the shares were duly allotted to Elsner and McArthur, and having paid 1*s.* per share, they were placed on the register of shareholders as the holders of and received certificates for fully paid-up shares in the company. Neither the applications nor the allotments refered to any registered contract.

On the 14th Nov. 1894 an order was made for the compulsory winding up of the company, and Elsner and McArthur were put upon the list of contributories for 19*s.* per share.

This was a summons taken out by the liquidator which, as amended, asked (*inter alia*) for a declaration that the shares were issued to and held by the respondents respectively, subject to the payment of 19*s.* per share in addition to the amount actually paid.

H. Reed, Q.C. and *J. Bradford* for the liquidator. —The burden is on the respondents of showing that at the date of the allotment a contract in writing to take the shares in question had been duly filed with the Registrar of Joint Stock Companies in conformity with the provisions of sect. 25 of the Companies Act 1867:

Re New Eberhardt Company Limited; Ex parte Menzies, 62 L. T. Rep. 301; 43 Ch. Div. 118.

Here we submit there was no such contract. The contract merely gave an option to the shareholders of Spiel's Company to take the shares on payment of 1*s.* per share. The respondents were not shareholders in that company, and were therefore not within the consideration given for the patent rights. Further we submit the consideration for the shares was illusory:

Re Theatrical Trust Limited; Chapman's case, 72 L. T. Rep. 461; (1895) 1 Ch. 771.

Levett, Q.C. and *Butcher* for Elsner.—The agreement of Feb. 1892, together with the deed indorsed thereon, constituted a valid registered contract in writing within the meaning of sect. 25. Further, as the nominee of shareholders, Elsner was entitled to the benefit of such contract:

Re Dominion of Canada Plumbago Company Limited; Kirby's case, 46 L. T. Rep. 682.

The mere form of the applications cannot alter the real contract between the parties which was for the issue of shares with 19*s.* per share paid up.

Cooper Willis, Q.C., and *Whitaker*, for McArthur, adopted the same arguments.

Bradford replied.

Cur. adv. vult.

Aug. 5.—The following written judgment was delivered by

ROMER, J. — The first question that arises on this summons so far as concerns the respondents Elsner and McArthur is one of fact. Were the shares the subject of this application allotted to them as nominees of shareholders in Spiel's Company in pursuance of the option given to those shareholders by clause 2 of the agreement of the 5th Feb. 1892 confirmed by the deed of the 19th March 1892? I am satisfied on the evidence that the shares were so allotted, and that they were not issued, as suggested on behalf of the liquidator of this company (the Common Petroleum Engine Company Limited) under the provisions at the end of clause 2 of the agreement as shares not applied for by the shareholders in Spiel's Company. The circumstances relied on by the liquidator, that Elsner's application was on a form labelled "extra shares" admits of easy explanation. The facts are that Spiel's Company (wholly without the authority of this company) issued to their shareholders two forms of application for shares; one as for shares to which they were directly entitled under the agreement, and the other as for extra shares not taken up by some of the shareholders; and the applicants seem not to

have noticed any distinction between the two forms but to have used them indiscriminately. As a matter of fact this company, at the time the shares in question were allotted had not authorised the issue of any shares, and did not in fact allot any shares except to shareholders of Spiel's Company or their nominees in respect of the shares to which they were entitled under the agreement. And I should add that this company never limited a time within which the shares were to be applied for, though Spiel's Company did make an abortive and ineffectual attempt to limit a time. The next question which arises is one of law, whether the agreement and indorsed deed which have been duly registered comply with the provisions of sect. 25 of the Companies Act 1867. In my opinion they do, having regard to the cases to which I am about to refer. In the first place the agreement as confirmed by the indorsed deed is in itself a contract in writing made before the issue of the shares and not a mere offer by the company to allot shares like the memorandum which formed the subject of the decision in *Re New Eberhardt Company; Ex parte Menzies* (*ubi sup.*). By the agreement this company was bound to allot to each shareholder of Spiel's Company his proportion of shares if he applied for them; and the fact that each shareholder had an option and was not bound to apply did not the less render the agreement a contract, and one binding on this company. This company had no option in the matter; and moreover, notwithstanding the curious wording of the agreement, and the form of the assignment made in pursuance of it, dated the 30th March 1892, I think the option given formed part of the consideration for the sale of the property the subject of the agreement. I cannot hold here that the consideration paid for the shares issued was illusory, or that the agreement was a mere fraud or excuse to enable these shares to be issued at a discount or as nearly fully paid up. See *Re Theatrical Trust Limited* (*ubi sup.*). It was suggested by the liquidator that Spiel's Company had no right to distribute a valuable option which was in the nature of capital amongst its shareholders. That may be so; but that is a matter which concerns Spiel's Company and its shareholders and creditors, and which cannot now be relied on by the liquidator for the purpose of this application. There being then a contract in writing filed with the Registrar of Joint Stock Companies before the issue of these shares, the next question is whether it is a sufficient contract within the meaning of sect. 25. Now, if the question were one arising for the first time I think a great deal might be said in favour of the contention that a contract within the section ought to be one (1) made direct with the allottee, and (2) showing on the face of it which are the shares to be allotted or issued to him. But the cases show that this is not necessary, and that the section (which is in the nature of a penal clause) must not be treated as by implication making essential details with regard to the contract in reference to the above points not mentioned in the section. For example, as to (1) it has been held that if the contract be to allot shares to A., the shares may be allotted to B. as A.'s nominee, and the contract will then protect B. See *Carling's case* (33 L. T. Rep. 645; 1 Ch. Div. 115) and the observations of James, L.J., at p. 124. And, apparently, even the company need not be directly a party to the contract. It is sufficient if the contract be with a trustee of the company and adopted by the company. See *Hartley's case* (32 L. T. Rep. 106; L. Rep. 10 Ch. 157), where Cairns, L.J. observes, at p. 159: "It is hardly necessary to advert to the argument that the shares ought not to be taken as paid-up shares because the agreement was not with the company, but with a trustee and before the company was formed. The Act of Parliament does not require the agreement to be with the company, and such agreements are very seldom made with the company directly." And with regard to point (2) it has been held that the contract need not on the face of it identify the shares. See *Re Delta Syndicate Limited; Ex parte Forde* (53 L. T. Rep. 559; 30 Ch. Div. 153), and *Hartley's* case (*ubi sup.*), and see also on both points *Re Dominion of Canada Plumbago Company Limited; Kirby's case* (*ubi sup.*), decided by Fry, J., and *Re Buenos Ayres and Campana Railway Company* (W. N. 1875, p. 59). In both of these last-mentioned cases the registered contract did not specify the shares or the names of the allottees, and yet the allottees were held protected by the registered contract. In the last-named case Sir G. Jessel, M.R. pointed out that sect. 25 did not render necessary the specification of the shares, or of the name of the allottee, and he said that if the contract did not give such particulars the sole effect was to make it more difficult for the holders of shares not paid for in cash to discharge the burden of proving that their shares had in fact been issued to them in pursuance of the registered contract. And with reference to these observations of the late Master of the Rolls, I need not again point out that in the present case the respondents have discharged the burden cast upon them and satisfied me that their shares were issued in pursuance of the registered agreement. Having regard to the above authorities I do not see on what principle the registered agreement is to be held not sufficient. And, indeed, with reference to an agreement which cannot, I think, on principle be distinguished from that now before me, Cotton, L.J., in *Re New Eberhardt Company* (*ubi sup.*), observed at p. 126 of 43 Ch. Div. "If the company had registered not the document but the agreement between the new company and the liquidator, my present opinion is that that would have been a contract registered to issue these shares as fully paid-up shares," and I gather that Bowen and Fry, L.JJ. do not differ in that case from the opinion of Cotton, L.J. Under these circumstances the application must be dismissed against these respondents with costs. I think that it is a proper case for the liquidator to bring before the court, and he may take his costs out of the assets.

Solicitors. *J. B. Roberts; Eagleton* and *Sons; Foss* and *Ledsam.*

July 24, 25, *and* 26.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division,)

Re PRESERVATION SYNDICATE LIMITED. (*a*)

Company—Winding-up—Fully paid-up shares—Omission to register contract till after allotment—Mistake—Rectification of register—Terms—Companies Act 1862 (25 *&* 26 *Vict. c.* 89), *s.* 35—*Companies Act* 1867 (30 *&* 31 *Viet. c.* 131), *s.* 25.

Where shares in a company have been allotted as fully paid up, but the contract has by inadvertence not been registered until after such allotment, relief, on a motion by a shareholder to rectify the register, notice of which has been given before the commencement of the winding-up of the company, will only be granted by the court on the terms of the applicant providing for the debts and liabilities of the company incurred between the dates of the allotment and the notice of motion to rectify.

MOTION.

This was a motion on behalf of the holders of preference shares in the Preservation Syndicate Limited, of which notice was given on the 5th March 1895, that the register of the syndicate might be rectified by striking out the names of the holders of the preference shares mentioned in an agreement, dated the 27th July 1893, in respect of the number of shares in the syndicate set opposite their names in the schedule to the agreement, on the ground that through mistake or accidental omission the agreement was not filed with the Registrar of Joint Stock Companies in accordance with the Companies Act 1867, previously to the issue or allotment of the said shares; and that the syndicate might be directed or authorised, forthwith after the rectification of the register in manner aforesaid, to register the names of such holders of preference shares as members in respect of a corresponding number of preference shares fully paid up in the syndicate, and with the same distinguishing numbers.

The facts, so far as they are material, were as follows:

The agreement in question was entered into for the purpose of carrying out an arrangement for the purchase by the syndicate of the whole share capital of the Co-operative Fish Supply Company Limited, and the parties thereto were the latter company of the first part, G. Hallett as trustee for the shareholders of the company of the second part, the syndicate of the third part, and M. C. Brown of the fourth part. By it it was agreed—(1) that each of the shareholders in the company should sell and the syndicate should purchase the several shares, being shares of 1*l.* each fully paid in cash, in the company set opposite to the name of such shareholder in the schedule to the agreement; (2) that as the consideration for such sale the syndicate should allot and issue to each of the aforesaid shareholders one share of an issue of 10 per cent. cumulative preference shares of 1*l.* each in the capital of the syndicate, credited as fully paid up in respect of each share of 1*l.* in the company held by such shareholder; (3) that the sale should be carried into effect as from the 4th April 1893; (4) the syndicate should undertake, perform, and discharge all outstanding contracts and liabilities of the company; and (5) that before the issue of any of the said preference shares a sufficient contract in writing should be filed with the Registrar of Joint Stock Companies.

In June 1893 the shareholders of the company transferred their shares to the syndicate, and the syndicate in exchange issued to them certificates for an equivalent number of preference shares in the syndicate purporting to be fully paid up. The agreement was not, however, registered until the 28th July 1893, *i.e.*, subsequently to the allotment of shares, at which date the syndicate was solvent.

Both the directors and shareholders were unaware of the delay in registering the agreement until a date considerably later, at which date the company was insolvent.

On the 27th March 1895 an order was made for the compulsory winding-up of the syndicate on a petition presented on the 13th March 1895.

By the Companies Act 1862 (30 & 31 Vict. c. 131), s. 25, it is provided that,

> Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

Witt, Q.C. and *E. Ford* for the motion.—Were it not for the fact that the company is now insolvent there could be no doubt as to the power of the court to order the register to be rectified:

> *Re Darlington Forge Company*, 56 L. T. Rep. 627; 34 Ch. Div. 522;
> *The Denton Colliery Company; Ex parte Shaw*, L. Rep. 18 Eq. 16;
> *Re New Zealand Kapanga Gold Mining Company; Ex parte Thomas*, L. Rep. 18 Eq. 17, n.;
> Buckley on the Companies Acts, 6th edit., p. 865.

Here, the company was insolvent at the date of the notice of motion. It is, however, sufficient, we submit, to show, as was the fact, that the company was solvent at the date of the registration of the agreement. The shares in the old company were fully paid up. [WILLIAMS, J.—It seems that where a contract is through inadvertence registered only a short time after the issue of the shares, the court will regard it as being substantially one transaction, and treat the contract as registered at the date of the issue (*Re Ambrose Lake Tin and Copper Company; Clarke's case*, 38 L. T. Rep. 587; 8 Ch. Div. 635; and *Re Tunnel Mining Company; Poole's case*, 56 L. T. Rep. 822; 35 Ch. Div. 579); but in *Re Darlington Forge Company* (*ubi sup.*), where there had been an interval of some years, the court would not allow rectification without the existing debts of the company being provided for. I do not see any way out of that.] The agreement having been on the file since July 1893, the creditors have had notice since that date that they could not rely on the capital uncalled on the shares. The applicants ought not to be prejudiced by the existence of the winding-up order, as they did all they could to obtain relief before the presentation of the petition on which the order was made: (Buckley on the Companies Acts, 6th edit., p. 113.)

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

The only contract which the applicants entered into was to take fully paid-up shares, and they ought not, therefore, to be placed on the list of contributories, notwithstanding that a winding-up has supervened:

Re Barangah Oil Refining Company; Arnot's case, 57 L. T. Rep. 353; 36 Ch. Div. 702.

Muir Mackenzie, for the official receiver and liquidator, submitted that relief could only be given on the terms of the applicants providing for the debts of the company, as in

Re Darlington Forge Company (*ubi sup.*).

Ford, in reply, referred to

Re Broad-street Station Dwellings Company, W. N. 1887, p. 149.

[WILLIAMS, J. referred to *Re Harwich Harbour Docks, Wharves, and Warehouses Company* (W. N. 1875, p. 235); *Re Government Security Fire Insurance Company*; *Mudford's Claim* (42 L. T. Rep. 825; 14 Ch. Div. 634).]

Cur. adv. vult.

July 26.—WILLIAMS, J.—This is only another instance of the gross injustice which is from time to time done by a portion of the 25th section of the Act of 1867. The section in question was a section passed by the Legislature to meet a class of cases which it was eminently necessary to deal with, and to deal with effectually. It was extremely common when a company got into difficulties for shareholders who did not wish to be made liable as contributories to come forward and say that they took their shares upon terms that they should not pay cash for them, and all sorts of shadowy excuses were suggested to get off payment, as, for instance, that the shares were allotted as remuneration for supposed services rendered to the directors, or to the company; and officers and directors of the company were found who were only too willing to come forward and support allegations of that sort. The company to all appearance had all its shares taken up, and persons who dealt with the company might well suppose that a cash equivalent for the shares was there, but it turned out that there was no cash equivalent, and that the shares had been issued to those who were interested in the formation of the company, and had nothing to lose if the company came to financial grief, and had everything to gain if it was a success. In such cases one would have great pleasure in holding that such persons must pay up the nominal face value of their contributions to the company; but unfortunately those are not the persons who are usually caught in the meshes of the legislative net. The cases which are generally hit by the section are cases where persons who are sought to be made contributories have made honest agreements to pay for their shares, not in actual cash, but in something else which is really equivalent to a cash payment, and by the negligence or mistake of someone, perhaps a clerk or solicitor, the contract is not registered, and the section takes effect. The shareholder thus has to pay over again, and he goes away with a sense that the law has done him an injustice; and it is not good that that feeling should exist, especially where there is some foundation for it. But I have to deal with this case. Here is a company, the shareholders in which have paid for their shares. A reconstruction becomes necessary, and an agreement is made that the shareholders in the old company who had paid up their shares in full should sell their shares to the new company. The new company has not much cash, so it is proposed to do it by handing over to the old shareholders paid-up shares in the new company of an amount equal to their shares paid up in the old company. That is what happened here. Hard cash had been paid for the shares in the old company which were to be exchanged for paid-up shares in the new company pursuant to the agreement, which was to be filed. Through the carelessness of somebody the agreement was not registered. This is the more remarkable, because the contract between the old and the new companies was a contract in writing; it was drawn up by the solicitor of the old company, and contained a clause that before the issue of any of the preference shares a sufficient contract in writing should be duly filed. The registration, however, did not take place till the 28th July, instead of in June when the shares were issued. Subsequently the new company got a new solicitor, and he found that the shares were issued to these people before the contract was filed, and that inasmuch as sect. 25 of the Act of 1867 requires the filing to be "at or before the issue" of the shares, what had been done had not the effect of giving the shareholders fully-paid shares. The directors proposed to put all right by cancelling the shares which had been issued by mistake before registration, and issuing an equal number of shares at a date subsequent to the date of the filing of the agreement. But they were advised that they were no longer in a position to do so, because the company was insolvent. I have to say what is to be done. Here was a mistake. I have not the slightest doubt that the shareholders honestly supposed that the contract had been duly registered. They had a right to suppose so. The directors of the company thought so too, and they had a right to suppose so. Whether either of the parties or both of them may have a remedy against the persons whose carelessness brought about this state of things I have not now to determine, but if it was brought about by carelessness I hope that the law is such that the persons responsible may have to pay. The mistake is one that the shareholders should have a right to have corrected. The applicant gave to the company notice of the motion to rectify on the 5th March whilst the company was still going on, but before any order was made a petition was presented, and the company went into liquidation. The law is perfectly plain. You cannot correct this mistake to the prejudice of any rights which have arisen in other people in the meantime, that is, the rights of persons who have become creditors of the company. Mr. Ford suggested that the rule was not accurately stated by me, and that the mistake might be rectified when you had satisfied all the rights of people who had been induced to deal with and give credit to the company by the state of things which existed. I do not assent to that. You cannot correct this mistake to the prejudice of any rights which accrued in the interval, whether those who have the rights relied on the mistake in the registration or not. I shall make an order that the register be rectified upon due provision being made for all debts and liabilities of the company which accrued between the date of the issue of

these shares and the 5th March when notice of motion was given. When the list of debts and liabilities has been made, if it can be agreed, so much the better; if it cannot be agreed, it will come before the registrar, who will settle it himself. As to directors' fees, it is rather a matter for arrangement than for an order. So far as the law is concerned no persons ought to be allowed to take advantage of their own wrong. If it is by the directors' wrong that this contract was not registered they ought not to be allowed to take advantage of that. The circumstances, however, are not sufficiently before me to enable me to decide this, and I will leave it to be settled in chambers. There is a decision of Lord Cairns, in *Kent* v. *Freehold Land and Brickmaking Company* (L. Rep. 3 Ch. 493), that, if an application to rectify is made after the liquidation has commenced, it is too late to allow rectification. The notice of motion here was before the liquidation, and I have given the benefit of the doubt in favour of the applicants by ordering a list to be prepared.

Solicitors: *F. W. Hill*, for *F. C. Manley*, Hull; *Walter J. Payne.*

Addendum.—*Re Foveaux* (*ante*, p. 202).—The following are the cases referred to in the judgment of Chitty, J., with the references to the reports, which were editorially omitted from the arguments of counsel, and are only cited in the judgment by the reference (*ubi sup.*):

Thornton v. *Howe*, 31 Beav. 14;
Re Joy, 60 L. T. Rep. 175;
Armstrong v. *Reeves*, L. Rep. Ir. 25 Ch. Div. 325;
University of London v. *Yarrow*, 1 De G. & J. 72;
Re Douglas; *Obert* v. *Barrow*, 56 L. T. Rep. 786; 35 Ch. Div. 472;
Commissioners of Income Tax v. *Pemsel*, 65 L. T. Rep. 621; (1891) A. C. 531;
March v. *Means*, 3 Jur. 790;
Re Vallance, Seton, 5th edit. p. 1141.

—Ed. L. T. Rep.

QUEEN'S BENCH DIVISION.

Wednesday, June 26.

(Before Wright and Wills, JJ.)

Reg. *v.* Slade, Esq. (Metropolitan Police Magistrate) and others; *Ex parte* Saunders. (*a*)

Criminal law—Conviction — Certiorari — *Public Health* (*London*) *Act* 1891 (54 *&* 55 *Vict. c.* 76)—*Continuing offence—Limitation of time—Summary Jurisdiction Act* 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Amendment—Baines' Act* (12 *&* 13 *Vict. c.* 45), *s.* 7.

On a conviction for wilfully and knowingly acting contrary to an order to close certain premises as unfit for human habitation the magistrate inflicted a fine of a shilling a day for the whole period during which the offence had continued (193 *days*).

Held, that the conviction was bad as contrary to the six months' limitation of sect. 11 *of the Summary Jurisdiction Act* 1848.

Held further, that the conviction could not be amended under sect. 7 *of Baines' Act, since the mistake was not one made in drawing up the conviction, but a mistake of law.*

(*a*) Reported by G. H. Grant, Esq., Barrister-at-Law.

This was an order *nisi* calling upon Wyndham Slade, Esq., a metropolitan magistrate, sitting at Southwark Police-court, and the St. Saviour District Board of Works, Southwark, to show cause why a writ of *certiorari* should not issue to remove the record of a certain conviction of Francis Saunders into the High Court, and why, when the conviction was returned, the same should not be quashed on the grounds that it included a period of more than six calendar months before the matter of the complaint or information arose, and that penalties are inflicted in it for more days than can be legally imposed.

Saunders was the owner of a certain dwelling-house at No. 75, Blackfriars-road, Southwark. On the 4th Jan. 1894 he appeared, on the summons of the St. Saviour District Board of Works, before the magistrate sitting at Southwark Police-court for failing to comply with a notice to abate a nuisance arising from the dwelling-house before mentioned. The magistrate, being satisfied that the dwelling-house was unfit for human habitation, made a closing order under sect. 5, sub-sect. 6, of the Public Health (London) Act 1891 (54 & 55 Vict. c. 76).

On the 29th Nov. 1894 Saunders again appeared before the magistrate sitting at Southwark Police-court on the summons of the St. Saviour District Board, and was convicted under sect. 5, sub-sect. 9 of the Public Health (London) Act 1891, of having knowingly and wilfully acted contrary to the closing order of the 4th Jan. during a period of 193 days, namely, from the 1st Feb. to the 12th Aug. He was thereupon fined 9*l.* 13*s.*, "being 1*s.* per day for each of the 193 days aforesaid."

On the 24th May 1895 the order *nisi* to quash the conviction, on the grounds already mentioned, was granted.

F. Dodd now showed cause.—The conviction is good, but, if not good, the mistake is one that may be amended. Sect. 5 of the Public Health (London) Act 1891 contains no limit as to the time for which penalties can be inflicted. The offence here is a single continuing offence, not a series of separate and distinct offences occurring on as many separate days:

London County Council v. *Worley*, 71 L. T. Rep. 487; (1894) 2 Q. B. 826.

That being the case, sect. 11 of the Summary Jurisdiction Act 1848 is satisfied if the offence continued up to within six months of conviction:

Higgins v. *Northwich Union*, 22 L. T. Rep. 752;
Reg. v. *Waterhouse*, 26 L. T. Rep. 761; L. Rep. 7 Q. B. 845;
Reg. v. *Catholic Fire Insurance Association*, 48 L. T. Rep. 675.

As to amendment under sect. 7 of Baines' Act:

Reg. v. *Walker*, 45 J. P. 682.

[Wright, J.—There is no power to amend save where the mistake is one made in drawing up the conviction.] Here the mistake is one made in drawing up the conviction. There was no necessity for mentioning the number of days. At any rate the mistake was immaterial, as the magistrate had power to inflict a much larger fine than that actually inflicted.

Wills, J.—In this case the conviction is clearly wrong, and must be quashed. It is impossible to read it and not to see that the

offence of which Saunders was convicted has been treated as an offence continuing during one hundred and ninety-three days. Of these twelve were statute-barred. We cannot take the conviction to pieces and say that one part of it is good and the other part bad. The conviction is for the whole period between 1st Feb. and 12th Aug., and as part of that period is outside the six months' limit imposed by sect. 11 of the Summary Jurisdiction Act, it cannot stand.

Solicitor for the defendants, *R. J. Tickle.*
Saunders in person.

Tuesday, June 11.

(Before WILLS and WRIGHT JJ.)

PLETTS *v.* CAMPBELL. (*a*)

Licensing Act 1872 (35 *&* 36 *Vict. c.* 94), *s.* 3—*Sale of liquor elsewhere than on licensed premises.*

The appellant held an off licence for the sale of beer by retail. His practice was to employ a carter, who went round to the customers' houses every week with a cart from which he delivered jars of beer, and received orders for the following week. The carter in this way received an order from a customer at the customer's own house for a jar of beer which was the following week delivered from the cart at the house and there paid for. The jar was one of several gallon jars, none of which were distinguished by any label or other mark from other similar jars in the cart.

Held, that the sale of beer to the customer took place at the latter's house and not on the licensed premises, and the appellant was therefore properly convicted under sect. 3 *of the Licensing Act* 1872 *of selling intoxicating liquor at a place where he was not authorised by his licence to sell the same.*

CASE stated by Quarter Sessions of Lancashire upon an appeal against a conviction by the petty sessions of Blackburn Lower, whereby the appellant was convicted under sect. 3 of the Licensing Act 1872 of selling intoxicating liquor on the 24th May 1894, at a certain house, No. 142, High-street, Rishton, where he was not then authorised by his licence to sell the same, he then being duly licensed to sell by retail certain intoxicating liquors in his house and premises. No. 11, Stanley-street, Burnley. The Court of Quarter Sessions allowed the appeal, subject to this case.

The appellant was a brewer, who held a licence under 11 Geo. 4 & 1 Will. 4, c. 64, and the Acts amending the same, for the sale of beer by retail at 11, Stanley-street, Burnley, such beer to be consumed off the premises.

On the 26th May 1894 one Greenwood, a person in the appellant's employ, delivered from a cart driven by him a stone jar containing a gallon of beer, to the wife of one Moore, at 142, High-street, Rishton, in payment for which he was to and did receive 1*s.* on the appellant's behalf on the 2nd June. The evidence showed a course of dealing for about eight months prior to the 26th May, whereby Greenwood delivered from the appellant's cart, carriage free, one gallon of beer per week to Moore or his wife, in pursuance of orders given to him by them the previous week. At each delivery he received 1*s.* for the beer delivered the previous week, and took back the empty jar. The week preceding the 26th May Mrs. Moore gave Greenwood an order to bring a gallon of beer on that day, which order was entered (with others) by Greenwood in an order book kept by him to be shown to the appellant. On his return to Burnley, he made out a list of orders so received, which the appellant ordered to be executed. On the 26th May, Greenwood selected from the appellant's stores at Stanley-street, the goods necessary to execute the orders aforesaid, and no more. The jar delivered to Mrs. Moore was not distinguished by any label or mark from similar jars, the goods being placed in the cart in the order in which the cart would arrive at the customers' houses. There was no evidence that either the appellant or Greenwood communicated to Moore or his wife the acceptance of the order for the gallon of beer for delivery on the 26th May otherwise than by the actual delivery of the beer to Mrs. Moore on that date.

It was contended for the appellant that the sale of the said gallon of beer delivered to Mrs. Moore on the 26th May took place at the appellant's premises in Stanley-street; for the respondent that the sale, or a transaction in the nature of a sale took place at Moore's house, 142, High-street, Rishton.

The Court of Quarter Sessions were of opinion that the sale of the beer took place on the appellant's licensed premises, and that the delivery to Moore at Rishton was not an offence within the meaning of sect. 3 of the Licensing Act 1872, and quashed the conviction subject to the opinion of the High Court.

Bigham, Q.C. (*Ferguson* with him) for the respondent (the appellant here)—The sale of beer took place not on the licensed premises but at the customer's house, where it was ordered, delivered, and paid for. The true test of a sale is the passing of the property, and here the customer had no property in the jar of beer until it was delivered.

Poland, Q.C. (*W. Mackenzie* with him) for the respondent (the brewer) The sale from the cart was in effect a sale at the licensed premises. There is no mode of getting a licence to sell by a cart at the customer's door, yet the publican may surely deliver his beer to the customer by his cart. The transfer of the property is not the test, because there may be a contract for the sale of goods not yet in existence. See the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 5, subsects. (1) (2). *Stretch* v. *White* (25 J. P. 485) is in point. There Lord Blackburn said that it was not necessary in order to constitute a sale within the 13th section of the Markets and Fairs Clauses Act 1847 that there should have been a transmutation of property.

Bigham, Q.C. in reply.

WILLS, J.—In this case I think the original conviction by the petty sessions was right, and, but for a case cited to us upon another Act of Parliament, I should have thought the matter too clear for argument. In this instance, the publican who is licensed to sell beer upon his own premises sends out his traveller to take orders. That is, of course, equivalent to going himself. Then he selects jars of beer, and sends them out in carts to the purchasers' houses, where they are paid for.

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

There is no evidence that any part of the transaction, except the fixing of the price, takes place on the licensed premises; everything else is at the purchaser's house. It was argued that a sale involved a transmutation of property, and that it is not complete until the property passes. I am prepared to agree that a sale cannot be completed without a transfer of property. But, without going into these matters minutely—which may be out of place with reference to this enactment—it is enough for me to say that every material part of this transaction took place at the purchaser's own house. It cannot make any difference whether the circumstances which are said to be a selection of the jar took place in the cart or at the licensed place. Evidently there was nothing at the licensed premises that amounted to an appropriation of any jar to a customer with his assent. Everything necessary to complete the appropriation of the jar took place at the cart, and I think there is no pretence for saying that there was a sale on the licensed premises. We were, however, pressed with the case of *Stretch* v. *White* (*ubi sup.*) The report there is not a very satisfactory one, and it is singular that the case is nowhere else reported. But, at any rate, the whole of the butter in that case seems to have been sold and appropriated, and, if so, the case differs from the present, and does not stand in our way. A decision based upon one Act of Parliament, in the nature of the Licensing Acts, is often a very fallacious argument when used in respect of another Act. It appears to me that the plain words of the statute in this case justify the conviction, and the appeal should be allowed.

Wright, J.—I think Mr. Bigham went too far in saying that the word "sale," as used in this Act, necessarily meant a sale in the legal sense of the term. I think it may also mean an agreement to sell, and so it was in the case cited from the *Justice of the Peace*. While I agree that this conviction should be restored, I do not say but that a very slight difference in the mode of selling the beer—*e.g.*, if the barrel had been marked with the name of the purchaser—might have made all the difference. My decision is based on this specific ground—that it is impossible there can be a sale, or a bargain and sale, or a sale and delivery, at a place, unless there has been some appropriation of the article at that place; and here there was none.

Solicitors: *Ainsworth, Sanderson*, and *Howson*, Blackburn; *Clifford, Gosnell*, and *Turnay*, for *Garnett* and *Jackson*, Blackburn.

May 6 and 7.

(Before Lord Russell, C.J. and Charles, J.)

Reg. *v.* Titterton. (*a*)

Penalties imposed by police magistrate—Appropriation of same by receiver of metropolitan police—Title of local authority — Municipal Corporations Act 1835 (5 *&* 6 *Will.* 4, *c.* 76), *s.* 126—*Metropolitan Police Courts Act* 1839 (2 *&* 3 *Vict. c.* 71), *ss.* 7 *and* 47—*Sale of Food and Drugs Act* 1875 (38 *&* 39 *Vict. c.* 63), *ss.* 12 *and* 28—*Margarine Act* 1887 (50 *&* 51 *Vict. c.* 29), *ss.* 11 *and* 12.

(*a*) Reported by T. R. Bridgwater, Esq., Barrister-at-Law.

A penalty recovered before a metropolitan police magistrate under sect. 6 *of the Margarine Act* 1887, *in the case of a prosecution by an "officer, inspector, or constable of the authority who shall have appointed an analyst" within the meaning of sect.* 26 *of the Sale of Food and Drugs Act* 1875, *must be paid to such officer, inspector, or constable, and not to the receiver of the metropolitan police district, in accordance with sect.* 47 *of the Metropolitan Police Courts Act* 1839.

The appropriation of penalties effected by sect. 26 *of the Sale of Food and Drugs Act* 1875 *is a "proceeding" within the meaning of sect.* 12 *of the Margarine Act* 1887.

Wray *v.* Ellis (1 *E. & E.* 276; 28 *L. J.* 45, *M.* C.) *considered and distinguished.*

This was a rule calling upon Harry Titterton, Esq., chief clerk at the Worship-street Police-court, to show cause why *a mandamus* should not issue directed to him commanding him to pay over to Charles Quelch, an inspector appointed by the Vestry of St. Leonards, Shoreditch, a penalty of 15*l.* received from one Thomas Morgan, upon an information laid against him by the inspector, before one of the metropolitan police magistrates at Worship-street, under sect. 6 of the Margarine Act 1887, for selling to the inspector half a pound of margarine by retail in a package which was not duly branded or durably marked as directed by the section in question, and for not delivering to him (the inspector) the margarine in or with a paper wrapper on which was printed the word "margarine" as required by the section.

The question was whether penalties under the Margarine Act 1887 (50 & 51 Vict. c. 29) recovered before a metropolitan magistrate must be paid to the receiver of the metropolitan police district or to the inspector who prosecutes on behalf of the vestry. For the purposes of the case it was assumed by the court that Quelch was an "officer, inspector, or constable of the authority who shall have appointed an analyst or agreed to the acting of an analyst within their district" within the meaning of the Sale of Food and Drugs Act 1875, c. 26. Mr. Titterton had received the fine, and refused to pay it to Quelch on the ground that he was bound to pay it to the receiver for the metropolitan police district under the provisions of the Metropolitan Police Act 1839 (2 & 3 Vict. c. 71).

The Metropolitan Police Courts Act 1839 (2 & 3 Vict. c. 71), s. 47, enacts:

> Where by any Act or Acts any penalties are or shall hereafter be made recoverable in a summary manner before justices of the peace, and by such Act or Acts the same are or shall be limited and made payable to Her Majesty, or to any person whomsoever save the informer who shall sue for the same, or any party aggrieved, in every such case the same, if recovered or adjudged before any of the said magistrates (of the metropolitan police), shall be recovered for and adjudged to be paid to the said receiver (of the metropolitan police) for the time being, and not to any other person.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 26, enacts:

> Every penalty imposed and recovered under this Act shall be paid in the case of a prosecution by any officer, inspector, or constable of the authority who shall have been appointed an analyst . . . to such officer, inspector, or constable, and shall be by him paid to the authority for whom he acts, and be applied towards the

expenses of executing this Act, any statute to the contrary notwithstanding: but in the case of any other prosecution the same shall be paid and applied according to the law regulating the application of penalties for offences punishable in a summary manner.

The Margarine Act 1887 (50 & 51 Vict. c. 79), ss. 11, 12. Sect. 11 enacts:

Any part of a penalty recovered under this Act may, if the court shall so direct, be paid to the person who proceeds for the same, to reimburse him for the legal costs of obtaining the analysis, and any other reasonable expenses to which the court shall consider him entitled.

Sect. 12 enacts:

All proceedings under this Act shall, save as expressly varied by this Act, be the same as prescribed by sections twelve and twenty-eight inclusive, of the Sale of Food and Drugs Act 1875.

H. Sutton for the receiver of metropolitan police.—The receiver of metropolitan police is fully entitled to this penalty under sect. 47, subsect. 1, of the Metropolitan Police Courts Act 1839, unless that section has been repealed by subsequent legislation. That section has not been overruled by sect. 26 of the Sale of Food and Drugs Act 1875. This section is a general section, and sect. 47 of the Metropolitan Police Courts Act applies only to prosecutions before a stipendiary magistrate sitting within a metropolitan police district, and therefore the general terms of sect. 26 of the Act of 1875 do not overrule sect. 47 of the Act of 1839. The title of the receiver of metropolitan police to this penalty therefore remains. This view is very strongly supported by the case of *Wray* v. *Ellis* (1 E. & E. 276). In that case a penalty was recovered summarily before a metropolitan police magistrate under the Act for the Suppression of Gaming Houses (17 & 18 Vict. c. 38). By sect. 8 of that Act it was provided that one half of any penalty recovered under that Act should be paid to the informer, and the other half to the overseer of the parish; and it was held by the Court of Queen's Bench that notwithstanding that provision sect. 47 of the Act was still operative, and that the half of the penalty which was not paid to the informer was payable to the receiver of metropolitan police, and not to the overseer. The case of the *Attorney-General* v. *Moore* (38 L. T. Rep. 251; 3 Ex. Div. 276) is illustrative of the same principle, although it was decided upon different statutes. Secondly, sect. 12 of the Margarine Act 1887 does not incorporate sect. 26 of the Sale of Food and Drugs Act 1875. Sect. 12 of the Act of 1887 incorporates certain sections of the Act of 1875 only so far as they relate to "proceedings," and the application of the penalty recovered is not a "proceeding." That term necessarily imports a step taken or an act done by some person, but the application of the penalty is not dependent upon any such act or step. It is not the magistrate who, under sect. 26 of the Act of 1875, directs to whom the penalty shall be paid; it is the section itself that applies it automatically. No greater weight is to be attached to the fact that sect. 12 refers to sects. 12 to 28 of the earlier Act. The draftsman accidentally omitted to observe that they included sect. 26, which does not refer to procedure at all. But even if the application of a penalty is to be regarded as a "proceeding," still sects. 12 to 28 are only to be incorporated "save as expressly varied by this Act"; and that must refer directly to sect. 11, which is a distinct variation of sect. 26. Sect. 11 provides that "the person who proceeds" for a penalty under that Act is only to have such part of the penalty as the court directs. Those words, "the person who proceeds," are general words, and apply to official prosecutors as well as to non-official; for the official prosecutor has, under sect. 13 of the Act of 1875, to pay for the analysis just as much as the non-official. But the provision which makes the title of an official prosecutor to the penalty recovered dependent on the discretion of the magistrate is quite inconsistent with a provision which gives him the whole penalty as of right; and sect. 11 cannot be read as confined to penalties recovered by non-official prosecutors, for the same reasoning which, if sound, prevents the reading of sect. 47 of the Act of 1839 into the Act of 1875, must equally prevent the reading of sect. 26 of the Act of 1875 into the Act of 1887. He cited

The Receiver of Metropolitan Police v. *Bell*, L. Rep. 7 Q. B. 433; 41 L. J. 153, M. C.

W. Willis, Q.C., *A. Macmorran*, and *F. Low* in support of the rule.—[Lord Russell, C.J.—The only point upon which the court desires your assistance is the distinction between the case of *Wray* v. *Ellis* (1 E. & E. 276; 28 L. J. 45, M. C.) and this present case.] That case is distinguishable from the present case, as it was a decision upon a different statute, and where the words are different. The prosecutor, who represents the vestry in this case, is burdened by the Sale of Food and Drugs Act 1875 with the obligation of appointing and paying an analyst, and inspector and other officers to execute the Act; and the object of the first part of sect. 26 was to enable the vestry to recoup themselves for the expenses to which they are thereby put. Having regard to that object, sect. 26 would have to be regarded as impliedly repealing sect. 47, even if the words "any statute to the contrary notwithstanding" were not there, and the presence of these words makes the case for a repeal all the stronger. Secondly, the provisions of sect. 26 are incorporated in the Margarine Act. The application of the penalty is part of the "proceedings." Sect. 11 is consistent with sect. 26. It was only intended to apply to prosecutions by private persons, the object being to enable the magistrate to reimburse such persons the expenses to which they had been put in obtaining the analysis, which, until then, he had no power to do. But even if the section does apply to official prosecutors, there is still no inconsistency, for under one section or the other the official prosecutor will still be entitled to the whole penalty. [They were stopped by the Court.]

Lord Russell, C.J.—The question in this case is whether the applicant Mr. Quelch, or the receiver of the metropolitan police, is entitled to a penalty imposed by one of the metropolitan magistrates under the provisions of the Margarine Act as I think it has been briefly called, the Act of 1887 (50 & 51 Vict. c. 29). We are to assume upon the admission of the parties for the purpose of this case that the applicant Mr. Quelch was an officer acting in the execution of the Act of 1875, and properly acting and coming within sect. 26 of that Act. We are not called

upon to consider whether that is so or not, but it is admitted between the parties as a datum of the judgment which the court is called upon to give. The title put forward upon the part of the receiver of the metropolitan police is based, and based solely upon sect. 47 of the Act of 1839, entitled "An Act for regulating the Police Courts of the Metropolis," the statute 2 & 3 Vict. c. 71. Sect. 47 of that Act provides that, "where by any Act (I do not read all the words, but the material ones only) any penalty is or shall hereafter be recoverable in a summary manner before any justice or justices of the peace, and by such Act the same penalty shall be limited and payable to Her Majesty or to any body corporate, or to any person or persons whomsoever, save the informer who shall sue for the same, or the party aggrieved, then in every such case, if recovered or adjudged before any of the said magistrates—meaning any of the metropolitan magistrates—such penalty is to be paid to the receiver." If the legislation in this matter had rested there it would be quite clear that the title of the receiver to the penalty in question would be good. But it does not rest there. That statute is followed after a long interval by the statute with which we have mainly to deal in this case, I mean the statute relating to the Sale of Food and Drugs passed in 1875 (38 & 39 Vict. c. 63), and we have mainly to deal with the sections, beginning with sect. 20 and ending with sect. 28; but in order to understand the scheme of the Act it is necessary to refer a little to the earlier provisions. For the purpose of guarding the public against adulterated articles and deleterious articles there are various provisions creating penalties for the infringement of the provisions directed to that subject. Sect. 10 provides that in the city of London and the liberties the Commissioners of Sewers of the city and the liberties, and in all other parts of the metropolis the vestries and district boards acting in execution of the Act, where no appointment has hitherto been made, and in all cases as and when vacancies shall occur, or when required by the Local Government Board, shall appoint certain skilled persons analysts, and shall pay to such analysts remuneration as may be agreed upon. Then the following provisions enable the purchaser (any member of the public) of any article of food to have it analysed, paying certain fees. Then the proceedings against offenders are regulated by the sections beginning with sect. 20. When the analyst, having analysed any article, shall have given his certificate of the result, then the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser; and having considered the matter, and having arrived at the conclusion that it is a case for the imposition of a penalty, then follows sect. 26, dealing with how a penalty is to be applied: "Every penalty imposed and recovered under this Act shall be paid in the case of a prosecution by any officer, inspector, or constable of the authority who shall have appointed an analyst, or agreed to the acting of an analyst within their district, to such officer, inspector, or constable" (and it is, as I have said, to be assumed that Mr. Quelch is within that category), "and shall be by him paid to the authority for whom he acts, and be applied towards the expenses of executing this Act, any statute to the contrary notwithstanding." So far, therefore, that section, in clear and unambiguous language, provides, in the case of what have been called during the argument official prosecutions, that the penalty recovered shall be paid to the authority whom the prosecutor represents. If one is to look to the reason of the thing, there seems to be excellent reason why it should be so. A new obligation is cast upon the local authority. They are to aid in the execution of this Act, and the Act requires them to take upon themselves the burden and responsibility of appointing and of paying an analyst. The provision to which I have so far directed attention provides a means by which that local authority may be put, at least in part, in funds for the purpose of seeing to the effective execution of this important Act of Parliament. Stopping there for one moment, and looking to the reason of the thing, it is exceedingly difficult to suppose that the Legislature, while it intended that that provision should have effect for the benefit of the local authorities throughout the whole of the rest of the kingdom, should not have that effect and that advantage in the case of the local authorities in this great and crowded metropolis, where undoubtedly the execution of the Act would be more urgently called for than in any other community. But the Act does not stop there. So far it deals with what I have called official prosecutions, but in the case of any other prosecution, and also in the case of a prosecution not official but instituted by any one of the public who, as I have pointed out, may institute such proceedings, then the penalty is to go according to the existing law; and according to that existing law, which it is not necessary to refer to at any length, in the case of the imposition of penalties by the metropolitan magistrates they go to the receiver of the police. In the case of boroughs having quarter sessions they go to the treasurer of those boroughs according to the general existing law. That is the state of the legislation upon the matter up to the time of the passing of the Margarine Act, the Act entitled "for the better Prevention of the Fraudulent Sale of Margarine" (50 & 51 Vict. c. 29) and passed in 1887. It is entirely connected with the offence of fraudulently selling margarine. It has, therefore, a limited application, but it is supplemental to the Act of 1875 dealing with the sale of food and of drugs, and it provides in sect. 11 that "any part of any penalty recovered under this Act may, if the court shall so direct, be paid to the person who proceeds for the same to reimburse him for the legal costs of obtaining the analysis and any other reasonable expenses to which the court shall consider him entitled. The object of that supplemental provision of the law is clear enough. Under sect. 26, which I have read from the Act of 1875, in the case of official prosecutions they evidently went to the authority whom the official prosecutor represented, but in the case of non-official prosecutions they went according to the general law. Therefore there did not appear to have been (I must assume it is so) any power in the case of a non-official prosecution for the magistrates to do more than award costs against the persons upon whom the penalty was imposed, and apparently no power, which would be a reasonable one in such a case and in

executing such a statute, for the court to reimburse the non-official prosecutor for any extra expense to which he might have been put. Therefore, quite fitting in with the statute of 1875, is the provision in the statute of 1887 providing that a part of the penalty recovered under that Act relating to what I may call the margarine offences may be paid to the person who proceeds in order to reimburse him for the legal costs. I do not think that there is much in the second point raised by Mr. Sutton, that in point of fact appropriation of penalties is not a proceeding within the meaning of sect. 12: in other words, that sect. 12 of the Margarine Act does not incorporate sect. 26 of the Act of 1875. I think it very clearly does. It enumerates the sections by numbers—from 12 to 28 inclusive—and even if there were not that enumeration expressly of those numbers which include sect. 26, I should have thought it was not straining the language of the Act of Parliament at all to say that the appropriation of the penalty which the magistrate is called upon to make after his adjudication that the penalty shall be paid by the party charged—I do not think it would be any straining of the language at all to say that that is a part of the proceeding within the meaning of the Act. But the main question which Mr. Sutton has argued is, that the statute of 2 & 3 Vict. c. 71, s. 7, is still good and operative law. That is the main question. Certain cases have been cited, and two principal cases have been cited by the learned counsel who appears in support of the claim of the receiver of the metropolitan police. I will only say, to begin with, about those cases that I conceive the observation pointed out to me by my learned brother in the judgment of Lord Campbell, C.J. is most apposite to the consideration of the true construction to be placed upon Acts of Parliament. He says in that case, on page 288 of the report in Wray & Ellis (*ubi sup.*): "There can be little use in referring to cases where a similar question has arisen on Acts of Parliament differently framed, for they only illustrate the general principle, which is not in dispute." I think that observation is most apposite. What then is the duty of the court which is called upon to construe an Act of Parliament? I conceive the first duty of the court to be to read the Act of Parliament, to consider the entire provisions of the Act of Parliament itself, and, if its language be clear and unambiguous, to give effect to what the Legislature has said. I think it is proper to refer to the history of legislation, to Acts *in pari materiâ* with that which is under construction only when there is ambiguity, and when there is doubt in the language which the Legislature has chosen to use. In this case I confess I can see no manner of doubt whatever. I think the scheme of the Act is intelligible, coherent, and entirely free from ambiguity; and, if one has to look beyond the language itself and seek for justification in and principle for what the Legislature has chosen to do, I think the explanation is in every way complete and satisfactory. The case decided by the Court of Queen's Bench, the case of *Wray* v. *Ellis* (*ubi sup.*), was undoubtedly decided by a very strong court, and, as it was a case in which there was an appeal, this court would be bound to act upon it if it applied, even if this court did not agree in the decision arrived at; and indeed, whether they considered themselves bound or not by it they would pay it the greatest possible respect because of the distinguished judges from whom the judgment emanated. But while I do not hesitate to say, speaking for myself only, that I should have found the greatest possible difficulty in arriving at the conclusion at which that court arrived, and I should not have arrived at it, I think yet it is distinguishable from the present case upon several grounds. Some of these grounds have been already adverted to. The language is not to be found in that case and the section of the Act of Parliament, which is to be found here, "any statute to the contrary notwithstanding"; but for my own part I confess I lay much less stress upon the presence in this case of those words and their absence in the previous case than I do upon the elaborate and careful provisions which are provided in the section of the Act of Parliament, and which make it clear to my mind that the Legislature did intend unmistakably to do what they have done, namely, to give in the case of official prosecutions the penalty to the authority the official prosecutor represented. In all other cases of non-official prosecutions they have to allow the penalty to go as the law sends it; that is to say, in the case of non-official prosecutions within the metropolitan district before the metropolitan police magistrate to the receiver, in boroughs where there are sessions to the treasurer of the borough. I do not think it necessary to refer to the case of the *Attorney-General* v. *Moore* (*ubi sup.*) beyond saying that the observations that I have made in distinguishing the case of *Wray* v. *Ellis* (*ubi sup.*) and this case apply equally to that case. Speaking for myself, I come to a conclusion perfectly clear and satisfactory to my own mind that in this case the receiver of police is not entitled to the penalty in question.

CHARLES, J.—I am of the same opinion. The first question which has to be considered in the case is, whether sect. 26 of the Food and Drugs Act 1875 is incorporated in the Margarine Act of 1837, and Mr. Sutton invites us to say that it is not, upon two grounds as I understand him. In the first place, he said that the 12th section of the Margarine Act of 1887 refers to proceedings only, and that a section in the prior Act which governs the mode of appropriating a penalty is a proceeding. Then, secondly, he said that sect. 11 of the Margarine Act must be read along with sect. 12, and that by sect. 11 there is an enactment with reference to a part of the penalty recovered which renders it impossible to suppose that it was intended to incorporate the 26th section of the earlier statute. I am unable to assent to either of these contentions. I think that the word "proceeding" in sect. 12 does include a section which prescribed the application of the penalty, the more so as by number at all events the section in question is itself alluded to in the 12th section of the Margarine Act of 1887. Secondly, I see no inconsistency between holding that "proceeding" includes the mode in which the penalty is to be applied. Sect. 11 of the Act of 1887 provides that in a certain case, if the court thinks fit, a part of the penalty received may be paid to the person who proceeds for the same. That appears to me to be quite consistent with the enactment contained in sect. 26 as to the general application of penalties where a prosecution is instituted that can be called an official prosecution, or where a prosecution is

instituted which may be described as a non-official prosecution. I think therefore that sect. 26 of the Act of 1875 is incorporated with the subsequent statute, and accordingly it becomes necessary to consider the second question—the main question which Mr. Sutton has argued. What is the construction of it, having regard to the language of 2 & 3 Vict. c. 71, sect. 47, upon which the title of the receiver in this case is based? I entirely concur with what my Lord has said as to the reason of this matter, and as to the propriety of the Legislature having enacted that in the case of an official prosecution the penalty shall be paid to the authority which acts, and it seems to me that, reading this section by itself and not for the moment laying any stress at all upon the words contained in "any statute to the contrary notwithstanding"—reading this section by itself, it is a plain enactment by the Legislature that official prosecutors shall have the penalty paid to them. In the 26th section there is a dealing by the Legislature with prosecutions which may be described as non-official prosecutions, and looking at the section by itself, as I have said, and my Lord has pointed out and given his reasons for so holding, it seems to me to be admirably adapted to effect the intention which the Legislature may be supposed to have had to recoup to an official person the expenses of a prosecution. But then it is said that it is necessary to read in those sections 12 to 28 of the Police Act and the 47th section of the 2 & 3 Vict. c. 71, and, as I understand the argument, it is put in this way: that that section applies to a limited area, namely, the area of the county of Middlesex within the jurisdiction of the metropolitan police magistrates; and in that area it is specially provided by this section that penalties and forfeitures recovered before metropolitan magistrates shall go to the receiver. It is said that this statute, never having been repealed, must be read with the later statutes, and furnishes an illustration of the maxim, *Generalia specialibus non derogant*, as Lord Campbell said in the case to which reference has been made. The principle which governs the matters is beyond dispute. The later statute must be carefully looked at, to see whether or not, when its purview is looked at, and when its terms are considered, it does in fact, as to the matters contained in the later statutes, by implication repeal the earlier enactment. I should have no hesitation whatever in this case in holding that, for the reasons which my Lord has given, sect. 26 is complete in itself, and extends to the whole of England, including the metropolitan police district, were it not for the case of *Wray* v. *Ellis* (*ubi sup.*), which, for a time, certainly did present great difficulty to my mind. It is a case, as pointed out, decided by a full Court of Queen's Bench, and a case which might have been appealed from, and it was not. In that case it was decided that, although the Gaming Act—the Act for the Suppression of Gaming Houses—expressly provides that "One half of any pecuniary penalty which shall be adjudged to be paid under this Act, shall be paid to the person laying the information upon which the conviction takes place, and the remaining half shall be applied in aid of the poor rates of the parish in which the offence shall have been committed, and shall be paid for that purpose to the overseer or other person authorised to receive poor rates in such parish, on a summary conviction under this Act, before a metropolitan police magistrate, it was held that the half of the penalty which was not paid to the informer was paid to the receiver of the metropolitan police and not to the overseer." I own I feel great difficulty in following the reason which appeared to have governed the Court of Queen's Bench in coming to the decision to which they did come; but there the decision stands, and if this were a case raised under 17 & 18 Vict. c. 38, we should undoubtedly be bound to follow that decision. But it is not, and it appears to me that there are material distinctions between the case of *Wray* v. *Ellis* (*ubi sup.*) and the case which we now have under our consideration. In *Wray* v. *Ellis* the court was of opinion—although obviously when you read the whole judgment of the Lord Chief Justice even in that case with greatest doubt, more especially that appears in the early part of Lord Campbell's judgment—the court was of opinion that they could best effect the intention of the Legislature by leaving the two statutes standing together, and allowing the receiver of police to receive the penalty where a prosecution was instituted under the Gaming Act. That is the whole extent of the decision of the court, and I cannot agree with the statement of the decision which I have before me in the well-known work of Chitty's Statutes, that it is an authoritative proposition that this section is not repealed so far as regards the application of penalties. I agree, so far as regards the application of penalties under the Gaming Act, that the section is not repealed; but otherwise it seems to me that in such cases it still remains a subject of inquiry by the court before which the question comes whether the subsequent statute does by its provisions, either expressly or impliedly, repeal the terms of the 47th section. In this case I think it is clear, when this section is looked at, that it does. It may be said with some little force that some weight ought to be placed upon the words "any statute to the contrary notwithstanding." Certainly the existence of those words points in the direction in which I own I should have decided the case myself, and I understand my Lord to say he would have done so too if those words had not been there. The other decision which was referred to by Mr. Sutton of the *Attorney-General* v. *Moore* (*ubi sup.*) is really a long way from the present case. There the Municipal Corporations Act itself does provide in the plainest terms, as the Lord Chief Baron points out in his judgment in the court below, that, although a subsequent statute may give a penalty to any informer or to Her Majesty, yet where a borough has a separate court of quarter sessions it is nevertheless to be paid to the treasurer. It seems to me that, although the language of the Municipal Corporations Act is very like the language of sect. 47, the same observation applies to it which I have made already with regard to the other case, that really these cases must be judged of as they arise, and must be decided exclusively upon the language which in each case the court is called upon to consider. I think, therefore, in this case that the *mandamus* was right.

Mandamus to go.

Solicitor in support of the rule obtained, *H. Mansfield Robinson.*

Showing cause against the rule, *The Solicitor for the Treasury.*

May 21 *and July* 31.

(Before Lord RUSSELL, C.J. and CHARLES, J.)

ATTORNEY-GENERAL *v.* ELLIS AND OTHERS. (*a*)

Revenue—Probate duty—"Voluntary transfers"—Customs and Inland Revenue Act 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-sect.* 2 (*b*)—*Customs and Inland Revenue Act* 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-sect.* (1).

Two persons in their joint names purchased stock. Each person contributed money towards the purchase in equal proportions on the express agreement that the survivor should be entitled by right of survivorship to the stock so purchased. One of the joint purchasers having died, the Crown claimed account stamp duty under sect. 38, *sub-sects.* (1) *and* (2) (*b*) *of the Customs and Inland Revenue Act* 1881, *on so much of the stock as was purchased with money of the deceased.*

Held, that the purchase of so much of the stock as was purchased out of the money of the deceased was a "voluntary transfer" of such stock by the deceased himself and his co-purchaser within the meaning of the section, notwithstanding that it was made in consideration of his co-purchaser doing the like, and that the Crown was consequently entitled to the duty claimed.

AN information by the Attorney-General against the executors of Arthur Ellis, deceased, to recover account stamp duty under the Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12), s. 38, and the Customs and Inland Revenue Act 1889 (52 & 53 Vict. c. 7), s. 11, in respect of certain railway stocks standing in the joint names of Arthur Ellis and his wife Charlotte Jane Ellis, at the time of the death of Arthur Ellis.

The *Attorney-General* (Sir R. T. Reid, Q.C.) and *Vaughan Hawkins* for the Crown.

Farwell, Q.C. and *L. H. Jenkins*, for the defendants.

The judgment of the Court (read by Lord Russell, C.J.) sufficiently states the facts and the arguments of counsel.

Cur. adv. vult.

Lord RUSSELL, C.J.—This was an information against the executors of Arthur Ellis to recover account stamp duty in respect of certain railway stocks standing at the time of his death in the joint names of his wife Charlotte Jane Ellis and himself. No part of these stocks had been bought solely with money belonging to Arthur Ellis. All of them had in fact been bought with moneys contributed in equal shares by him and by his wife out of her separate estate. These investments were made from time to time in pursuance of a verbal arrangement that they should, on the decease of such one of the parties as should first die, belong to the survivor absolutely. Arthur Ellis died on the 11th Feb. 1891. By his will he devised and bequeathed his residuary estate for the benefit of his wife during widowhood and afterwards for his children. The will then declared that his wife and himself had from time to time invested moneys partly belonging to him and partly to her in various railway stocks and shares which were registered in their joint names, "such investments having been made on the express agreement that the survivor of them should be entitled by right of survivorship to the stocks and shares so bought," and proceeded to direct that the income of the residuary estate should be enjoyed by her on condition of her transferring all such stocks and shares to his executors and trustees, to be by them held on the same trusts as the rest of his residuary estate. In fulfilment of this condition the various stocks and shares were duly transferred into the names of the defendants, the executors and trustees of Arthur Ellis. It was now sought to charge account stamp duty on so much of the stocks and shares as had been bought by Arthur Ellis out of his own moneys. The defendants refused to pay the duty claimed, on the ground that the investment of the moneys by Arthur Ellis was made in pursuance of a contract for value, and not "voluntarily" within the meaning of the Customs and Inland Revenue Acts 1881 and 1889, and this is the question to be determined. By the Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12), s. 38, sub-sect. 1, it is enacted as follows: "Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and be paid on accounts delivered of the personal or movable property to be included therein according to the value thereof." Sub-sect. 2: "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.: (*b*) Any property which a person dying on or after such day (June 1, 1881), having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person." By the Customs and Inland Revenue Act 1889 (52 & 53 Vict. c. 7), s. 11, it is enacted that the description of property marked (*b*) in the Customs and Inland Revenue Act 1881, s. 38, "shall be construed as if the expression 'to be transferred to or vested in himself and any other person,' included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert or by arrangement with any other person." It was contended on behalf of the Crown that the act of Arthur Ellis was "voluntarily" done, inasmuch as it had not been done in pursuance of any obligation previously incurred either by common law, statute, or contract. Had Arthur Ellis acted alone—it was pointed out—there could not have been any doubt that the transfer would have been voluntarily effected; and it was urged that, even under the words of the earlier statute, the circumstance that the wife brought in equivalent sums could make no difference. She too was not acting under any precedent obligation. Further, it was said that the amending statute made the matter perfectly clear. Arthur Ellis had done the very thing contemplated; he had effected a purchase "in concert or by arrangement with" his wife of securities, the beneficial interest in which accrued by survivorship to her on his death, and that it by no means followed that because there might have been consideration between the parties the acts could not properly be considered to have been "voluntarily" done within the meaning of the Act: (see *Crossman and another* v. *The Queen*, 55 L. T.

(*a*) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Rep. 848; 18 Q. B. Div. 256.) The defendants, on the other hand, contended that "voluntarily" meant "gratuitously" or "without consideration," and that here the transfer was not gratuitous but for valuable consideration. The funds were contributed in consideration of mutual promises. The husband and wife had contracted with each other for value, and except as in so far as every contract is in one sense voluntary as being the result of an exercise of will, the act of neither was "voluntarily" done: (see *Re the Duty on the Estate of the New University Club*, 56 L. T. Rep. 909; 18 Q. B. Div. 720.) We are, however, of opinion that in the section under consideration the word "voluntarily" is not used in the sense of "without consideration," but in its ordinary sense of "freely without compulsion," and "not under any obligation": (see *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868; *Art Union* v. *Overseers, &c., Savoy*, 71 L. T. Rep. 40; (1894) 2 Q. B. 609.) We think that this is not the only construction, but it is that best calculated to carry out the object of the Act, which was to fix with liability to duty "all dispositions" which, while preserving to a man the enjoyment of personal property to the day of his death, make the same property pass on his death to someone else and so become substitutes for wills: (*Attorney-General* v. *Gosling*, 66 L. T. Rep. 284, at p. 287; (1892) 1 Q. B, 545.) It is moreover a construction which makes it possible to put a reasonable interpretation on the amending Act, sect. 11, relating to property marked (*b*), whereas if "voluntarily" means "without consideration," it is difficult to give effect to the words in the last-mentioned section, "in concert or by arrangement with," words which would appear to point to the existence of some contractual obligation. Our judgment must, therefore, be for the Crown.

CHARLES, J. agreed.

Judgment for the Crown.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Walker, Son,* and *Field.*

CROWN CASES RESERVED.

Saturday, July 27.

(Before Lord RUSSELL, C.J., POLLOCK, B., GRANTHAM, LAWRANCE, and WRIGHT, JJ.)

REG. *v.* FARNBOROUGH. (*a*)

Criminal law—Practice—Inferences from findings of jury—Power of judge to draw inferences—Larceny—Animus furandi.

In a criminal trial the judge has no power to draw inferences of fact from the findings of the jury.

Upon the trial of an indictment for larceny the jury, not having agreed upon a verdict, were asked by the presiding judge whether or not they believed the evidence given for the prosecution, and the judge upon being answered in the affirmative, directed a verdict of guilty to be entered. A case having been reserved at the trial for the consideration of this court:

Held, that the direction amounted to a drawing by the judge of an inference of animus furandi *on the part of the prisoner which ought to have been drawn, if at all, by the jury; and that the conviction was therefore bad.*

THIS was a case stated by the Chairman of the Middlesex Quarter Sessions, as follows:—

At the Midsummer Quarter Sessions of the Peace for the county of Middlesex, on the 6th July 1895, the prisoner was charged with stealing milk.

The facts of the charge are immaterial to this case.

It appeared to me that, if the jury believed the evidence for the prosecution, the prisoner was in law guilty as charged, and I so directed them. No evidence except as to character was called for the defence, and the counsel for the defence did not seriously dispute my ruling.

The jury retired to consider their verdict, and after they had been absent some time I sent for them and asked if they were agreed, and they replied that they were not. I then asked them did they believe the evidence for the prosecution, and the foreman replied that they did.

Counsel for the prisoner objected that no question could be asked except the ordinary one, "Are you agreed on your verdict?" and "Do you find the prisoner guilty or not guilty?" I overruled the objection, and directed the jury that their verdict amounted to one of guilty, and it was so recorded; but I released the prisoner on his own recognisance pending the decision of this case.

It is laid down in 4 Bl. Comm. ed. 1813, p. 328:

> Such public or open verdict may be either general guilty or not guilty, or special, setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated it be murder, manslaughter, or no crime at all. This is, when they doubt the matter of law, and therefore choose to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict if they think proper so to hazard a breach of their oaths.

The question is, Had I the power to put the question and direct such verdict to be recorded, the facts in the judgment of the court clearly constituting in law the offence charged if proved to the satisfaction of the jury?

Hutton, on behalf of the prisoner, submitted that, in doing what he had done, the learned chairman had usurped the functions of the jury, and drawn the inference from the findings of the jury that the act of the prisoner in taking the milk, the value of which was at the most 2*d.*, had been committed with a felonious intent. [He was here stopped by the Court.]

J. P. Grain admitted, on behalf of the prosecution, that the conviction could not under the circumstances be supported.

Lord RUSSELL, C.J.—If this case did not raise a question of very considerable public importance I should content myself with saying that the conviction could not stand. But it does raise a question of great public importance. The prisoner being charged with stealing milk, evidence was given in support of that charge; and, after the evidence had been given for the prosecution, no evidence, except as to character, being called for the defence, the jury retired to consider their verdict. After the lapse of some time, without any communication being made by them to the

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

learned chairman that they desired his assistance, he sent to them, as he might properly do, and asked them if they had agreed upon their verdict. when they said "No." He then asked them, "Did they believe the evidence for the prosecution," and the foreman replied that they did. I will not stop to consider whether that was a convenient mode of conducting a criminal prosecution. But what did the answer of the foreman, assuming that it expressed the opinion of the jury, amount to? They had already said that they were not agreed upon their verdict; it seems to me that it all amounted to this, "We have heard certain witnesses say so and so, and we believe that they have been telling the truth." But that was consistent with a finding by them that they were nevertheless not satisfied that the essential elements were present which were necessary to constitute the offence with which the prisoner was charged, namely, that he took the milk *animo furandi*. It was quite consistent with their believing that he thought he had leave to take the milk, or that the matter was too trivial to justify such a finding. We know nothing of the facts, but it was quite consistent with the jury declining, although they believed the evidence, to draw the conclusion which was necessary for convicting the prisoner. It is for the jury to answer all questions of fact, and for the judge to answer questions of law. Here the learned chairman took upon himself the functions of the jury, and the conviction cannot, in my opinion, be sustained.

POLLOCK, B.—I entirely agree, and wish to say nothing but that this decision of ours is not to be taken in any way to interfere with the rule as to the power of the judge where the jury find a special verdict. If a special verdict is found in which all the elements of the crime charged against the prisoner are included, there is nothing to prevent the judge from directing whether or not a verdict of guilty is to be entered. This will be found discussed in *Reg.* v. *Gray* (2 East P. C. 708; 17 Cox C. C. 299).

GRANTHAM, LAWRANCE, and WRIGHT, JJ. concurred.

Conviction quashed.

Solicitors: for the prosecution, *C. H. Mason*; for the prisoner, *H. Firth.*

Saturday, July 27.

(Before Lord RUSSELL, C.J., POLLOCK, B., GRANTHAM, LAWRANCE, and WRIGHT, JJ.)

REG. *v.* WAUDBY. (*a*)

Criminal law—Practice—Joint indictment for felony of cutting and wounding, and for aiding and abetting a felony—Conviction of one for misdemeanour of wounding, and of the other for aiding and abetting—14 & 15 *Vict. c.* 19, *s.* 5; 24 & 25 *Vict. c.* 94, *s.* 8.

Upon a joint indictment charging one prisoner with the felony of wounding with intent to do grievous bodily harm, and the other with aiding and abetting him in committing such felony, it is competent for the jury to find the one charged with aiding and abetting guilty, although they may have acquitted the other of the felony, and found him guilty only of the misdemeanour of wounding by virtue of 14 & 15 *Vict. c.* 19, *s.* 5.

THIS was a case stated for the opinion of the Court by Lawrance, J. as follows:—

John Waudby and William Waudby were tried before me on the 17th May last, at the assizes held at Leeds, upon an indictment charging John Waudby with feloniously, &c., shooting with intent to do grievous bodily harm to one William Featherstone, and William Waudby was charged with aiding and abetting John Waudby to commit the said felony.

In the second count of the indictment the charge against John Waudby was for feloniously wounding with intent to do grievous bodily harm, and against William Waudby for being present aiding, abetting, &c., the said John Waudby to commit the said felony.

The jury found John Waudby guilty of unlawfully wounding, and William Waudby guilty of aiding and abetting, and it was objected on behalf of the prisoner William Waudby that, as he was aiding and abetting a misdemeanour, he was entitled to be acquitted on the said indictment.

I overruled the objection, and released the said William Waudby on recognisances to come up for judgment when called upon.

The question for the consideration of the Court is, whether I was right in so holding.

The following is a copy of the indictment which accompanied the case:

Yorkshire to wit. North and East Ridings Division. Spring Assize.—The jurors for our Lady the Queen upon their oath present, that John Waudby the younger, on the seventeenth day of April in the year of our Lord one thousand eight hundred and ninety five, a certain revolver then loaded with ball cartridge, at and against one William Featherstone, feloniously, unlawfully, and maliciously did shoot with intent in so doing thereby then to do some grievous bodily harm to the said William Featherstone, and the jurors aforesaid upon their oath aforesaid do further present that William Waudby, on the day and in the year aforesaid, feloniously was present aiding, abetting, and assisting the said John Waudby the younger the felony aforesaid to do and commit, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Second count.—And the jurors aforesaid upon their oath aforesaid do further present, that the said John Waudby the younger, on the day and in the year aforesaid, feloniously, unlawfully, and maliciously did wound the said William Featherstone with intent in so doing thereby then to do some grievous bodily harm to the said William Featherstone, and the jurors aforesaid upon their oath aforesaid do further present, that the said William Waudby, on the day and in the year aforesaid, feloniously was present aiding, abetting, and assisting the said John Waudby the younger the felony aforesaid to do and commit, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

No one appeared either in support of or against the conviction.

Lord RUSSELL, C.J.—In this case the prisoners John and William Waudby were tried before my brother Lawrance upon an indictment which charged, in the first count, John Waudby with feloniously shooting at the prosecutor with intent to do him grievous bodily harm, and William Waudby with aiding and abetting him in the

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

felony. In the same count John Waudby was charged with feloniously wounding the prosecutor, with intent to do him grievous bodily harm, and William Waudby was charged with aiding and abetting him as before. The jury acquitted both the prisoners on the first count. But on the second count they found John Waudby guilty not of felony, but of the misdemeanour of unlawfully wounding, and William Waudby guilty of aiding and abetting him in that unlawful wounding. It was objected that William Waudby could not be convicted as an accessory, the jury having negatived the charge of felony, and found John Waudby guilty of the misdemeanour only. The learned judge, however, overruled this objection; and in my judgment he was clearly right in so doing. In the first charge, which was of felony, both the prisoners were charged as principals, William Waudby being charged as a principal in the second degree as having aided and abetted. The jury negatived the charge of felony, but found John Waudby guilty of unlawful wounding, which offence is a misdemeanour, and William Waudby, who was charged with aiding and abetting, was found guilty of aiding and abetting in the commission of that misdemeanour. Now a person who aids and abets in the case of misdemeanour is liable as a principal in the commission of that offence, there being no first and second degrees of criminality in the case of a misdemeanour. The statute 14 & 15 Vict. c. 19, s. 5, is clear on the point, for it provides that, "if upon the trial of any indictment for any felony except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon the defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding." That is to say, that where the act has not been done with the intent necessary to constitute the felony, then the prisoner shall be punished in the same manner as if he had been charged with the misdemeanour only. Then follows the statute 24 & 25 Vict. c. 94, s. 8, which enacts that: "Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour, whether the same be a misdemeanour at common law, or by any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender." Here the jury negatived the felony, but found that which constitutes an offence as a principal offender, there being no secondary degree in the commission of the offence. The conviction appears to me therefore to be right, and must be affirmed.

POLLOCK, B., GRANTHAM, LAWRANCE, and WRIGHT, JJ., concurred.

Conviction affirmed.

House of Lords.

May 9 and July 29.

(Before Lords HALSBURY, (*a*) WATSON, ASHBOURNE, and MACNAGHTEN.)

CORPORATION OF BRADFORD *v.* PICKLES. (*b*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Water—Subterranean springs—Interference with flow of water—Injunction—Mala fides—*Bradford Waterworks Act* 1854 (17 & 18 *Vict. c. cxxiv.*) *s.* 49.

Where an act, apart from motive, gives rise merely to damages without legal injury, the motive, however reprehensible it may be, will not supply that element.

The appellants were the owners of waterworks, which they had purchased from a company which had constructed them under the powers of a special Act. The Act authorised the company to appropriate the water from certain specified springs, and provided that it should not be lawful for any other person to divert, alter, or appropriate in any other manner than by law they might legally be entitled any of the waters supplying or flowing from the springs, or to sink any well or pit, or do any other act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity. The Act contained no provision for compensating landowners whose rights were affected.

The respondent, who was the owner of land adjacent to the springs, began to make a tunnel through his land, with the alleged intention of draining certain beds of stone which lay under his land.

The effect of the respondent's operations was to seriously affect the supply of water to the appellants' springs, and there was evidence that he was not acting bonâ fide, *but with the intention of compelling the appellants to buy him out at his own price. The appellants applied for an injunction to restrain him from continuing his tunnel.*

Held (affirming the judgment of the court below), that the respondent's common law rights were not affected by the Act, and that, as he was doing no more than he was legally entitled to do, within the decision in Chasemore *v.* Richards (7 *H. of L. Cas.* 349) *his ulterior motive was immaterial, and an injunction should not be granted.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Herschell, L.C., Lindley and Smith, L.JJ.), reported in 71 L. T. Rep. 793 and (1895) 1 Ch. 145, who had reversed a decision of North, J., reported in 71 L. T. Rep. 319.

The action was brought by the appellants to restrain the respondent from making or continuing a drift or tunnel in his lands situate near East Many Wells, in the parish of Bradford, Yorkshire, whereby the waters of certain springs and underground streams, known as "Many Wells," to which the appellants alleged that they

(*a*) In the interval between the argument and the judgment in this case Lord Halsbury accepted the office of Lord Chancellor.

(*b*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

were entitled under certain Acts of Parliament, might be diverted, drawn off, or diminished in quantity.

The appellants were authorised by the Bradford Corporation Waterworks Act 1854 to purchase the whole undertaking of the Bradford Waterworks Company, who had acquired the exclusive right to the springs and streams of water called "Many Wells," arising or flowing in and through certain farm lands and grounds called Trooper or Many Wells Farm. By the 234th section of the Bradford Waterworks Act of 1842 it was provided that after the "Many Wells" springs had been purchased by the company it should not be lawful for any persons to divert or appropriate in any other manner than by law they might be legally entitled any of the waters then supplying or flowing from the same.

The respondent was the owner of a farm of about 140 acres immediately adjoining Trooper's Farm, and on higher ground, which had been in the possession of his family for about 100 years. The surface soil was let to agricultural tenants, but the mines and minerals, which were of considerable value, were reserved to the respondent. The respondent had been advised that large quantities of stone and other minerals could be profitably worked if the works could be kept effectually drained and cleared of water without the expense of pumping-engines, but the effect would be that the underground stream of water which supplied "Many Wells" would be cut off. The appellants by the present proceedings sought to restrain the respondent from executing the proposed works for the purpose of draining his mines.

The action was tried before North, J. in 1893, when the learned judge granted an injunction restraining the respondent from executing his drainage works, but his judgment was reversed on appeal, as above mentioned.

Cozens-Hardy, Q.C. and *Eyre* (Sir *H. James*, Q.C. with them) appeared for the appellants, and contended that the evidence showed that the respondent was acting maliciously and not *bonâ fide*. He is not making a reasonable use of his land. See *Acton* v. *Blundell* (12 M. & W. 324). The penalty imposed by sect. 234 of the Bradford Waterworks Act 1842, which is re-enacted by sect. 49 of the Act of 1854, applies to acts made illegal in the earlier portion. "Divert, alter, and appropriate" in the earlier part of the section applies to surface water, and is something different from "sinking any well or pit," which applies to underground water, and is absolutely prohibited. The state of things existing in 1854 when the Act passed must be looked at, and at that time the water flowed from the springs in well-defined channels, which the respondent had no right to interfere with. The section refers to two descriptions of illegality, one at common law, and one created by the statute, which abridged the common law right of the respondent. They also referred to

Keeble v. *Hickeringhill*, 11 East, 574, n.; 11 Mod. 75, 131;
Smith v. *Kenrick*, 7 C. B. 515;
Chasemore v. *Richards*, 7 H. of L. Cas. 349.

The respondent is making no use of the water, it is running to waste. In the *Mogul Steamship Company* v. *McGregor* (61 L. T. Rep. 820; 23 Q. B. Div. 598) the Court of Appeal held that wilful and malicious injury to the business of another, without just cause or excuse, was actionable, and that view was not overruled in the House of Lords (66 L. T. Rep. 1; (1892) A. C. 25). See also Angel on Watercourses, 6th edit., p. 182.

Everitt, Q.C., *Tindal Atkinson*, Q.C., *Butcher*, and *Longstaffe*, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the argument for the appellants their Lordships took time to consider their judgment.

July 29.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Halsbury). — My Lords: In this action the plaintiffs seek to restrain the defendant from doing certain acts which they allege will interfere with the supply of water which they want, and are incorporated to collect, for the purpose of better supplying the town of Bradford. North, J. ordered the injunction to issue, but the Court of Appeal, consisting of Lord Herschell and Lindley and Smith, L.JJ., reversed his judgment. The facts that are material to the decision of this question seem to me to lie in a very narrow compass. The acts done, or sought to be done, by the defendant were all done upon his own land, and the interference, whatever it is, with the flow of water is an interference with water which is underground, and not shown to be water flowing in any defined stream, but is percolating water, which, but for such interference, would undoubtedly reach the plaintiffs' works, and in that sense it does deprive them of the water which they would otherwise get. But although it does deprive them of water which they would otherwise get, it is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant has no right to do what he is doing. I am of opinion that neither of those propositions can be established. Apart from the consideration of the particular Act of Parliament incorporating the plaintiffs, which requires separate treatment, the question whether the plaintiffs have a right to the flow of such water appears to me to be covered by authority. In the case of *Chasemore* v. *Richards* (7 H. of L. Cas. 349) it became necessary for this House to decide whether an owner of land had a right to sink a well upon his own premises, and thereby abstract the subterranean water percolating through his own soil, which would otherwise, by the natural force of gravity, have found its way into springs which fed the river Wandle, the flow of which the plaintiff in that action had enjoyed for upwards of sixty years. The very question was then determined by this House, and it was held that the landowner had a right to do what he had done, whatever his object or purpose might be, and although the purpose might be wholly unconnected with the enjoyment of his own estate. It therefore appears to me that, treating this question apart from the 49th section of the Act of Parliament upon which the whole question turns, it would be absolutely hopeless to contend that this case is not governed by the authority of *Chasemore* v. *Richards*. This brings me back to the 49th section of the statute 17 & 18 Vict. c. cxxiv., upon which reliance has

been placed. That section is as follows: "It shall not be lawful for any person other than the company to divert, alter, or appropriate in any other manner than by law they may be legally entitled, any of the waters supplying or flowing from certain streams and springs called "Many Wells," arising or flowing in and through a certain farm called "Trooper" or Many Wells Farm, in the township of Wilsden, in the parish of Bradford, or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity, and if any person shall illegally divert, alter, or appropriate the said water, or any part thereof, or sink any such well or pit, or shall do any other act, matter, or thing whereby the said waters may be drawn off or diminished in quantity, and shall not immediately on being required so to do by the company repair the injury done by him so as to restore the said springs and the waters thereof to the state they were in before such illegal act as aforesaid, he shall forfeit to the company a sum not exceeding 5*l.* for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by, or by the authority of, such person, in addition to the damage which the company may sustain by reason of their supply of water being diminished." Whatever may be said of the drafting of this section, two things are clear: first, that the section in its terms contemplates that persons other than the company may be legally entitled to divert, alter, or appropriate the waters supplying or flowing from the streams and springs; and, secondly, that the acts against which the section is directed must be illegal diversion, alteration, or appropriation of the said waters. The natural interpretation of such language seems to me to be this—that whereas the generality of the language of the section might apply to any alteration or appropriation of waters supplying or flowing from the streams and springs called "Many Wells," the section only intended to protect such streams and springs and supplies as the company should have acquired a right to by purchase, compensation, or otherwise; but in such wise as should vest in them the proprietorship of the waters, streams, springs, &c. And, lest the generality of the language should give them more than that to which they had acquired the proprietary right, the legal rights of all other persons were expressly saved; and upon this assumption the latter part of the section makes penal the illegal diversion, alteration, or appropriation of any streams, &c., of which, by the hypothesis, the company had become the proprietor. I do not think that North, J. does justice to the language of the section when he says that, "the section enacts that a man is not to do certain specified things except so far as he may lawfully do them." The fallacy of that observation (with all respect to North, J.) resides in the phrase "certain specified things." If my reading of the section be correct, the thing that is prohibited is taking or diverting water which has been appropriated and paid for by the company; but the thing which is not prohibited is taking water which has not reached the company's premises, to the property in which no title is given by the section, and which, by the very act complained of, never can reach the company's premises at all. To use popular language, therefore, what is prohibited is taking what belongs to the company, and what is not prohibited is taking what does not belong to the company. I have used popular language because I have no doubt that the draftsman who drew the section was encountered with the proposition in his own mind that you could not absolutely assert property in percolating water at all. You may have a right to the flow of water; you may have a property in the water when it is collected and appropriated and reduced into possession; but in view of the particular subject-matter with which the draftsman was dealing, it seems to me intelligible enough why he adopted the phraseology now under construction. It appears to me that this is the true construction of the section from the language itself. But I confess I can entertain no doubt that the mere fact that the section as construed by the plaintiffs affords no right to compensation to those whose rights might be affected, is conclusive against the construction contended for by the plaintiffs. The only remaining point is the question of fact alleged by the plaintiffs, that the acts done by the defendant are done not with any view which deals with the use of his own land or the percolating water through it, but is done, in the language of the pleader, "maliciously." I am not certain that I can understand or give any intelligible construction to the word so used. Upon the supposition on which I am now arguing, it comes to an allegation that the defendant did maliciously something that he had a right to do. If this question were to have been tried in old times as an injury to the right in an action on the case the plaintiff would have had to allege, and to prove, if traversed, that he was entitled to the flow of the water which, as I have already said, was an allegation he would have failed to establish. This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant. But I am not prepared to adopt Lindley, L.J.'s view of the moral obliquity of the person insisting on his right when that right is challenged. It is not an uncommon thing to stop up a path which may be a convenience to everybody else, and the use of which may be no inconvenience to the owner of the land over which the path goes. But when the use of it is insisted upon as a right it is a familiar mode of testing that right to stop the permissive use, which the owner of the land would contend it to be, although the use may form no inconvenience to the owner. So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which otherwise would go into the possession of this trading company, I see no reason why he should not insist on their purchasing his interest from which this trading company desires to make profit. For these reasons, my Lords, I am of opinion that this appeal ought to be dismissed with costs, and that the plaintiffs should pay to the defendant the costs both here and below.

Lord WATSON.—My Lords: The appellants have purchased under statutory powers, and are

now vested with the whole undertaking of the Bradford Waterworks Company, incorporated by an Act passed in 1854, which transferred to that company the undertaking of a corporation having the same name, created by statute in 1842, together with all rights and privileges thereto belonging. The older of these companies acquired for the purposes of their undertaking a parcel of land known as "Trooper Farm," and also certain springs or streams arising in or flowing through the farm. From these springs and streams the appellants and their predecessors have hitherto obtained a valuable supply of water for the domestic use of the inhabitants of Bradford. Trooper Farm is bounded on the west and north by lands belonging to the respondent, which are about 140 acres in extent. The first of these boundaries, on the west—which alone is of importance in the present case—is a public highway called "Doll's Lane." The respondent's land to the west of that boundary is on a higher level than Trooper Farm, and has a steep slope downwards to the lane. Its substrata are intersected by two faults running east and west—one at each end of the boundary—which prevent the escape of percolating water either to the north or south: and the nature and the inclination of the strata are such that the subterraneous water which they contain must, by the natural force of gravitation, eventually find its way to Trooper Farm. The sources from which the appellants derive a supply of water near to the western boundary of Trooper Farm are two in number. The first of these is a large spring, known as "Many Wells," which issues from their ground twenty or thirty yards to the east of Doll's Lane; the second is a stream to the south of "Many Wells," which has its origin in a smaller spring on the respondent's land, close to Doll's Lane, at a point known as "The Watering Place," from which the water flows in a definite channel into Trooper Farm. It is an admitted fact that neither the appellants, nor either of the companies whose undertaking is now vested in them, ever acquired from the respondent, or his predecessors in title, any part of their legal right to, or interest in, the water in their land, whether above or below the ground; and also that the statutes—to the benefit of whose provisions the appellants are now entitled—make no provision for compensating the respondent in the event of such right or interest being prejudicially affected by the appellants' undertaking. In the year 1892 the respondent began to sink a shaft on the other side of the land to the west of "Many Wells" spring, and also to drive a level through his land adjoining the lane, for the professed purpose of draining the strata, with a view to the working of his minerals. These operations had the effect of occasionally discolouring the water in the "Many Wells" spring, and also of diminishing to some extent the amount of water in that spring, and in the stream coming from the "Watering Place"; and it became apparent that, if persevered in, they would result in a considerable and permanent diminution of the water supply obtainable from these sources. The appellants then brought the present suit, in which they crave an injunction to restrain the respondent from continuing to sink the shaft or drive the level, and from doing anything whereby the waters of the spring and stream might be drawn off, or diminished in quantity, or polluted, or injuriously affected. It is clear that, apart from any privilege which may have been conferred upon them by statute, the respondent, as in a question with the appellants, has a legal right to divert or impound the water percolating beneath the surface of his land, so as to prevent it from reaching Trooper Farm, and feeding, or assisting to feed, the "Many Wells" spring, or the stream flowing from the Watering Place. Upon that point there can be no doubt, since *Chasemore* v. *Richards* (7 H. of L. Cas. 349) was decided by this House in the year 1859. But the appellants argued at your Lordships' bar, as they did in both courts below, that the principle of *Chasemore* v. *Richards* is inapplicable to the present case, because, in the first place, the operations contemplated and commenced by the respondent are expressly prohibited by statute; and, in the second place, these operations were designed and partly carried out by the respondent not with the honest intention of improving the value of his lands or minerals, but with the sole object of doing injury to their undertaking. The statutory provisions upon which the appellants rely as supporting the first of these pleas are to be found in sect. 234 of the Act of 1842, and in sect. 49 of the Act of 1854, which is a mere repetition of the previous enactment. The clause relates to the Many Wells springs, an expression which, as the context shows, includes the stream coming from the Watering Place. It contains two separate enactments, one of them prohibitory, and the other penal. First of all, it declares that it shall not be lawful "for any person other than the said company to divert, alter, or appropriate in any manner other than by law they may be legally entitled" any of the water "supplying or flowing from" these springs, or to sink any well or pit, or to do any act, matter, or thing whereby "the waters of the said springs" may be drawn off or diminished in quantity. That declaration is followed by the provision that, "if any person shall illegally divert, alter, or appropriate the said water or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing whereby the said waters shall be drawn off or diminished in quantity," and shall not, on being required to do so by the company, immediately restore the springs and waters to the same condition in which they were before the alleged act, they shall be liable to pay 5*l.* to the company for each day until restoration is made, besides compensating the company for any damage sustained through their illegal act. The appellant endeavoured to construe the prohibitory clause as effecting a virtual confiscation in their favour of all water rights in or connected with the respondent's land lying to the west of Trooper Farm. It appears to me to be exceedingly improbable that the Legislature should have intended to deprive a landowner of part of his property for the benefit of a commercial company without any provision for compensating him for his loss. But it is not necessary to rely upon probabilities, because, in my opinion, the language of the clause is incapable of bearing such an interpretation. I think that the plain object of the statutory prohibition, which has two distinct branches, was to give protection to the supply of water which had been acquired by or belonged to the company for the time being; and that it was not meant to forbid, and does not prevent, any legitimate use made by a neighbour-

ing proprietor of water running upon or percolating below his land before it reached the company's supply and became part of their undertaking. The first branch makes it unlawful for any person other than the company to divert, alter, or appropriate any of the "waters now supplying" the Many Wells springs, which appear to include sources of supply existing upon lands adjacent to Trooper Farm. Had the prohibition been absolute it would have struck against the operations of the respondent; but it is subject to the qualification that the respondent, or any landowner similarly situated, may lawfully divert those waters which ultimately feed the Many Wells springs, so long as he does so in any manner which is not in excess of his common law rights. The respondent's operations, of which the appellants' complain, are within his proprietary right, and are therefore not obnoxious to that part of the prohibition. The second branch, which prohibits the sinking of wells and other operations, has no reference to outside waters, more or less distant, which might ultimately find their way to the Many Wells springs. It relates to "the waters of the said springs," an expression which, in my opinion, can only denote the waters which have actually reached the Many Wells springs, or some channel or reservoir which has been prepared for their reception upon their issuing from those springs. The prohibition gives effectual protection against the withdrawal or diminution, either by an adjacent proprietor or any other person, of waters which have come within the dominion of the appellants. But it does not prevent the diversion or impounding by an adjacent proprietor of water in his own land which has never reached that point, so long as his operations are such as the law permits. For these reasons, in so far as concerns the first plea urged for the appellants, I concur in the judgment of the Court of Appeal. The second plea argued by the appellants, which was rejected by both courts below, was founded upon the text of the Roman law (Dig. lib. 39, tit. 3, art. 1, sec. 12), and also, somewhat to my surprise, upon the law of Scotland. I venture to doubt whether the doctrine of Marcellus would assist the appellants' contention in this case; but it is unnecessary to consider the point, because the noble and learned lords who took part in the decision of *Chasemore* v. *Richards* held that the doctrine had no place in the law of England. I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Wensleydale in *Chasemore* v. *Richards* (7 H. of L. Cas. at p. 388). The noble and learned lord appears to have accepted a passage in Bell's Principles (sect. 966), which is expressed in very general terms, and is calculated to mislead unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase *in aemulationem vicini* was at one time frequently, and is even now occasionally, used very loosely by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being *in aemulationem*, where it was not attended with offence or injury to his neighbour. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landowner proceeded to burn limestone close to his march, so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal, or greater, convenience to himself, and without giving cause of offence, the court would probably grant an interdict. But the principle of *aemulatio* has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same as the law of England. No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper, or even malicious. I therefore concur in the judgment which has been moved by the Lord Chancellor.

Lord ASHBOURNE.—My Lords: I concur. To my mind the case is clear, and turns upon considerations sufficiently simple, and far from obscure. The plaintiffs have no case, unless they can show that they are entitled to the flow of the water in question, and that the defendant has no right to do what he is doing. Putting aside the statutes, the defendant's rights cannot be seriously contested. The law stated by this House in *Chasemore* v. *Richards* (7 H. of L. Cas. 349) cannot be questioned. Mr. Pickles has acted within his legal rights throughout, and is he to forfeit those legal rights, and be punished for their legal exercise, because certain motives are imputed to him? If his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal. If his motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal. It is to be noted that the defendant, or his predecessors in title, never parted with any of their legal rights; it is not suggested that the plaintiffs, by agreement or otherwise, ever acquired them; and no indication is given that there is an intention to compensate the defendant for his legal rights sought to be appropriated, or injuriously affected, by the plaintiffs. The appellants' contention on the construction of the statutes would practically confiscate the defendant's water rights. I see nothing in the statutes to interfere with, or prejudice, his legal rights. Very clear words would be required to support the contention that legal rights have been swept away without compensation. Waters that have come under the control of the appellants are fully protected, but there is not a word to hinder or cramp the action of Mr. Pickles unless he acts "illegally" or proceeds in any manner "other than by law he may be legally entitled." I therefore concur in the order proposed.

Lord MACNAGHTEN.—My Lords: For fifty years the Corporation of Bradford have supplied their town with water. They were empowered to do so by an Act of Parliament passed in 1854, which authorised and required them to purchase the undertaking of a then existing company called "The Bradford Waterworks Company." The chief source of their water supply was taken over from that company. It comes from a cluster of springs known as "The Many Wells." These springs issue from the lower slope of a hill-side at some distance from the town. Above them, in the immediate neighbourhood, there is a tract of land belonging to Mr. Pickles, the respondent. Owing to the fall of the ground and the nature and lie of the strata beneath the surface, Mr. Pickles' land forms a sort of gathering room or reservoir for subterranean water. Two faults,

nearly parallel to each other, run downwards through it, and there is a bottom of impermeable clay. At present there is no way of escape for the imprisoned waters except by the Many Wells springs. Within the orbit of his own land Mr. Pickles has set about making a tunnel or drift which, apparently, is intended to pierce one of the two faults that keep the underground water within bounds. If this is done, the result, it is said, will be to allow the water to run off in some other direction. The corporation claim an injunction to restrain Mr. Pickles from going on with the proposed works. They put their case in two ways. They say that under the circumstances the operation which Mr. Pickles threatens to carry out is something in excess of his rights as a landowner. Failing that ground, they maintain that his proceedings are in contravention of the express terms of their special Act. As regards the first point, the position of the appellants is one which it is not very easy to understand. They cannot dispute the law laid down by this House in *Chasemore* v. *Richards* (7 H. of L. Cas. 349). They do not suggest that the underground water with which Mr. Pickles proposes to deal flows in any defined channel. But they say that Mr. Pickles' action in the matter is malicious, and that, because his motive is a bad one, he is not at liberty to do a thing which every landowner in the country may do with impunity if his motives are good. Mr. Pickles, it seems, was so much alarmed at this view of the case that he tried to persuade the court that all that he wanted was to drain some beds of stone which he thought that he could work at a profit. In his innocent enterprise the court found a sinister design; and it may be taken that his real object was to show that he was master of the situation, and to force the corporation to buy him out at a price satisfactory to himself. Well, he has something to sell; or at any rate he has something which he can prevent other people from enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a storeroom for a commodity which the corporation dispense, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr. Pickles has no spite against the people of Bradford. He bears no ill-will to the corporation. They are welcome to the water, and to his land, too, if they will pay his price for it. So much perhaps might be said in defence or in palliation of his conduct. But the real answer to the claim of the corporation is, that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element. On this point both North, J. and the Court of Appeal decided against the corporation; and the decision, as it seems to me, is plainly right. On the second point, in which North, J. was in favour of the corporation, and the Court of Appeal against them, there is certainly more to be said. I quite agree with the Court of Appeal in the result at which they have arrived; but, speaking for myself, I rather take leave to doubt whether the section of the special Act, on which the question turns, is so unsatisfactorily drawn, and so difficult to construe, as it seemed to be to the Court of Appeal. The old waterworks company was incorporated by an Act passed in 1842. It was dissolved and re-incorporated in 1854 in view of the immediate transfer of the undertaking to the corporation. In the Act of 1854, the provisions of which were kept in force for the benefit of the corporation, the section in question is the 49th. But that section is merely a reproduction of sect. 234 in the Act of 1842, and it will be more convenient to deal with the earlier Act. The Act of 1842 scheduled certain lands which the company were empowered to take. Among them was part of a farm belonging to one Seth Wright, which was known as "Trooper" or "Many Wells" Farm. By sect. 233 the company were authorised to divert or alter the course of a certain beck called "Hewenden Beck," which is a tributary of the river Aire, "and also to divert and take the water from" the Many Wells springs, described as "the springs and streams of water called Many Wells rising or flowing in and through . . . Trooper or Many Wells Farm." At the date of the passing of the Act the water issuing from the Many Wells springs in Trooper Farm, and a stream which rose in the adjoining land, flowed in several defined channels through Trooper Farm into Hewenden Beck, which forms one of the boundaries of the farm. The scheduled portion of the farm comprised apparently some, but not all, of those channels. However, after the Act was passed, the company purchased the whole of Trooper Farm, and, as required by the Act, they made compensation to the mill-owners on Hewenden Beck for the loss of the waters of the Many Wells springs. Sect. 234 is a protective clause corresponding in the main with sect. 14 in the Waterworks Clauses Act 1847. It was to come into operation after the purchase of the Many Wells springs. According to the ordinary course of legislation in this country, a clause of that sort is intended to protect property, rights, and interests which have been acquired by purchase, not to transfer arbitrarily from one person to another property and rights for which nothing has been paid, and for which no compensation is provided. Sect. 234 prohibits in terms two classes of acts, and it imposes a penalty not exceeding 5*l.* per day on any person infringing its provisions so long as the injury lasts. One of these classes is treated as legal or illegal, according to circumstances; the other is treated as illegal under all circumstances. In the first place, the section says that "after the Many Wells springs have been purchased by the company, it shall not be lawful for any person, other than the said company, to divert, alter, or appropriate in any other manner than by law they may be legally entitled, any of the waters now supplying or flowing from the same." Both as regards the underground sources of the springs, and as regards the streams flowing from them in their natural course, it forbids any act by any person in excess of his legal rights. At that time, it must be remembered that the rights of landowners in regard to underground water had not been finally determined. If the view which commended itself to the Court of Exchequer in *Dickinson* v. *Grand Junction Canal Company* (7 Ex. 282) had been established, the proposed action of Mr. Pickles would no doubt

have been illegal. As it is, there is nothing in the first part of the prohibition to restrict or curtail his rights as a landowner in dealing with underground water percolating through his land in unknown channels. In the second place, the section declares that no person but the company is "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity." What is the meaning of the expression "the water of the said springs?" The natural and obvious meaning seems to me to be the waters issuing from the springs, such as they happen to be in quantity and volume, at the point of issue, or in one case at the point of entry, into Trooper Farm. The expression cannot include the underground sources which serve to feed the springs. Otherwise you would have this singular result, that things which by reason of the saving of existing rights, are treated as legal and permissible in one part of the clause, are treated as illegal and prohibited by another. It must mean the water which the company were authorised to "divert and take from" those springs which the section at its commencement assumes the company to have purchased; not the waters which supply the springs, but the waters which the springs supply. A comparison of other sections in the Act will confirm this view if any confirmation is required. The expression "The waters of the said 'Many Wells'" occurs in sect. 275, and then it is evidently synonymous with the following words in a parallel passage in sect. 238, "the water issuing from the springs of water before-mentioned called 'Many Wells,' and which is hereby authorised to be taken and diverted for the purposes of this Act." After the company had compensated the millowners on Hewenden Beck and purchased Trooper Farm, the waters of the Many Wells springs at and from the point of issue in Trooper Farm, and the water of the stream which rose in the adjoining land at and from the point of its entry into Trooper Farm, became the absolute property of the company, and it was the duty of the company to carry those waters to Bradford. No one was to interfere with them. Any such interference is characterised, in a later part of the section, as an illegal act. And, indeed, it seems to me very difficult to conceive how such an act could in any case be legal, unless the company constructed their works in a perverse and foolish manner. No one from whom the company acquired land or even an easement for the purposes of their works could lawfully let down those works. No one else, it may be assumed, would be in a position to do so. No one could lawfully tap their aqueducts or conduits. I am of opinion that the act which Mr. Pickles proposes to do is not within either of the two classes of prohibited acts mentioned in sect. 234. It is not within the first class, because at the time of the passing of the Act his predecessor was legally entitled, and he is now legally entitled, to do the thing which is complained of. It is not within the second class, because Mr. Pickles does not propose to do anything which can have the effect of drawing off or diminishing in quantity the waters of the Many Wells springs, such as they may be at the point of issue in Trooper Farm, or as regards the stream which does not rise in Trooper Farm at the point of its entry into that farm. It was argued somewhat faintly that sect. 49 of the Act of 1854 must have a wider meaning than that which I think ought to be attributed to sect. 234 of the Act of 1842, because the Act of 1854 incorporates the Waterworks Clauses Act of 1847, and sect. 14 of that Act covers, it is said, everything which is covered by sect. 234 of the Act of 1842 if it be construed as it seems to me it ought to be construed. There would be very little in such an argument under any circumstances, because it is only natural that the promoters of the legislation of 1854 would on the reconstruction of the company desire to retain or re-enact every clause in the former Act which could make for their protection. But the truth is, that the section of the Waterworks Clauses Act of 1847, which corresponds with sect. 49 of the Act 1854, does not apply to the Many Wells springs which were purchased under the Act of 1842. The Act of 1854, which incorporates the Waterworks Clauses Act 1847, declares that, in construing that Act, the expression "the special Act" shall mean the Act of 1854. It does not mean or include the Act of 1842. I am therefore of opinion that this appeal should be dismissed with costs.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Cann* and *Son*, for *McGowen*, Town Clerk of Bradford.

Solicitors for the respondent. *Ullithorne, Currey*, and *Currey*, for *W.* and *G. Burr* and *Co.*, Keighley.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, May 29.

(Before Lindley and Kay, L.JJ.)

Re Somes; Stewart *v.* Somes. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Administration action commenced in Chancery Division—Appointment of receiver—Bankruptcy of defendant—Transfer of action to Bankruptcy Court—Procedure—Bankruptcy Act 1883 (46 *&* 47 *Vict. c.* 52), *s.* 102, *sub-sect.* 4.

The beneficiaries under a will commenced an action in the Chancery Division against the acting trustee and executor, who was a partner in the deceased testator's business, claiming a declaration that the assets of the business formed part of the estate of the testator; that an account might be taken of the partnership dealings, and that the affairs of the partnership might be wound-up; that the defendant might be removed from being a trustee, and that new trustees might be appointed; and administration of the testator's estate. A receiver was then appointed to get in the testator's estate, and the debts and assets of the partnership business. Shortly afterwards the defendant was adjudicated a bankrupt. Thereupon his trustee in bankruptcy applied to the Chancery Division that the receiver might be discharged.

(*a*) Reported by W. C. Bass, Esq., Barrister-at-Law.

and the action handed over to the Bankruptcy Court so far as related to the debts and assets of the partnership business.

It was decided by Kekewich, J. that, the Chancery Division having seisin of the action, it would not be proper to hand it over to the Bankruptcy Court, nor to divide the administration into two parts. On appeal:

Held, that the application was wrongly made, the right procedure being to apply to the judge of the Bankruptcy Court, under sect. 102, *sub-sect.* 4, *of the Bankruptcy Act* 1883, *to order a transfer to himself of the action pending in the Chancery Division.*

Held, therefore, that, on this ground, the appeal must be dismissed.

Frederic Somes, by his will dated the 2nd May 1872, after bequeathing certain specific and pecuniary legacies, and an annuity of 200*l.* to his wife during her life, payable as therein mentioned, devised and bequeathed his residuary real and personal estate to his trustees, his brothers George Somes and Samuel Somes, whom he also appointed his executors, upon trust for his two daughters, Gertrude Somes and Frederica E. Somes, equally as tenants in common, for their separate use, the income of each daughter's share to be paid to her during her life, and, after the death of either of them, the share of the daughter so dying to be divided equally amongst her children, with power for both or either of his daughters, in the event of their marrying, to appoint a life interest to their husbands as therein mentioned.

The testator died on the 3rd May 1872, and his will was proved by Samuel F. Somes, power being reserved to George Somes to prove the same, but which he had not done.

The testator left him surviving his widow and his two daughters above named.

The testator left no real estate.

Frederica E. Somes was married to Harry H. A. Stewart on the 22nd Nov. 1879, and there had been issue of such marriage five children.

At the time of his death the testator was carrying on business as a merchant and commission agent in partnership with Samuel F. Somes, under articles of partnership dated the 13th March 1872.

Upon the testator's death, Samuel F. Somes took to the assets and property of the partnership, and from time to time made various payments to the testator's widow and daughters by way of interest on the capital of the testator invested therein. He, however, it was alleged neglected to pay the said capital out of the business, and in breach of his duty as the trustee of the testator's will employed the whole of the moneys constituting the testator's net residuary estate in and for the purposes of the business.

On the 29th Jan. 1895 this action was commenced by Frederica E. Stewart, her husband and children, and Gertrude Somes, against Samuel F. Somes, claiming a declaration that the assets and effects of the business carried on by the defendant constituted assets and formed part of the estate of the testator; that an account might be taken of the partnership dealings between the testator and the defendant, and that the affairs of the partnership might be wound-up by the court; that the defendant might be removed from being a trustee, and that new trustees might be appointed; and administration of the testator's estate.

By an order dated the 1st Feb. 1895 a receiver was appointed to collect and get in the outstanding personal estate of the testator, and also the debts due and outstanding and other assets and effects of the partnership business.

On the 28th Feb. 1895 the defendant was adjudicated a bankrupt upon his own petition, and on the 18th March 1895 a trustee in bankruptcy was appointed, who was subsequently added as a defendant to the action.

On the 2nd April 1895 notice of motion was given on the part of the defendant, the trustee in bankruptcy, (1) that the receiver appointed by the order of the 1st Feb. 1895 might be discharged so far as related to the debts due and outstanding and other assets and effects of the partnership business, and that he might be ordered to pay and deliver over to the applicant all assets and effects of the business in his possession or control, together with all books and papers relating thereto; or, alternatively, (2) that the receiver might be discharged so far as related to the debts due and outstanding, or other assets or effects of the business not forming part of the assets of the partnership at the date of the death of the testator, and might be ordered to pay and deliver over to the applicant all assets and effects of the business in his possession or control not forming part of the assets of the partnership at the date aforesaid, together with all books and papers relating thereto; or, alternatively to 1 and 2, (3) that the receiver might be discharged so far as related to the debts due and outstanding and other assets and effects of the partnership business, and that the applicant might be appointed receiver and manager of that business and all assets thereof; (4) that in any case the receiver might be ordered to deliver over to the applicant all the books of account of the bankrupt in the receiver's possession or control.

On the 9th April 1895 the action came on for trial before Kekewich, J., when the following judgment was delivered:

Kekewich, J.—This is an action which is at present in the Chancery Division, and is a class of action with which that division is tolerably familiar. It is an action by persons interested in the estate of one of two partners to administer the deceased partner's estate, and at the same time to have the partnership accounts taken, the partnership property realised, and so to obtain the plaintiffs' interest in the testator's share in the partnership estate. The defendant is the surviving partner, and is also the legal personal representative of the deceased partner. The defendant has become bankrupt, and it is suggested that the better plan will be to hand over not the administration of the deceased partners' estate, but the action, so far as it relates to the partnership assets, to the Bankruptcy Court. That, it is suggested, will be more convenient, and that, it is said, is justified by several authorities. No doubt in one sense it would be more convenient, but at the same time matters of this kind are under the jurisdiction of the Chancery Division as they were under the jurisdiction of the old Court of Chancery. Here I have an action properly constituted, and I have an order made appointing a receiver of both estates, that is to

say, receiver of the personal estate of the testator, and also the debts due and outstanding, and other assets and effects of the partnership business. The matter has not stopped there, for, although the action is new, and the order appointing the receiver is only dated the 1st Feb., I have recently had before me an application for leave to spend money in the up-keep of certain estates in Ceylon. Those estates, though not the only property of the partnership, are no doubt the most important item in the partnership assets, and therefore the most important item of property in which the plaintiffs are interested. [His Lordship stated the course which had been pursued in respect to the application referred to and continued:] That shows that the Chancery Division has seisin of a really active action, and that the administrative powers of that division are being exercised. I do not understand that the cases which have been cited of *Morley* v. *White* (27 L. T. Rep. 736; L. Rep. 8 Ch. App. 214), *Ex parte Gordon*; *Re Dixon* (28 L. T. Rep. 858; L. Rep. 8 Ch. App. 555); or *Ex parte Dear*; *Re White* (34 L. T. Rep. 631; 1 Ch. Div. 514) constrain me in any wise to give that action over to the Bankruptcy Court. Nor do I myself see how it can be much advantage to split the administration into two parts. If I were to hand the action wholly over to the Bankruptcy Court no doubt there would be the advantage in having a great part of the business under the control of the court particularly well constituted as regards its officers and practice to deal with that matter. At the same time that which is not so strictly within their purview would be administered by the same persons in the same court. I by no means say the advantage of having it all here is equal to having it all there. I do not sit here to defend the Chancery Division as altogether the best constituted court for this or any other purpose. But I do see great disadvantage in dividing the administration. I do not see why the administration of the personal estate of the testator should go to the Bankruptcy Court; nor do I see under the present circumstances that it will do any good. Therefore, not seeing that I am constrained by any decision, it seems to me I had better keep the matter as it is as regards administration. But then the notice of motion asks that the books should be handed over, and no doubt the trustee in bankruptcy requires to have all the books relating to his bankrupt's estate. It is suggested that, if he has access to them in the hands of the receiver, it would be enough. I do not think it is. It cannot be convenient for the trustee in bankruptcy to be continually applying to the receiver, however free the access may be, and however near the receiver's office may be or the place where the books are kept. The trustee in bankruptcy cannot get on without the books. What particular books he wants from time to time may not be so easy to say. Therefore what I think ought to be done is to direct the receiver to hand over to the trustee in bankruptcy the books, documents, and papers relating to the bankrupt's estate on his undertaking to return them as and when required. The receiver cannot act without the order of the court. Of course the trustee in bankruptcy must take care of the books, for the receiver will have to account for them when his time is over. I think that, if the trustee in bankruptcy gave that undertaking, that would do. He must also undertake to give the receiver that access which I think will be sufficient for his purpose, though it is not so convenient for the trustee's purpose. That I think will work out right as regards the documents, and to that I think the counsel for the plaintiffs cannot make any reasonable objection. The order will be, that the receiver do hand over the books and documents relating to the bankrupt's estate to the trustee in bankruptcy, and that the trustee in bankruptcy do return them to the receiver as and when required, and give the receiver access at all reasonable times. By books and documents I do not mean securities of course. I do not think that it will be proper to make the applicant pay the costs. The costs will be costs in the action.

From that decision the defendant, the trustee in bankruptcy, by leave of Kekewich, J. and of the Board of Trade, now appealed.

Bramwell Davis, Q.C. and *C. E. E. Jenkins* for the appellant.—We submit that the Court of Bankruptcy is the proper tribunal to determine this matter:

Morley v. *White*, 27 L. T. Rep. 736; L. Rep. 8 Ch. App. 214;
Ex parte Gordon; *Re Dixon*, 28 L. T. Rep. 858; L. Rep. 8 Ch. App. 555.

[Kay, L.J.—Why did you not apply to the bankruptcy judge to order a transfer of the action under sect. 102, sub-sect. 4, of the Bankruptcy Act 1883? All that we can do is to stay proceedings. The bankruptcy judge would be the right judge to make an order for a transfer of the action. It seems to me this is a wrong application.] It was considered that the proper course was to apply to the court in which the action was pending. The same result is arrived at. All that was desired was to get rid of the receiver, who was appointed by the Chancery Division. [Kay, L.J.—The bankruptcy judge would have power to do that.] But then the appellant would have to apply to the Chancery Division to discharge the receiver. The case of *Morley* v. *White* (*ubi sup.*) arose under the Bankruptcy Act 1869, s. 72, but the facts there were very much the same as in the present case. [Kay, L.J.—The Act of 1883 has pointed out the clear course which ought to be pursued, and I confess that I do not like to depart from that. Lindley, L.J.—After the decisions referred to the Act of 1883 was passed, and has altered the machinery. The Bankruptcy Court does not now grant an injunction; it orders a transfer.] We submit that Kekewich, J. was wrong, and that he ought to have discharged the receiver. *Ex parte Gordon* (*ubi sup.*) is almost the same case as *Morley* v. *White* (*ubi sup.*), and the observations of James, L.J. (at p. 560 of L. Rep. 8 Ch. App.) are much in point here. As to joint estate having become separate estate see

Ex parte Satterthwaite; *Re Simpson*, 30 L. T. Rep. 448; L. Rep. 9 Ch. App. 572;
Vyse v. *Foster*, 31 L. T. Rep. 177; L. Rep. 7 E. & I. App. 318.

We ask the court to make an order in the terms of the first part of the notice of motion, for the receiver has got property belonging to the trustee in bankruptcy, and unless a *primâ facie* case can be shown for depriving him of his property the order made by Kekewich, J. is a wholly wrong order and ought to be dis-

charged. There is no absolute rule that a question relating to the estate of a bankrupt should be determined by the Court of Bankruptcy, and not by the High Court, whenever the trustee in the bankruptcy is claiming by a higher title than that of the bankrupt himself; it is a matter for judicial discretion:

Ex parte Reynolds; Re Barnett, 53 L. T. Rep. 448; 15 Q. B. Div. 169;
Re Ross, 5 Morr. 281.

There would have been a difficulty in applying to the Bankruptcy Court for a transfer of the action in the first instance. The appellant would have been met by the objection that the making of such an order was discretionary.

Warrington, Q.C. and *Eve*, for the respondents, the plaintiffs, were not called upon to argue.

LINDLEY, L.J.—It appears to me that this appeal is wrong; that is to say, that the wrong course has been taken to produce a result which might have been obtained by another proceeding. An action has been brought in the Chancery Division by the beneficiaries of a deceased partner against the surviving partner, and what the beneficiaries seek to obtain from the surviving partner is what is due from him to the estate of the deceased. It is not necessary to go through the partnership articles. That is the general nature of the action. The plaintiffs have obtained an order for a receiver upon the ground that they have a lien upon the assets or property of the business in the hands of the continuing partner for what is due to them. I am not at all prepared to say that that order was wrong. I suspect it was right, having regard to the position of the parties. The surviving partner has become bankrupt. Now what is there in that action which cannot be properly dealt with in the Bankruptcy Court? Absolutely nothing at all. The object of the action is to ascertain what is due from the surviving partner to the estate of the deceased partner. That may give rise, and probably will give rise, to very difficult questions about creditors, and so on. It would, however, be a lamentable thing if we were to hold that there should be bankruptcy proceedings going on for what is practically the same purpose as these Chancery proceedings, and that there should be a conflict between the two branches of the High Court, and that it should be necessary for the trustee in bankruptcy to go sometimes to the Bankruptcy judge and sometimes to the Chancery judge, to have the accounts taken, and to have the rights of the parties ascertained. All that is provided for by the Bankruptcy Act 1883. The present Bankruptcy Act differs entirely from the previous Bankruptcy Acts in this important particular, which lies at the root of the whole matter, that the present Bankruptcy Court is a branch of the High Court, and the judge of the Bankruptcy Court has the powers and jurisdiction of the judges of the High Court. He has certain powers and jurisdiction assigned to him, but he can exercise all the powers of any judge of the High Court. Now, among other powers, he has powers conferred upon him by sect. 102, subsect. 4, of the Bankruptcy Act 1883, which enacts that: "Where a receiving order has been made in the High Court under this Act"—that is what I will call the Bankruptcy Court—"the judge by whom such order was made"—that is, the judge in bankruptcy—"shall have power, if he sees fit, without any further consent, to order the transfer to such judge"—that is, to himself—"of any action pending in any other division, brought or continued by or against the bankrupt." Now, supposing that an application had been made to the bankruptcy judge under that clause before the statement of claim had been put in, as to which I will say something presently, I should have thought it was as plain as anything can be that it was a fit and proper thing to transfer that action to the Bankruptcy Court, so that the bankruptcy judge should himself wind-up the assets and affairs in bankruptcy and ascertain what is properly payable by the bankrupt to the estate of the deceased. I should have thought it was obviously one of those cases in which that ought to be done. Now, is there any difficulty introduced by what is put in the statement of claim, which seeks the removal of the bankrupt as a trustee of the will, and the appointment of a new trustee? There is nothing else at all. It appears to me that the bankruptcy judge can do that if he thinks proper. I see no difficulty about it. He has all the powers of a judge of the High Court, and notwithstanding that that claim is put in the statement of claim—whether it is for the purpose of preventing a transfer or not I do not know—it appears to me that this is a case in which the bankruptcy judge would, in the exercise of his discretion, order this transfer, and so prevent this unseemly wrangle between two of the divisions of the High Court. I think, therefore, that this appeal must be dismissed, and I do not see why it should not be dismissed with costs. I take it for granted that this action will be transferred to the Bankruptcy Court and dealt with there. The appellant may, of course, apply to get the costs out of the estate. We do not give him leave, but that is his course obviously. It will be for the judge in bankruptcy to settle that point.

KAY, L.J.—If this action were to go on concurrently with the bankruptcy proceedings, we should have this state of things, which all the Bankruptcy Acts have contained provisions of some kind or another to prevent, namely, that you would have all the accounts of the partnership taken in bankruptcy and concurrently taken in the Chancery Division. Now it would be a monstrous thing if that could be allowed. The former Bankruptcy Act gave power to prevent that by means of an injunction, which the bankruptcy judge was empowered to grant, to stay the action in another court. Then came the Act of 1883 whereby a simpler proceeding is provided, namely, that to which Lindley, L.J. referred, in sub-sect. 4 of sect. 102, for transferring the whole action, by the order of the bankruptcy judge, into the Court of Bankruptcy itself. The bankruptcy judge can deal with the action as he likes, and of course then there will not be two sets of proceedings going on concurrently in different courts. Now that is exactly what ought to have been done in this case, and I cannot conceive any reason why that course was not taken. I do not in the least say a word fettering the discretion of the bankruptcy judge. He can do just what he likes when the application is made to him. But I cannot conceive any reason why he should not grant the application in a case of this kind. It seems to me to be the very sort of case to

which that sub-section of sect. 102 was expressly intended to refer. Therefore I think that all these proceedings have been misconceived; that there ought not to have been a motion to discharge the receiver partly, which this motion was in effect; and that there ought not now to be an appeal from the order which the learned judge in the court below made refusing to make an order on that motion. He does not seem to have refused, as I gather, on the ground that the whole proceedings were wrong, and that the proper proceeding would have been an application to the judge in bankruptcy to transfer the action. But he has refused it. And as I take the view that the whole application was altogether wrong, and that the proper course was to apply to the judge in bankruptcy to transfer the action, I am not at all inclined to interfere with the order that he made. I think, therefore, that this appeal fails, and ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Trinder* and *Capron*.

Solicitors for the respondents, *Poole* and *Robinson*.

Friday, June 14.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Re Liddell; Liddell *v.* Liddell. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Will—Bequest of personalty upon trusts corresponding with trusts of realty—Alteration by codicil of limitations of realty—Effect upon personalty.

A testator, who died in Oct. 1881, *by his will dated in Dec.* 1862 *devised his real estate, subject to the payment of certain annuities, upon trust for his brother during his life, and after his death upon trust for the brother's four sons and for their respective issue male severally and in succession according to seniority of age; and he directed that his personal estate should be held upon such trusts as would best correspond with the trusts thereinbefore declared of and concerning his real estate.*

By a codicil, dated in July 1873, *the testator, after reciting the trusts declared by the will of and concerning his real estate, directed that his will should be read and construed and should take effect as if there were contained therein immediately after the limitation upon trust for his brother for life a limitation upon trust for the brother's four sons severally and successively, and for their respective issue male in such order of succession as the testator's wife should by deed or will appoint.*

The testator's wife died in Nov. 1894, *having by her will, dated in May* 1886, *varied the order of succession of the four sons to the real estate.*

Held, that the power of appointment given to the testator's wife extended to the personal estate; and that the appointment was a valid and effectual exercise of the power as to both the real and the personal estate.

Martineau *v.* Briggs (33 *L. T. Rep.* 283; 43 *W. R.* 889) *distinguished.*

Decision of Kekewich J. reversed.

(*a*) Reported by W. C. Bigg, Esq., Barrister-at-Law.

By his will, dated the 13th Dec. 1862, Matthew Liddell, after appointing executors and trustees, and bequeathing divers specific and pecuniary legacies, devised and appointed all his real estate to his trustees upon trust out of the rents and proceeds to pay life annuities to his wife and four other persons, and subject thereto he directed that his trustees, until the expiration of twenty-one years from his decease, if his wife and the wife of his brother John Liddell, or either of them, should so long live, should invest the clear surplus of the rents and proceeds of the same real estate, and accumulate them, and on the determination of the said term of twenty-one years or sooner convert the accumulations into money, and invest them in the purchase of real estate, which, if purchased during the term, was to be subject to the trust for accumulation.

The testator then proceeded as follows:

And I direct that my trustees shall from and after the determination of the said term of twenty-one years stand seised of and interested in as well the said real estate hereinbefore devised and appointed as the said real estate so to be purchased, which are together hereinafter referred to as "the said trust real estate" (subject, nevertheless, to the payment of the said five annuities or such of them as shall be subsisting), upon trust for my said brother John Liddell during his life, and from and after his decease upon trust for his four sons, Matthew Liddell, John Liddell, Henry Liddell, and Charles Liddell, and every other son of my same brother born in my lifetime, and for their respective issue male severally and in succession according to seniority of age, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male, and on failure of such issue upon trust for all and every the other son and sons of my same brother to be begotten after my decease severally and successively according to their respective seniorities in tail male, and on failure of such issue upon trust for my own right heirs.

The testator appointed and bequeathed all his personal estate to his trustees upon trust to pay thereout his debts and funeral and testamentary expenses, and the legacies and certain other charges; and subject thereto he directed his trustees until the expiration of twenty-one years from his decease, if his wife and the wife of his brother John Liddell, or either of them, should so long live, to invest the clear surplus of the interest and proceeds of his personal estate "pursuant to the clause hereinbefore contained relative to the investment of moneys until laid out in the purchase of real estate," so that the same might accumulate at compound interest; and he directed his trustees, on the determination of the said term of twenty-one years or sooner, to convert the accumulations and invest them in the purchase of real estate, the rents of which during the term were to be subject to the trust for accumulation, and after the determination of the term the purchased hereditaments were to be held upon the like trusts as were declared of and concerning the "trust real estate," but so as not to multiply charges. The testator then proceeded as follows:

And I direct that from and after the determination of the said trust for the accumulation of the said trust personal estate, the same personal estate shall be held upon such trusts as will best correspond with the trusts

hereinbefore declared of and concerning the said trust real estate subsequent to the said trust for accumulation first hereinbefore contained, but so nevertheless as not to multiply charges, and so that on the death of any tenant in tail by purchase in possession under the trusts aforesaid under the age of twenty-one years, the said trust personal estate shall go to the person who under the same trusts shall be next entitled to the same personal estate.

The testator further directed that "the said trust premises" (meaning thereby as well real as personal estate) should be liable to indemnify the trustees in certain events.

By a codicil, dated the 12th July 1873, the testator, after reciting the trusts declared by his will of and concerning his real estate, declared a trust in favour of his wife for her life as to a specified part of his real estate, subject to which he directed that it should be held upon the trusts which, with respect to the trust real estate, were by the will as altered by the codicil declared to take effect on the determination of the term of twenty-one years. He then proceeded as follows:

And I further direct that my will shall be read and construed and shall take effect as if there were contained therein immediately after the said limitation upon trust for my brother John Liddell for life a limitation upon trust for the said four sons of my said brother, and every other son of my said brother born in my lifetime or to be begotten after my decease, severally and successively, and for their respective issue male in such order of succession as my wife, whether covert or sole, shall by any deed or deeds, with or without power of revocation and new appointment or by will appoint, but so that under every such appointment every such son already born or to be born in my lifetime shall take an estate for his life, with remainder to his first and every subsequent son successively according to seniority in tail male, and so that every son of my same brother to be begotten after my decease shall take an estate in tail male; and in default of such appointment and subject thereto I direct that the said trust real estate shall be held upon the trusts in my will expressed concerning the same subsequently to the said limitation upon trust for my brother John Liddell for life; and I confirm my will except as aforesaid.

The testator died on the 20th Oct. 1881.

John Liddell died on the 25th Aug. 1888, without having had any other son than the four above mentioned.

John Liddell's wife died on the 28th April 1877.

The testator's widow died on the 17th Nov. 1894, having by her will, dated the 6th May 1886, in exercise of the power given to her by the codicil to her husband's will, appointed that the order of succession of the four sons of her husband's brother John Liddell and of their respective issue male to the trust real estate in her husband's will and codicil mentioned should be as follows:

First, John Liddell and his issue male; second, Matthew Liddell and his issue male; third, Charles Liddell and his issue male; and fourth, Henry Liddell and his issue male: each of the said four sons taking for his life with remainder to his first and every subsequent son successively, according to seniority in tail male as provided by the said will and codicil.

An originating summons was taken out by Matthew Liddell, the eldest son of the testator's brother John Liddell, asking whether the power of appointment given to the testator's widow by the codicil relating to the order of succession of the four sons of the testator's brother John Liddell and their respective issue to the testator's trust real estate extended also to the testator's trust personal estate; and whether the appointment was a valid and effectual exercise of the power of appointment as to both or either of the said trust estates; and asking also for a declaration of the rights of the persons interested.

The summons was adjourned into court, and came on to be heard before Kekewich, J. on the 7th March 1895, when his Lordship decided that the appointment was effectual as regarded the trust real estate, but that the trust personal estate was held upon trust for the persons named in the testator's will in the original order of succession.

From that decision John Liddell the younger and his eldest son now appealed.

Cozens-Hardy, Q.C. and *Warrington*, Q.C. (*W. C. Druce* and *R. H. Forster* with them) for the appellants.—The testator has shown by his will a governing intention that the trust real estate and the trust personal estate should pass together, and there is no revocation of that intention by the codicil. This case is therefore covered by

Re Towry; Dallas v. *Law*, 60 L. T. Rep. 715; 41 Ch. Div. 64.

This class of case was fully considered there, and it was held by the Court of Appeal, reversing the decision of Stirling, J., that there was a governing intention shown in the will that certain chattels and a pecuniary legacy should pass with the real estate; and that, although the devolution of the real estate was altered by the codicil, there was no revocation of such governing intention.

Warmington, Q.C. and *A. R. Ingpen* for the respondent, the plaintiff.—The testator has not shown by his codicil any intention to alter the limitations of the trust personal estate. Where personalty is directed to go upon the same trusts as realty, and the trusts of the realty are afterwards revoked, the gift of the personalty remains. The case which governs the present is

Martineau v. *Briggs*, 33 L. L. Rep. 283; 23 W. R. 889.

[Lindley, L.J.—That case is to be contrasted with *Lord Carrington* v. *Payne* (5 Ves. 404), also cited in *Re Towry; Dallas* v. *Law* (*ubi sup.*).] Another case in point is

Lord Beauclerk v. *Mead*, 2 Atk. 167.

We submit that the present case is distinguishable from

Re Towry; *Dallas* v. *Law* (*ubi sup.*).

Cozens-Hardy, Q.C. in reply.—In *Martineau* v. *Briggs* (*ubi sup.*) there was a revocation by the codicil and a separate devise; here there is no revocation, but a specific alteration in the terms of the will.

Lindley, L.J.—I have no doubt myself as to the true construction of this will and codicil, and I am sorry to say that my opinion does not agree with that expressed by Kekewich, J. He has construed the codicil as if there were two powers, and as if the widow had exercised only one. That appears to me to be fundamentally wrong. Well, apart from that, the key to this case, in my judgment, is to be found in doing what the testator has told you to do, and all the rest follows. Now, the will disposes first of all of the

real estate. There are five expressions which are to be found in this will. He talks of real estate, he talks of personal estate, he talks of trust real estate, and trust personal estate, and he talks of trust premises which include both. But I think it is easy to see what the real meaning of the testator was. I confess that I think the two documents have been framed with care, and that the codicil has been artistically drawn so as to give effect to what appears to me to be the plain intention of the testator. [His Lordship read the will and codicil and continued:] Just let us do what the testator tells us to do. Let us put into the will this limitation, the limitation which has been altered by the wife in pursuance of the power contained in the codicil. Let us put it into the will, and put it into the will where the testator tells us to put it. Having done that, let us read the will as he has left it with his codicil. What will be the effect of that? The effect of that will be, that you have the personal estate necessarily going under the will and the codicil combined to the person who takes under the appointment which the wife has made. There is no revocation here; there is nothing of the sort. The codicil merely gives his wife power to alter the order in which the nephews and their descendants are to take, and subject to that the will stands. Upon the documents I confess I cannot see the difficulty, and I cannot see that there is anything inartistic or any mistake or any defect in the drawing. It appears to me that the draftsman here has been a clear-headed, logical man; he has seen the exact effect of what he has said, or what the testator has said under his direction. The effect of it is to my mind clear, and the intention to my mind is obvious. But *Martineau* v. *Briggs* (33 L. T. Rep. 283; 23 W. R. 889) is relied upon. All I can say is, that *Martineau* v. *Briggs* (*ubi sup.*) appears to me to differ *toto cœlo* from the present case. In the first place, the House of Lords have said that they could not extract from the will in that case an intention to keep all the estates together, and there was a revocation there. What they said was, that there was a revocation as regarded one part of the property, and no revocation as regarded the other part. But they had not to grapple with the expression which we have here, and upon which the whole of this case turns. There was no clause in the codicil there similar to that which we have here: "My will shall be read and construed and take effect as if there were contained therein immediately after" a certain clause, some other words which are not in the will. That is what the testator tells you to do. He says, "Put those in, and then read the will as you find it." I think that the learned judge in the court below was wrong, and that the appeal must succeed.

LOPES, L.J.—I am of the same opinion. By his will the testator devises his real estate to trustees in strict settlement, and then by reference gives his personal estate upon the same terms. In point of fact the devise is to the brother for life, with remainder to the brother's four sons, his nephews, in tail male according to seniority. Then the testator makes a codicil to his will, and by the codicil he gives his wife a power of appointment, by which she may alter the succession of those who are to take under this strict settlement. I mean the order of succession in respect of the four sons who are tenants in tail. Now it is said that that only applies to the real property. But when I look at the codicil I find these words: "And I further direct that my will shall be read and construed and shall take effect as if there were contained therein, immediately after the said limitation," certain words which I need not read. They have been already read by my brother Lindley. Those words are to be inserted in the will at their proper place, and they are to be regarded just the same as if the testator with his own hand had written them in the will in that particular place. Well, if he had so done, it appears to me that everything follows and everything is clear. You have then a power of appointment in the wife authorising her to alter the order of succession, and the order of succession only, as to all the trust property, that is both the real and personal. I cannot quite understand how the learned judge in the court below came to the conclusion that there were two powers. I am unable to follow him. It is clear to my mind that there is one power, and one power only. Now in the will it cannot be denied that there is a paramount intention to unite both the real and personal property. That intention is manifest—an intention, too, untouched by the codicil, because in my view the codicil only authorises an alteration as to the order of succession. Now the widow has exercised the power of appointment, and she has exercised it as to the real estate, and altered the order of succession accordingly. Now, so altering it with regard to the real estate involves, in my judgment, the personal estate. There is no severance. Both the real and the personal estate go according to the order in which she has appointed. This, in my judgment, is the proper construction of the will and codicil, and such construction is very satisfactory, because it is, in my opinion, clearly giving effect to that which was the manifest intention of the testator—namely, keeping these two properties, the real and the personal property, together.

RIGBY, L.J.—I am of the same opinion. In this case, although I agree with almost everything that is said in the judgment of the learned judge in the court below, I will point out where I feel myself constrained to part company with him. In effect he says, in order to obtain accurately the trusts of the personal estate, you must expand the trusts which are declared concerning the real estate. Well, that is right enough if there is no alteration in them. The testator has assumed that the trusts of the real estate are to be a model so far as the rules of law allow for the trusts of the personal estate. But the effect of expanding those trusts before you have ascertained the final will of the testator is this—that you expand them, not to give effect to the final will, but in order to give effect to an intention which he has departed from, and for which he has substituted a new intention, thus creating a new model. The real thing is this: Do what he tells you; treat his will as if it contained a clause which it does not in fact contain; treat it for all those purposes throughout. The testator does not say "that part of my will which deals with real estate," but "my will" shall be read and construed and shall take effect as if that clause were there. That clause, therefore, becomes a part of the model terms upon which you are to found the trusts of the personal estate. I can see no difficulty in it. I conceive that there

is a misconception in trying first to expand these trusts and treating them as though they are final, although the testator himself has said they shall not be final, but other trusts shall be. Probably, if the testator had said, "I give my wife power to appoint my real estate to Matthew before John, or, *vice versâ*, John before Matthew," that would not have altered the construction of the original will as regards personal estate. But when he tells you to modify that original will, to introduce the words which are to be the foundation of the true construction of that instrument, which words are to be depended upon as giving effect to the rest of his will, I can see no doubt about it. As regards the authorities, I am quite certain that the case of *Martineau* v. *Briggs* (*ubi sup.*) has nothing to do with the present case; and therefore it is better that I should say nothing about it.

Appeal allowed.

Solicitors for the appellants, *Crossman* and *Prichard*, agents for *Dees* and *Thompson*, Newcastle.

Solicitors for the respondent, *Fooks, Chadwick, Arnold*, and *Chadwick*.

July 10, 11, *and* 24.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

Re FREME'S CONTRACT; FREME *v.* HALL. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Vendor and purchaser—Incumbrances—Discharge of, on sale—Will—Construction—Future interests—Jurisdiction—Revocation by codicil of gift contained in will—Substitution of fresh gift—Conveyancing Act 1881 (44 *&* 45 *Vict. c.* 41), *s.* 5—*Order LIV.* A.

Upon the sale of certain real estate a summons was taken out, under sect. 5 *of the Conveyancing Act* 1881, *for leave to pay into court a sum of money in order to make provision for certain charges upon the property by the will of a deceased testator.*

Held (*affirming the decision of Kekewich, J.*, 72 *L. T. Rep.* 486), *that the court could ascertain, upon the construction of the will, what was the amount of the charges upon the property, notwithstanding that it involved the determination of interests* in futuro.

A testator by his will gave to each of two of his granddaughters an annuity of 300*l.*, *and he directed the annuities to be raised and paid, after their respective deaths, amongst their respective children, as they should by deed or will appoint, and in default of appointment amongst the children equally. The testator charged the annuities upon certain real estate which he devised to his son. By a codicil to his will the testator revoked his gift of the annuities of* 300*l.*, *and gave instead to his two granddaughters annuities of* 150*l. apiece, to be payable in the same manner and to be charged on the same property as the annuities of* 300*l. The testator, however, made no mention of the children of his granddaughters in the codicil.*

Held (dissentiente *Rigby, L.J.*), *that the effect of the codicil was to substitute an annuity of* 150*l. payable to each of the granddaughters, her appointees and children, for the annuity of* 300*l. given by the will.*

Doe *v.* Hicks (1 *Cl. & F.* 20; 8 *Bing.* 475) *and* Randfield *v.* Randfield (8 *H. of L. Cas.* 225) *applied.*

Decision of Kekewich, J. affirmed.

By his will, dated the 27th Feb. 1877, William Purser Freme, after appointing executors and trustees, and specifically devising certain freehold estates to his son James for life, with remainders over, proceeded as follows:

I give and devise to my granddaughter Anna Helena, the wife of Samuel Hall, an annuity of 300*l.* a year, to be paid to her half-yearly, for her sole and separate use, and to be a charge on my property in John-street, Liverpool, and after the death of my said granddaughter Anna Helena, I direct that the said sum of 300*l.* shall be raised and paid unto and amongst all her children as she shall by deed or will, and notwithstanding coverture, direct or appoint, and in default of such appointment amongst all the children of my said granddaughter Anna Helena, in equal shares during their respective lives. I give and bequeath unto my granddaughter Ellen Elizabeth, the wife of Graham Lloyd, a like annuity of 300*l.* to be a charge upon the said property in John-street aforesaid, and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter Anna Helena.

After giving to his daughter Anne T. D. Clement, widow (since deceased) an annuity of 300*l.* charged on certain property in Oil-street, Liverpool, and giving an annuity of 150*l.* per annum to Sidney Clement, son of Anne T. D. Clement, for his life, to be paid half-yearly, such annuity to be charged on the property in John-street, Liverpool, and certain other property (the first half-yearly payment of each of the before-mentioned annuities to be made six months after the testator's decease), and after making certain specific and pecuniary bequests, the testator devised and bequeathed all his real and personal estate not thereinbefore disposed of to his son James absolutely.

By a codicil, dated the 22nd March 1877, the testator, after reciting that he had by his will given to each of his granddaughters, Anna Helena Hall and Ellen Elizabeth Lloyd, an annuity of 300*l.* per annum, and had also by his will given to his grandson Sidney Clement an annuity of 150*l.* per annum, the said three several annuities being payable and charged in the manner and on the hereditaments in his will particularly mentioned, thereby revoked the devises of the said several annuities, and instead thereof gave and devised as follows: "To each of my said granddaughters, Anna Helena Hall and Ellen Elizabeth Lloyd, an annuity of 150*l.* per annum, to be payable and charged in the same manner and on the same hereditaments as the said several annuities of 300*l.* each were in and by my said will respectively made payable and charged," and to his said grandson Sidney Clement an annuity of 100*l.* per annum, to be payable and charged in the same manner and on the same hereditaments as the annuity of 150*l.* was in and by his said will made payable and charged. In all other respects the testator confirmed his will.

The testator died on the 10th Sept. 1878.

The testator's property in John-street (the name of which was afterwards changed to North John-street), Liverpool, passed by virtue of the resi-

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

duary devise in his will to his son James Freme, charged with the annuities above mentioned.

The testator's granddaughter Anna Helena Hall had five children by her marriage, the youngest of whom was born on the 26th July 1883, and four of whom were surviving.

His granddaughter Ellen Elizabeth Lloyd had four children by her marriage, the youngest of whom was born on the 1st Feb. 1870, and three of whom were surviving.

The annuitant Sidney Clement sold and assigned his annuity of 100*l.* per annum to John Rowden Freme.

The testator's son James Freme died on the 21st April 1888, intestate, the said John Rowden Freme being his eldest son and heir-at-law.

By a contract in writing, dated the 18th Jan. 1895, and made between John Rowden Freme of the one part and the Royal Insurance Company of the other part, John Rowden Freme agreed to sell to the company for 30,200*l.* the property in North John-street, Liverpool. subject to certain conditions of sale, one of which was that the vendor would immediately after the sale apply to the Chancery Division of the High Court of Justice under sect. 5 of the Conveyancing Act 1881, and endeavour to obtain an order discharging the property from the annuities; but, if the court should refuse to make such an order, or should, as a term thereof, require payment into court of a sum exceeding the purchase money, the vendor was to be entitled to rescind the contract in the same manner and upon the same terms as if the purchasers had made and insisted on a requisition which the vendor was unable to comply with.

Neither of the testator's said granddaughters had ever executed any deed purporting to exercise the power of appointment contained in the said will.

An originating summons was accordingly taken out by John Rowden Freme against Anna Helena Hall and her surviving children, Ellen Elizabeth Lloyd and her surviving children, and the Royal Insurance Company, for an order that he might be at liberty to transfer into court to the credit of the matter the sum of 12,000*l.* 2*l.* 10*s.* per Cent. Consols, or such other sum of like consols as the court should direct, and that the costs of the respondents, other than the Royal Insurance Company, might be taxed, and that upon such transfer into court and payment of the said costs and expenses the plaintiff might be at liberty to apply that the hereditaments comprised in the contract might be declared free from the annuities charged thereupon by the will and codicil other than the annuity by the codicil given to the testator's grandson Sidney Clement, and that directions might be given for the payment, out of the dividends on the consols so transferred, of the annuities to the persons entitled thereto, and for payment of the balance of such dividends to the plaintiff.

The summons was adjourned into court, and came on to be heard before Kekewich, J. on the 30th March 1895, when his Lordship decided that the court had jurisdiction, under sect. 5 of the Conveyancing Act 1881, to declare land freed from a charge, notwithstanding that there was a possibility of other persons acquiring an interest in the charge *in futuro*, and that the court was alled on to decide a question as to the amount of the charge depending on the construction of a will (72 L. T. Rep. 486).

His Lordship also decided that the effect of the codicil was to substitute an annuity of 150*l.*, payable to each of the testator's granddaughters——Mrs. Hall and Mrs. Lloyd—her appointees and children, for the annuity of 300*l.* given by the will.

From these decisions Mrs. Hall and her children, and Mrs. Lloyd and her children, respectively now appealed.

Marten, Q.C. (with him *Ingle Joyce*) for the appellants Mrs. Hall and her children.—Future interests should not be decided until they arise. The court, therefore, will not determine during the lives of the annuitants the rights *in futuro* of the persons entitled after the deaths of the annuitants respectively. Sect. 5 of the Conveyancing Act 1881 is permissive. It merely empowers the court to provide for the charge or incumbrance, and not to ascertain what the amount of the charge or incumbrance is, or to decide questions of construction. The court can substitute money for land without deciding any question of construction. This objection was taken in the court below.

Renshaw, Q.C. (with him *E. S. Ford*) for the appellants Mrs. Lloyd and her children.—The summons has been amended for the purpose of bringing it within Order LIV.A. The court ought not now by construing the will to decide a question affecting the future interests of infants. A much larger sum should be paid into court, sufficient to provide for the utmost that might be required. In all the cases where the court has been asked to decide a question *in futuro* the question has been raised by the parties themselves, and it is not the practice of the court to decide such a question where infants are interested. The most recent case on the point is

Curtis v. *Sheffield*, 46 L. T. Rep. 177; 21 Ch. Div. 1.

Warrington, Q.C. (with him *Arkle*) for the respondent, the plaintiff.—The rule has never been a hard and fast one that the court will not decide as to future interests until they arise. The court has jurisdiction to make the order under sect. 5 of the Conveyancing Act 1881, the summons having been amended so as to raise the point of construction.

LINDLEY, L.J.—I think that we will decide the qeustion. We should be nullifying a very useful provision if we did not. The new Order LIV.A. is important, and I think that we ought to avail ourselves of the powers it confers.

LOPES and RIGBY, L.JJ. concurred.

Marten, Q.C.—Then upon the question of construction, I submit that the true construction of the codicil is, that it has not affected the rights of the children of the granddaughters, who are accordingly entitled to the annuities bequeathed to them by the will. The general rule of construction applies, that where a devise in a will is clear it is incumbent on those who contend that it has been revoked by a codicil to show that the intention to revoke is as clear and free from doubt as the original intention to devise; and if there is any reasonable doubt whether the clause of revocation was intended to

include the particular devise, then such devise must stand:

Alt v. *Gregory*, 8 De G. M. & G. 221;
Doe d. Hearle v. *Hicks*, 1 Cl. & F. 20, 24, 34; 8 Bing. 475;
Barclay v. *Maskelyne*, Joh. 124; 5 Jur. N. S. 12;
Stocks v. *Hammond*, 2 N. R. 307.

[LINDLEY, J. referred to *Randfield* v. *Randfield* (4 Drew. 147; on app. 8 H. of L. Cas. 225).] The rule is laid down by Lord Cairns in *Kellett* v. *Kellett* (L. Rep. 3 E. & I. App. 160, 167) in the same words as by Tindal, L.C.J. in *Doe d. Hearle* v. *Hicks* (*ubi sup.*). [LINDLEY, L.J.—The principle is clear; the difficulty is in applying it.] There is one other case to the same effect:

Follett v. *Pettman*, 48 L. T. Rep. 835; 23 Ch. Div. 337, 342.

Renshaw, Q.C.—As to the canons of construction there are two. One is, you must have a revocation free from ambiguity; the other is, that you must never disturb the will more than is necessary to construe the codicil. Here the annuities in the codicil are expressed to be given merely "instead" of the annuities given by the will to the granddaughters.

Warrington, Q.C.—I do not dispute the principle upon which the court proceeds. Applying that principle to the present case, the court has to ascertain what is meant by the two testamentary instruments, the will and the codicil read together. I submit, first, that the annuities of 300*l.* given by the will are altogether revoked by the codicil, and that in lieu thereof fresh annuities of 150*l.* are given; and, secondly, that the substituted annuities of 150*l.* are given to the granddaughters for their respective lives only, and not to their appointees or children in reversion.

Cur. adv. vult.

July 24.—The following judgments were delivered:—

LINDLEY, L.J.—Although there are two appeals in this case, the question in each appeal is the same, viz., what is the true construction of the will and the codicil of the testator? Now, the testator had a daughter. He had three grandchildren, two of whom were married women, the other was a son—the son of the daughter. By his will the testator, after making certain devises—which are not material—proceeds as follows: [His Lordship read the clause containing the gift of an annuity of 300*l.* to the testator's granddaughter Mrs. Hall, her appointees and children, and continued:] Now, my observation upon that devise is, that the testator treats it as a devise of one annuity to Mrs. Hall, and then to her children as she shall appoint, and, in default of appointment, then to the children for their lives. He does not treat it as if it were several annuities—one given to Mrs. Hall, and another to her children, and so on; but he treats it as one annual sum of 300*l.*, and, in dealing with the power of appointment, he calls it "the said sum of 300*l.*" Then, with respect to Mrs. Lloyd, he says: [His Lordship read the clause containing the gift of an annuity of 300*l.* to the testator's granddaughter Mrs. Lloyd, her appointees and children, and continued:] There, again, he treats in still plainer language this annuity which is given to Mrs. Lloyd and her children as one annuity, and not as two or more. Then he gives to his daughter Mrs. Clement—nothing turns upon this, I think—an annuity of 300*l.* to be a charge upon the property in Oil-street, and to be paid to her during her life. He then gives to her son an annuity in these words: [His Lordship read the clause containing the gift of an annuity of 150*l.* to Sidney Clement, and continued:] Then comes a clause which is applicable to all the annuities: "The first half-yearly payment of each of the before-mentioned annuities to be made six months after my decease." Looking, therefore, at the scope of this will, it appears to me that the testator devises four annuities and four only—one to Mrs. Hall and her children, one to Mrs. Lloyd and her children, one to Mrs. Clement, and one to her son Sidney; and then as to all these the first payment is to be made six months after his decease. Now, I do not see that there would be any difficulty in construing this will—and I do not think that any is suggested—if it stood alone. The question really is, to what extent the codicil has revoked that will. The codicil runs thus: [His Lordship read it and continued:] It is contended on behalf of the children both of Mrs. Hall and of Mrs. Lloyd, that the codicil only revokes the annuity which is given to Mrs. Hall and Mrs. Lloyd respectively. It is contended on the other side that there is a substitution of a smaller annuity for a larger, and that what is revoked is not the interest given to Mrs. Hall or Mrs. Lloyd, but the annuity, that is to say, the thing given, and instead of the thing given by the will, another thing, a less annuity, is given by the codicil. Kekewich, J. has held the last construction to be the true one, and in my opinion he is right. I think, when you come to study these two documents, you will find yourself excessively embarrassed by any other construction. The power of appointment which is contained in the will strikes me as creating a difficulty; but, if you substitute the smaller annuity for the larger, there is no difficulty at all, and everything works perfectly well. If you do not, you find this curious state of things—that the annuity of 300*l.* a year is revoked by the codicil so far as the lives of Mrs. Hall and Mrs. Lloyd are concerned, but they nevertheless have still the power to appoint a larger annuity than that, that is to say, 300*l* a year. The language of the will does not admit, and I cannot construe the will and the codicil together as admitting, of such a conclusion. I think, therefore, that there is a revocation or substitution by the codicil of the smaller annuities for the larger all through. And, bearing in mind the rule which was impressed upon us very properly by the learned counsel for the appellants, which is laid down in *Doe d. Hearle* v. *Hicks* (1 Cl. & F. 20; 8 Bing. 475) and *Randfield* v. *Randfield* (4 Drew. 147; on app. 8 H. of L. Cas. 225), that you are not to guess at the revocation or to extend it further than the clear language of the thing requires you to do, it does appear to me, I confess, that we should be missing the real intention of the testator if we were to adopt the construction contended for by the appellants. I think that the difficulty consists in not seeing that that which is revoked is the thing given, and not the interest of the takers. I think, therefore, that both appeals ought to be dismissed, with costs.

LOPES, L.J.—I am clearly of the same opinion. The rule which we have to regard in this case I

take it is this—that to cut down a previous gift it must be reasonably clear that it was intended to be cut down. The words cutting it down must not be equivocal, but they must show with a reasonable certainty that a revocation was intended. I take it that that is the rule beyond all question upon which we have to act in this case. Now, the object in construing all wills is to ascertain the intention of the testator or testatrix so far as it is expressed by the words used. I do not propose to read the will and the codicil which have been already read by my brother Lindley. But I do say that this passage in the will seems very strong to show that the view which we take is the correct one. I mean these words: "I give and devise unto my granddaughter Ellen Elizabeth, the wife of Graham Lloyd, a like annuity of 300*l.* to be a charge upon the said property in John-street aforesaid." Then come these words, "and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter Anna Helena." That makes me think that the testator was dealing in the will with the entire annuity. The result that I arrive at is this: that it is reasonably certain that an entire revocation of the devise was intended by the codicil, and a substitution of an annuity of 150*l.* payable to the granddaughter, her appointees and children, instead of an annuity of 300*l.* given by the will. Now, unless that is the correct view, it appears to me that it would be difficult to attach the power of appointment given in the will to the codicil. I cannot construe the will and the codicil together unless I adopt the view which I have expressed with regard to the effect of that codicil upon the will. I come therefore to the conclusion that Kekewich, J. was right in the interpretation that he put upon this will and codicil.

Rigby, L.J.—I have considered the will and the codicil carefully, and I am unable to arrive at the same conclusion as the Lords Justices have done. The testator, by his will dated the 27th Feb. 1877, gives, in quite plain and unambiguous language, to Mrs. Hall, one of his granddaughters, an annuity of 300*l.* a year to be paid to her half-yearly for her sole and separate use, and to be a charge upon his property in John-street, Liverpool, and after the death of the said granddaughter he directed that the sum of 300*l.* should be raised and paid for the benefit of her children as in the will mentioned. He then gave to his granddaughter Mrs. Lloyd a like annuity of 300*l.* to be a charge upon the same property, and to be paid to her and her children in the same manner in all respects as the annuity before given to Mrs. Hall. The two latter gifts refer to the gifts to Mrs. Hall in an inaccurate manner, but the inaccuracies appear to be mere slips of the draftsman, and from neither of these taken separately, nor from both taken together, is there raised the slightest difficulty as to what is really given to the granddaughters. The granddaughters take under the will annuities for their respective lives, and nothing more, and it is with this broad fact in view that we must approach the codicil. Now, the codicil is dated the 22nd March 1877, and is a much better drawn instrument than the will; and there is not a word in it which could raise any suspicion that the express revocation of the annuities to the granddaughters was intended to revoke the annuities to their children. Direct revocation of the latter annuity there is none, and the only way in which a revocation can be brought about is by supposing that the language of the codicil means something different from what would be the result of the plain interpretation of words in themselves clear. The supposition must be that the draftsman used the plain words of reference and revocation in an inaccurate manner because there were inaccuracies in the will; and I do not think, having regard to the recognised canon of construction that a disposition in a codicil must be a plain revocation of a gift in a will in order to take effect as a revocation, that such a conjecture (for it seems to me little more) can be founded upon it. In order to make the codicil a revocation of the gifts to children of grandchildren, it has to be altered, for everything in it shows careful drafting. The supposed improbability of the testator meaning to give a larger annuity among the children of a grandchild than is given to the grandchild herself, weighs little or nothing, in my judgment, against the plain language of the codicil. We can no more tell the motives operating upon the testator in this case than we can in his treating differently the family of one granddaughter and the family of another. There may have been reasons personal to the grandchildren whose annuities are dealt with by the codicil. With regard to the power of appointment I find no difficulty. The power of appointment arises under the will, and, according to my view, is not interfered with, and I cannot see the slightest difficulty in supposing that the testator meant to give this power of appointment in favour of the children whatever the annuity might happen to be—whether it was larger or only the same amount as that which was given to the donee of the power.

Appeals dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, agents for *Holland* and *Rigby*, Ashbourne; *Patersons, Snow, Bloxam, and Kinder*, agents for *Peele* and *Peele*, Shrewsbury.

Solicitors for the respondents, *Field, Roscoe, and Co.*, agents for *Gibbons* and *Arkle*, Liverpool.

Monday, July 15.

(Before Lindley, Lopes, and Rigby, L.JJ.)

The Thompson and Norris Manufacturing Company Limited v. Hawes. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Public health—Nuisance—Intimation or warning to owner served by sanitary authority upon premises—Abatement of nuisance by occupier—Right of occupier to recover expenses from owner—Public Health (London) Act 1891 (54 & 55 *Vict. c.* 76), *ss.* 2, 4, 5, 11, 128, 130.

Under the Public Health (London) Act 1891 *a sanitary authority served on certain premises an intimation or warning, addressed to the owners, that, if certain necessary works were not completed within a specified time, they would commence proceedings against them "by the service of a statutory notice." Thereupon, the occupier, without forwarding the document to the owners, or informing them of it, caused the*

(a) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

work to be executed, and then sought to recover the amount expended thereon from the owners. It was decided by Lawrance, J., on the authority of Gebhardt *v.* Saunders (67 *L. T. Rep.* 684; (1892) 2 *Q. B.* 452), *that the owners were liable. On appeal:*

Held (reversing the decision of Lawrance, J.), that the occupiers, not being compellable to execute the work, had acted as mere volunteers in doing so, and had no claim to be reimbursed by the owners.

THIS action was brought by the plaintiffs, the Thompson and Norris Manufacturing Company Limited, against the defendants, George Hawes and Edwin King, to recover the sum of 100*l.*, being moneys paid by the plaintiffs to a builder and contractor for work done and materials supplied in respect of certain drainage repairs in the nature of improvements executed by him for the plaintiffs at Nos. 37 and 39, Britannia-row, Islington. The plaintiffs were the lessees of 37 and 39, Britannia-row, and the defendants were the executors and trustees of the will and estate of Charles Bryant, deceased, the lessor.

On the 14th Sept. 1894 the plaintiffs received a notice from the Public Health Department of the Vestry of St. Mary, Islington, under the Public Health (London) Act 1891, headed "intimation," and signed by the medical officer of health, in the ollowing terms:

To the owner of the factory, 37 and 39, Britannia-row.—Sir or Madam,—The sanitary inspector having visited the above premises, has given me information that the nuisances numbered . . . in the schedule at the back hereof which are liable to be dealt with summarily, exist thereon. I therefore now by this written intimation make the existence of the said nuisances known to you as being the person who is required to abate them, and I have to request that the same be abated within the period of seven days. At the end of this time the sanitary inspector will again visit the premises, and if the necessary works have not then been completed, the vestry, as the sanitary authority for the parish, will commence proceedings against you by the service of a statutory notice.

The plaintiffs did not forward the notice of the vestry to the defendants or communicate with them in any way.

The necessary work was, however, done under the direction of the vestry by a builder and contractor employed by the plaintiffs, and paid for by them.

Subsequently a claim was made against the defendants for the 100*l.* paid, but the claim was repudiated.

On the 1st Feb. 1895 the action came on for trial before Lawrance, J., sitting without a jury, when his Lordship reserved judgment.

On the 10th April 1895 the following judgment was delivered:

LAWRANCE, J.—This is an action in which the plaintiffs sue for the sum of exactly 100*l.* for money which they allege was paid at the request of the defendants. The plaintiffs are lessees of the defendants of certain premises, and notice was served, under the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), that the drainage was out of order. The premises were examined, and it was found that the drains required reconstruction. The money which is sought to be recovered is money which was laid out for the reconstruction of the drains and putting the place into a sanitary condition. The only question that arises is, whether the plaintiffs have a right of action against the defendants as their lessors. My attention was called to the case of *Gebhardt* v. *Saunders* (67 L. T. Rep. 684; (1892) 2 Q. B. 452), and it seems to me, without going through the facts of that case, that *Gebhardt* v. *Saunders* (*ubi sup.*) is precisely in point. Indeed, I am unable to distinguish the present case from the case of *Gebhardt* v. *Saunders* (*ubi sup.*). In that case it was decided that the plaintiff was entitled to recover from the defendants, under the same circumstances as in the present case, the costs and expenses incurred in abating a nuisance, being money paid by him for the use and at the request of the defendants, though no notice, under sect. 4, sub-sect. 3, of the Public Health (London) Act 1891, had been served upon the defendants as owners of the premises. The only point that was made here on behalf of the defendants was that no notice in this case had been served on the defendants. On carefully reading the case of *Gebhardt* v. *Saunders* (*ubi sup.*) I see that that is one of the points which was dealt with, and was decided in that case. As I have already said, I fail to see any distinction whatever between the two cases. Therefore my judgment is for the plaintiffs for the amount claimed.

From that decision the defendants appealed.

Channell, Q.C. and *J. D. Fitzgerald* for the appellants.—We submit that the decision of Lawrance, J. was wrong on two grounds: First, because the public health department of the vestry as sanitary authority never served a proper statutory notice at all. What was served was not in proper form. It was a mere intimation that a statutory notice would be served if the owners of the premises did not complete the necessary works. It was an intimation or friendly warning, not a statutory notice. Secondly, even assuming that it was a statutory notice, it was not served on the occupiers. It was served on the owners—that is to say, addressed to the owners. There was, therefore, no obligation on the occupiers to do the work referred to. They had nothing to do beyond sending the document on to the owners. They acted as mere volunteers in doing the work. The defendants are not liable, and the plaintiffs have no claim against them. The plaintiffs have made the defendants a present of the improvements: (see Public Health (London) Act 1891, 54 & 55 Vict. c. 76, ss. 2, 4, 5, 11, 128, 130.) The scheme of the Act is, that notice should be served on the persons who are liable. The persons liable here were the owners, not the occupiers. The service of the notice is a condition precedent. Unless a notice has been served the owners are not liable at all. If the notice is not complied with there is a penalty and power for the sanitary authority to enter to abate the nuisance. The only document served was this intimation or warning that a nuisance existed on the premises, and that if the owners did not abate it the sanitary authority would commence proceedings against them by the service of a statutory notice. The learned judge in the court below relied on

Gebhardt v. *Saunders*, 67 L. T. Rep. 684; (1892) 2 Q. B. 452.

But that case is not an authority against the defendants. On the contrary, it is in their favour.

Marshall, Q.C. (*A. J. Walter* with him) for the respondents.—Merely because of the omission of one or two words in this notice, are the occupiers to be regarded as mere volunteers? The appellants say that this is not a statutory notice. But it is a notice within sect. 4 of the Act of 1891. The form is not essential. They referred to

The Guardians of the Poor of the Holborn Union v. *The Vestry of the Parish of St. Leonards, Shoreditch*, 35 L. T. Rep. 400; 2 Q. B. Div. 145.

No reply was called for.

Lindley, L.J.—I think that in this case there has been a miscarriage of justice, and a very unfortunate one. I do not think that it is a mere question of tehnicality. If I ask a person to reimburse the money which I have spent, but not on his behalf, why should he? The difficulty is that the plaintiffs cannot give any sufficient reason for having disbursed the money which they now seek to recover. The case stands in this way: [His Lordship stated the facts of the case, and continued:] It will be observed that the notice says: "At the end of this time the sanitary inspector will again visit the premises." That is followed up by another passage: "And if the necessary works have not then been completed, the vestry, as the sanitary authority for the parish, will commence proceedings against you by the service of a statutory notice." The meaning of that is tolerably intelligible. It is a warning that, unless the owners do abate the nuisance in question, there will be proceedings commenced by the service of a statutory notice. The document is addressed not to the occupiers but to the owners of the premises. Unfortunately the plaintiffs never sent this document on to the defendants, so that they knew nothing about it. The plaintiffs, complying with the friendly warning, proceeded to spend 100*l.* in executing the necessary drainage alterations and repairs. There has been a deal of controversy about those matters, but assuming that they have been properly done, what is the legal aspect of the case? The plaintiffs were not compellable as matters stood to execute the works, and they have failed to show any reason for having done so. I am sorry for it; for part, if not all, of the repairs would properly fall on the defendants. They consequently benefit by the blunder of the plaintiffs. I am of opinion, therefore, that the decision of the learned judge in the court below was wrong, and that the appeal must be allowed with costs.

Lopes, L.J.—I am of the same opinion. This is not a mere technicality; it is a matter of substance. The action is to recover money paid by the plaintiffs at the defendants' request. The short answer is, that the plaintiffs were not compelled to do the work. There was no obligation on them to abate the nuisance. But not being content to forward the notice on to the defendants, they did the work and spent 100*l.* They had received an intimation or friendly warning. It was addressed to the owner of the premises. It was not a statutory notice. They never sent it on to the defendants, and never told them anything about it, but proceeded to do the work entirely behind the backs of the defendants. The defendants knew nothing about it; they never heard of it; and they are justified in saying that the work was not done by their authority. There is no obligation therefore on their part to reimburse the plaintiffs, although no doubt they have benefited to some extent by the work which has been done. The appeal must be allowed.

Rigby, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors for the appellants, *Waller* and *Sons*.

Solicitors for the respondents, *Marshall* and *Marshall*.

Monday, July 15.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Bean v. Flower. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Bankruptcy of plaintiff in action—Discontinuance by trustee—Stay of proceedings—Assignment of interest by trustee—Fresh action by assignee for same relief—Order XXV., r. 4.

The plaintiff in an action having become bankrupt, his trustee in bankruptcy elected not to continue the action, and thereupon an unconditional order was obtained by the defendants staying further proceedings. B. having purchased the trustee's interest, commenced a second action for the same relief as that asked by the former action. Upon motion to dismiss the second action, as an abuse of the process of the court and as frivolous and vexatious, it was decided by Kekewich, J. (ante, *p.* 118) *that it must be dismissed; the trustee, who alone had the right of action in him, having by his election barred anybody subsequently becoming entitled through him to the same cause of action. On appeal:*

Held (*reversing the decision of Kekewich, J.*), *that the action ought not to be dismissed in a summary way as frivolous and vexatious, as the motion gave rise to a question that required consideration, namely, whether the order staying the proceedings in the former action was equivalent to a judgment for the defendants.*

On the 6th Sept. 1894 Joshua Jones, a mortgagor, brought an action for redemption against his mortgagees, Wickham Flower and Charles Hopkinson, in respect of a large estate in New Zealand. In that action the plaintiff charged the defendant Flower with having, as the plaintiff's solicitor, agreed to purchase the property for himself, and asked for a declaration that, upon payment by him, the plaintiff, to the defendants of the money advanced by them to him, the defendant Flower was a trustee of the estate for the plaintiff; and claimed that, on payment to the defendants of what should be found due to them on taking an account, the defendant Flower might be ordered to reconvey the estate to the plaintiff; and for costs and damages.

On the 6th Dec. 1894 the plaintiff was adjudicated a bankrupt. Thereupon his trustee in bankruptcy, the official receiver, elected not to continue the action, which was upon the application of the defendants unconditionally stayed by an order of the court dated the 15th March 1895.

On the 9th July 1895 the present action of *Bean* v. *Flower* in respect of the same estate was commenced against the same defendants by George Thomas Bean, who had purchased the official receiver's interest for 50*l.* The relief

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

asked by the action of *Bean* v. *Flower* was precisely the same as that asked for by the former action of *Jones* v. *Flower*, but in addition an injunction was claimed to restrain the defendants from selling or otherwise disposing of the estate.

On the 12th July 1895 the defendants moved before Kekewich, J. for an order dismissing the second action "as an abuse of the process of the court, and as frivolous and vexatious." It was contended for the plaintiff Bean that his interest was independent of that of the former plaintiff, Jones, and that the case, therefore, was within *Bennett* v. *Gamgee* (35 L. T. Rep. 764: 2 Ex. Div. 11).

There was a prior motion by the plaintiff Bean for an interim injunction to restrain the defendants from selling the property on the alleged ground which formed the basis of the former action, that the defendant Flower, who had acted as the plaintiff Jones's solicitor, had improperly bought the property on his own account.

It was decided by Kekewich, J. (*ante*, p. 118) that the action must be dismissed with costs, the law applicable to this case being that laid down by Wright, J. in *Selig* v. *Lion* (64 L. T. Rep. 796; (1891) 1 Q. B. 513); and that, if it were necessary to decide between *Bennett* v. *Gamgee* (*ubi sup.*) and *Selig* v. *Lion* (*ubi sup.*), which it was not, his Lordship had no hesitation in following the latter case.

The learned judge also, as a consequence of his decision, dismissed the plaintiff's motion.

The plaintiff now appealed.

Chester for the appellant.—Kekewich, J. decided this case on the authority of

Selig v. *Lion*, 64 L. T. Rep. 796; (1891) 1 Q. B. 513.

But I submit that, as the interest of the plaintiff Bean is independent of the interest of the plaintiff Jones in the former action, the case comes within the principle of

Bennett v. *Gamgee*, 35 L. T. Rep. 764; 2 Ex. Div. 11.

The facts there are almost identical with the present. The election by the trustee in bankruptcy not to continue the former action cannot be pleaded as a bar to the subsequent action by the present plaintiff.

Renshaw, Q.C. and *J. G. Wood* for the defendants.—The election by the trustee in bankruptcy not to continue the action bars anyone who subsequently becomes entitled through him to the same cause of action. *Bennett* v. *Gamgee* (*ubi sup.*) has no application now to any case that comes before the courts. The particular section under which it was decided — viz., sect. 142 of the Common Law Procedure Act 1852—has been repealed since the date of the decision. It turned on the construction of that section, and has therefore nothing to do with the present case. What has to be considered is the practice since the Judicature Acts:

Order XVII., rr. 1 and 2;

Jackson v. *The North-Eastern Railway Company*, 36 L. T. Rep. 779; 5 Ch. Div. 844;

Warder v. *Saunders*, 47 L. T. Rep. 475; 10 Q. B. Div. 114.

The law on the question of election is summed up by Lord Blackburn in

Scarf v. *Jardine*, 47 L. T. Rep. 258; 7 App. Cas. 345, at p. 360.

Chester replied.

LINDLEY, L.J.—I think that the action ought not to be dismissed in a summary way as being "frivolous and vexatious." The motion gives rise to a very difficult question which requires considerable investigation, viz., whether the order staying the proceedings in the former action is equivalent to a judgment for the defendants absolutely dismissing the action. I have great doubt whether the present action is not maintainable. I do not say that it is, for that is a question which the court will not at present decide. But having regard to that question, to dismiss the action in this way as "frivolous and vexatious" is going a great deal too far. The order must be discharged, and the appeal allowed, with costs.

LOPES and RIGBY, L.JJ. concurred.

Chester was then heard upon the appeal against the refusal of the plaintiff's motion for an injunction.

Renshaw, Q.C. and *J. G. Wood*, for the defendants, were not called upon to argue.

LINDLEY, L.J.—The legal estate in the property is in the defendants or one of them; the plaintiff has only an equitable interest, subject to what is due to the defendants. The defendants desire to sell the property in order to obtain payment of what is due to them, and the court is asked at the last moment to stop the sale without imposing any terms. It is an application that cannot be entertained, and the appeal must be dismissed with costs.

LOPES and RIGBY, L.JJ. concurred.

Order varied.

Solicitor for the appellant, *John M. Mitchell.*

Solicitors for the respondents, *Flower, Nussey,* and *Fellowes.*

Wednesday, July 17.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

VAN JOEL *v.* HORNSEY. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Mandatory injunction—Interlocutory application—Intended action—Notice—Evasion of service of writ.

On the 23rd May the plaintiffs wrote to the defendant objecting to a building which he was erecting as interfering with their ancient lights. On the 24th May the plaintiffs commenced an action to restrain the erection of the building. The defendant evaded service of the writ till the 28th May, when an order was made for substituted service, and the writ was then duly served. Between the 24th and the 28th May the defendant actively proceeded with the building, and completed the gable to its full height. Kekewich, J. granted an interlocutory mandatory injunction in respect of so much of the building as had been erected between the 24th and the 28th May. The defendant appealed.

Held, that, although the defendant had not been served with the writ before the 28th May, he knew that an action would be brought and had evaded the process of the court; and that therefore the case came within the principle of Daniel *v.* Ferguson (1891) 2 *Ch.* 27), *and the injunction was properly granted.*

Decision of Kekewich, J. affirmed.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

ON the 23rd May 1895 the plaintiffs H. Van Joel the owner and A. G. Johnson the tenant of a certain house sent a letter through their solicitors to the defendant objecting to his rebuilding his house on the opposite side of the street to such a height as to obstruct the ancient lights of the plaintiffs' house; and threatening that if he persisted an action would be brought to restrain him.

On the 24th May the defendant's clerk called on the plaintiffs, but, as he would give no promise to desist from the building, he was told that a writ would be forthwith issued.

On the afternoon of the same day the writ in this action was issued, and the plaintiffs endeavoured to serve it on the defendant, but he kept out of the way and evaded the service of the writ until the 28th May, on which day the plaintiffs obtained an order for substituted service, and the writ was in that way served.

Between the 24th and the 28th May the defendant actively proceeded with his building, but it did not appear that he employed additional workmen to expedite the work. On the 30th May the gable of the house was completed to its full height, and according to the evidence of the plaintiffs it materially interfered with their ancient lights.

On the 30th May the plaintiffs obtained an interim injunction for a few days, and on the 11th July Kekewich, J. granted an interlocutory injunction till the trial, restraining the defendant from erecting his building so as to obstruct the plaintiffs' ancient lights, and from permitting so much of the new gable as had been built on and after the 24th May from remaining as built, the portion to be pulled down being defined by a red line on a photograph.

From that decision the defendant by leave now appealed.

Buckley, Q.C. (with him *Ashton Cross*) for the appellant.—No reported case has gone so far as to decide that a defendant on an interlocutory motion can be ordered to pull down a building unless it has been erected in defiance of the order of the court. In the present case the defendant did not disobey the order of the court. He had no notice that the plaintiffs intended to apply for an interlocutory injunction, nor did he hurry on the building by employing extra workmen so as to take an unfair advantage of the plaintiffs. The order of Kekewich, J. is wrong, and ought to be discharged. There is no reason for the intervention of the court, for the plaintiffs cannot be injured by the continuance of the building till the trial of the action, and the defendant is willing to give an undertaking to do nothing until then.

Curtis Price (*Graham Hastings*, Q.C. with him) for the respondents.—Although the defendant had no written notice of the service of the writ or of the plaintiffs' intention to apply for an interlocutory injunction, yet he knew that they intended to issue a writ, and he kept out of the way and evaded the process of the court. His conduct in truth amounted to contempt of court. The case is governed by

Daniel v. *Ferguson*; (1891) 2 Ch. 27.

[He was stopped by the Court.]

Buckley, Q.C. in reply.—I say that *Daniel* v. *Ferguson* (*ubi sup.*) does not apply to the present case at all. The facts there were entirely different, and it is therefore distinguishable. This is not a case for an injunction. At the most the plaintiffs can claim damages.

LINDLEY, L.J.—It seems to me to be quite obvious that there is a cause of action here. I purposely abstain from expressing any opinion whatever as to whether, at the trial of the action, the right course would be to grant an injunction. That depends on the conduct of the plaintiffs. I therefore say nothing about that. Kekewich, J. has granted an injunction to restrain the defendant from going on with his building, and has granted a mandatory injunction to pull down a certain portion of his building. What we understand that Kekewich, J. has done is this: He has made an order to the effect that the defendant should pull down that which he has hurried up since the 24th May 1895. Now, having regard to the letter written on the 23rd May by the plaintiffs' solicitors, and having regard to the affidavits which have been read to us, the conclusion is irresistible that the building was hurried on as fast as the defendant could hurry it on after the 23rd May, in order that he might say that he had got the building up. The principle applicable to the case is that upon which this court acted in *Daniel* v. *Ferguson* (1891) 2 Ch. 27), and upon which I shall always act—that is, that the court will not allow itself to be imposed upon by a proceeding of that kind. If builders will run up a building in that way, they must take the risk of being ordered to pull it down; and the court will not be imposed upon by any such proceeding. To that extent Kekewich, J., I think, was perfectly justified in the view which he took; and this appeal must therefore be dismissed, and dismissed with costs.

LOPES, L.J.—I am of the same opinion, and I think that Kekewich, J. has done that which is right in this case. I desire to say nothing as to what may be the result of the trial; that is a matter for the future. But I have no doubt that there has been a material diminution of light coming to the plaintiffs' house, and that is the cause of action. Now Kekewich, J. has, I understand, granted an injunction to prevent the defendant's building from being further proceeded with until the trial; and he has also granted a mandatory injunction that a certain portion of the building shall be pulled down. That portion is only the portion which has been erected since the 23rd May. On the 23rd May a letter was written to the defendant, and I have not the slightest doubt that he did all he possibly could to evade the service of the writ. The evidence upon that subject, in my opinion, is conclusive. Attempts over and over again were made to serve him with that writ, and excuses of all sorts were made with regard to the absence of the defendant. I am of opinion, therefore, that there was an intention on his part to evade service. What has been done in the meantime? In the meantime the building has been hurried on. I do not mean to say that an extra number of workmen have been put on—not anything of that kind—but instructions beyond all question were given to the foreman, as the foreman states, to hurry on the building, and to do that in defiance of the plaintiffs. Under these circumstances the principle in *Daniel* v. *Ferguson* (*ubi sup.*) applies to this case on the ground which exists here, that the defendant was hurrying on his building in defiance of proceedings before the court, and

also in anticipation of proceedings to be taken. I think that this appeal, therefore, ought to be dismissed.

RIGBY, L.J.—I am of the same opinion. Three affidavits were filed on the motion for substituted service. The defendant does not say what he might have said, that he was not aware of those affidavits. It would not be just, unless the court were satisfied that the defendant had seen the plaintiffs' affidavits, to require any answer. But the defendant knew very well what the charge was; he attempts in a very imperfect manner to meet it in his own affidavit. My impression certainly is, that he had seen the plaintiffs' affidavits, and that he put forward the best answer he could. That is very much confirmed by the fact that he has allowed all this time to go by, and that now when he has had a full opportunity of answering the plaintiffs' affidavits he thinks it safer to rely upon the answer which he has already made. If he had not received that letter of the 23rd May he certainly would have told us so. I rather suspect he received the letter of the 23rd May. But at all events on the 24th May he knew that the court would be applied to. I think he endeavoured to put off the evil day by escaping service, knowing all the time that this building was being carried on rapidly. I do not say that it has been carried on with greater rapidity than it had been during the previous weeks; but his object was to get, before the court could possibly interfere, a position of advantage in the action. As regards the merits of the case, I say nothing, but a *primâ facie* case has been made out of some injury to the plaintiffs' light. That being so, I think that the defendant ought not to have run up his building beyond the red line marked on the photograph, and that Kekewich, J. was right in ordering that he should pull it down.

Appeal dismissed.

Solicitors for the appellant, *Taunton* and *Dade*.
Solicitors for the respondents, *Yarde* and *Loader*.

Wednesday, July 31.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

THE SOUTHERN COUNTIES DEPOSIT BANK LIMITED *v.* RIDER AND KIRKWOOD. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Directors—Quorum—Resolution passed at board meeting—Irregularity—Validity of resolution to wind-up voluntarily—Refusal by court to interfere.

The notices convening the meeting at which a special resolution to wind-up voluntarily was passed by the shareholders of a company were issued under the authority of a resolution passed at a meeting of the board of directors at which a quorum was not present.

Six months afterwards the shareholders sought to have the special resolution declared invalid.

Held, that the doctrine upon which the court had acted since Foss *v.* Harbottle (2 *Hare*, 461), *as was explained in* Browne *v.* La Trinidad (58 *L. T. Rep.* 137; 37 *Ch. Div.* 17), *was not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of could be set right at any moment; and that therefore, in the present case, the court would not interfere, especially as no application to the court had been made until six months had elapsed after the passing of the resolution.*

Decision of Stirling, J. affirmed.

CLAUSE 52 of the articles of association of the above-named company provided that the number of the directors, and the names of the first directors, should be determined by the subscribers of the memorandum of association.

Clause 53 provided that, until directors were appointed, the subscribers of the memorandum should be deemed to be directors.

Clause 61 provided that the directors might determine the quorum necessary for the transaction of business.

In March 1885 all the subscribers of the memorandum met and appointed four persons as the first directors, and resolved that three should form a quorum.

In July 1889 a meeting of two directors only was held, at which it was resolved "that two directors shall form a quorum at this and future meetings of the directors." After that resolution was passed, namely, from 1889 to Jan. 1895, the company had gone on with two directors regularly acting as a quorum.

In Jan. 1895 a special resolution to wind-up voluntarily was passed by the shareholders of the company.

It subsequently became known to the shareholders that the notices summoning the meeting at which the special resolution to wind-up was passed were issued under the authority of a resolution passed by two directors only.

An application was accordingly made by the shareholders to Stirling, J. for a declaration that the special resolution to wind-up the company voluntarily was not validly passed, or to grant an injunction restraining the defendants (the person appointed liquidator and the directors) from carrying the resolution into effect.

On the 24th July 1895 the learned judge held that, though there had been some technical irregularities, they were not sufficient to render the resolution invalid.

The plaintiffs now appealed from that decision.

Martelli for the appellants.—The special resolution passed for voluntary liquidation was not validly passed owing to the invalidity of the notices convening the meeting, and therefore the company is not in voluntary liquidation. I rely on

Harben v. *Phillips*, 48 L. T. Rep. 334, 741; 23 Ch. Div. 14.

That case was distinguished in

Browne v. *La Trinidad*, 58 L. T. Rep. 137; 37 Ch. Div. 1.

Sending out the notices was not a merely ministerial act, but there was a discretion to be exercised by the directors under the articles of association.

W. E. Vernon, for the respondents, was not called upon to argue.

LINDLEY, L.J.—[His Lordship stated the facts of the case as above set forth, and continued:] The court is asked to declare the special resolution to wind-up voluntarily an invalid one, or to grant an injunction restraining the defendants

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

from carrying it into effect. There has been, no doubt, an irregularity. But from 1889 to Jan. 1895 the company has gone on with two directors acting as a quorum. The resolution to wind-up was passed in Jan. 1895, and no application to the court to declare it invalid was made until July last. I will repeat what I said in *Browne* v. *La Trinidad* (58 L. T. Rep. 137, at p. 143; 37 Ch. Div. 1, at p. 17): "I think it is most important that the court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment." That is the doctrine upon which the court has acted ever since the case of *Foss* v. *Harbottle* (2 Hare, 461). I think that the appeal ought to be dismissed.

Lopes and Rigby, L.JJ. concurred.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp,* and *Co.*

Aug. 5 *and* 9.

(Before Lindley, Lopes, and Rigby, L.JJ.)

Re Brown (a Lunatic). (*a*)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunatic resident in colony of Victoria—Property in England—Appointment of master in lunacy of Victoria guardian and receiver—Transfer of stock—"Vested"—Lunacy Act 1890 (53 *Vict. c.* 5), *s.* 134—*Victoria Lunacy Act* 1890 (54 *Vict. No.* 1113), *ss.* 124, 131, 182, 229.

B. had been found a lunatic in the colony of Victoria, where she resided, and the master in lunacy of that colony had been appointed guardian of her person and receiver of her estate, and the care, protection, and management of her property had been remitted to him. By the Colonial Lunacy Act the master was empowered to take possession of and administer the estates of all lunatics, but the property was not vested in him, nor did the Act provide for the appointment of a committee.

A petition was presented by the master, by his attorney in this country, for an order that English stocks belonging to the lunatic should be transferred and the dividends paid to him.

Held, that sect. 134 *of the Lunacy Act* 1890 *gave the court a discretion, and that it was not confined to cases where the personal estate of the lunatic had been "vested" in the strict technical sense in a person appointed for the management thereof; that the stocks had been vested in the master within the meaning of that section; and that the order ought to be made.*

Re Barlow; Barton *v.* Spencer (57 *L. T. Rep.* 95; 36 *Ch. Div.* 287) *considered.*

By an order, dated the 6th Sept. 1894, of the Supreme Court of Victoria, made in lunacy in the matter of Gertrude Emily Brown, a lunatic patient, and in the matter of the Lunacy Act 1890 of the colony of Victoria, on the application of the lunatic's brother, it was ordered that the master in lunacy should examine G. E. Brown, and take evidence as to whether she was a lunatic, and report thereon to the court.

The master reported that she was of unsound mind, and incapable of managing herself or her affairs, and, by an order of the same court, dated the 27th Sept. 1894, the report was confirmed.

By another order of the same date the court appointed T. P. Webb, master in equity and master in lunacy of the colony of Victoria, guardian of the person and estate of G. E. Brown, and receiver of her estate, and by that order the care, protection, and management of her property were remitted to him.

T. P. Webb appointed H. L. Taylor his attorney to receive the lunatic's property in the United Kingdom.

A petition was presented by T. P. Webb, by H. L. Taylor, his attorney, asking for an order that some fit person should transfer to him (T. P. Webb) or his attorney certain securities belonging to the lunatic, and receive and pay the dividends to them.

The securities in question consisted of 752*l.* 9*s.* 2*d.* consolidated ordinary stock of the Midland Railway Company, 104*l.* consolidated ordinary stock of the London and North-Western Railway Company, and 260*l.* 2¾ per Cent. Consols.

The Lunacy Act 1890 of the colony of Victoria (54 Vict. No. 1113) provides (sect. 124) that the court and the master may make orders after the return of the inquisition for the custody of the person and management of the estate of the lunatic.

Sect. 131. The master in lunacy is empowered and required to undertake the management of the estates of all lunatics in Victoria, and to take possession and care of, recover, collect, preserve, and administer their property.

Sect. 182. The master in lunacy is to have power with respect to the estates of patients to receive and recover moneys due, demise lands, sell or convert into money any real or personal property, and surrender any lease, receive all rents, income, and profits of real or personal property, settle or compromise demands, &c.

Sect. 190. The master in lunacy is to be at liberty to apply money in paying the debts of and maintaining the lunatic and his family, and payment of costs of management; to invest the patient's money in Government stock in the name of the treasurer, and the treasurer, at the request of the master, may buy, sell, or transfer such stock.

Sect. 229. Where any stock shall be standing in the name of, or shall be vested in, a lunatic beneficially entitled thereto, the court may order some fit person to transfer the stock, and to receive and pay the dividends as the court may order.

Minutes of an order had been drawn up by the master in lunacy for transferring the stock and paying the dividends to H. L. Taylor, but the Lord Justice sitting in lunacy, before whom the application was heard, refused to make the order, having regard to the decision in *Re Barlow; Barton* v. *Spencer* (57 L. T. Rep. 95; 36 Ch. Div. 287).

The application was accordingly now renewed to the Lords Justices in court.

Sefton Strickland for the applicant.—The only mode of vesting the property of the lunatic is

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

under the Lunacy Act 1890, sect. 134. The question is whether the property has been, in the words of the Act, "vested in a person appointed for the management thereof according to the law of the place where he is residing." In the Colonial Lunacy Act the general scheme appears to be that the master in lunacy of Victoria is to do certain things and to act as the lunatic's committee. Sect. 124 appoints the master to be the person to take care of the lunatic. Sects. 131, 182, and 229 of the same Act confer upon him various powers. I submit that the lunatic's property should be transferred to him. [Lindley, L.J.—Is not the master merely a receiver and manager with power to act as such until a committee is appointed?] There is no specific provision for the appointment of a committee, though it is contemplated that there shall be a committee. The case of *Re Barlow*; *Barton* v. *Spencer* (57 L. T. Rep. 98; 36 Ch. Div. 287), does not seem to apply here, because that was a case of a lunatic patient, not a lunatic so found by inquisition as in the present case. Though there is nothing in the colonial Act which says that the lunatic's property shall be vested in the master, yet the duties he has to perform are such that it is obviously contemplated that he should have the control of the property.

Cur. adv. vult.

Aug. 9.—The following judgment of the Court (Lindley, Lopes, and Rigby, L.JJ.) was delivered by

Lindley, L.J.—The question which has to be decided in this case is, whether this court, sitting in lunacy, has jurisdiction under sect. 134 of the Lunacy Act 1890 to order certain stocks and shares standing in the name of the lunatic to be transferred into the name of the master in lunacy in the colony of Victoria, to be applied by him in the maintenance of the lunatic. Sect. 134 of the Lunacy Act 1890 runs thus: "Where any stock is standing in the name of or vested in a person residing out of the jurisdiction of the High Court, the judge in lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of the stock or any part thereof to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof as the judge thinks fit." The lunatic in this case is residing out of the jurisdiction of the High Court, and has been declared a lunatic, and the master of the Supreme Court of Victoria has been appointed to manage the lunatic's personal estate. So far there is no difficulty. But such personal estate has not vested in the colonial master in the sense of being divested from the lunatic, nor so as to pass to the master's successor in office, or to his personal representatives, in trust for the lunatic in case of the master's death. Sect. 134, it will be observed, uses the word "vested" with reference to the laws of the country where the lunatic lives and has been declared lunatic; and if that section only applies where the personal property of a person declared lunatic by a foreign or colonial court is vested in the strict technical sense attached to it by the courts of law in England, the section would not only be inapplicable to this case, but it will seldom, if ever, be applicable at all. It very rarely happens, if indeed it ever happens, that foreign or colonial courts divest the personal estates of lunatics subject to their jurisdiction, and vest such property in committees, curators, or other officials. What is usually done in the colonies and in foreign countries is very much the same as we do ourselves. We appoint a committee with power to obtain possession of the lunatic's property, and, if necessary, to sue for and recover any property of the lunatic by proper process; but we do not vest the lunatic's property in the committee in the strict legal sense of the word "vest." Neither do colonial or foreign courts. Unless, therefore, the word "vested" in sect. 134 is to be construed in its wide sense, and not in its strictly legal sense, so as to include the right to obtain and deal with, without becoming the actual legal owner of, the lunatic's property, the section would become practically useless. It is obviously the intention of the section to enable the judge in lunacy to hand over to committees, curators, and other persons properly qualified by foreign tribunals, the personal property of persons declared lunatics, and subject to their jurisdiction; and the section ought to be so construed as to effectuate and not to defeat this object. If now we turn to previous decisions we find that orders have been made for the transfer of stocks, funds, and securities to curators of lunatics resident out of the jurisdiction, namely, in France, Holland, and Scotland, although the property of such lunatics was not "vested" in their curators in the strict technical sense of that expression. The following are the cases referred to, arranged in the order of date in which they were decided: *Re Stark* (2 Mac. & G. 174), a Scottish case; *Re Elias* (3 Mac. & G. 234), a Dutch case; *Scott* v. *Bentley* (1 K. & J. 281), also a Scottish case; *Re Garnier* (25 L. T. Rep. 928; L. Rep. 13 Eq. 532), a French case; *Re Mitchell* (17 Ch. Div. 515), a Scottish case. Of these cases *Scott* v. *Bentley* (*ubi sup.*) is the most instructive, as the rights and powers of Scottish curators were there fully argued and carefully considered by Sir W. Page Wood. In *Re Stark* (*ubi sup.*), and also in *Re Garnier* (*ubi sup.*) the dividends only were ordered to be paid to the curator, the court considering that it had a discretion in the matter, and not being satisfied that any capital was wanted for any immediate purpose. In *Re Elias* (*ubi sup.*), however, and again in *Re Mitchell* (*ubi sup.*), the capital was ordered to be transferred to the curator without any security being required. In *Scott* v. *Bentley* (*ubi sup.*) and in *Re Garnier* (*ubi sup.*) the stock was in court, and those cases did not therefore turn on the construction of the Lunacy Acts, but on the rights and powers of Scottish and French curators respectively. In *Re Barlow*; *Barton* v. *Spencer* (57 L. T. Rep. 95; 36 Ch. Div. 287), the master in lunacy had been appointed by the Supreme Court of New South Wales under the New South Wales Lunacy Act, and he applied for a transfer to him of the stock consisting of 2249*l.* 18*s.* New Three per Cent. Annuities, which belonged to the lunatic, which had been paid into court by the trustee of the will under the Trustee Relief Act. The beneficiary had not been judicially declared a lunatic, and the court held first, that the colonial master had no absolute

right to have the whole sum transferred to him, but that there was nevertheless ground for making such an order as to part of the capital, namely, 803*l.*, and of the future dividends. The lunatic in that case was only a patient, and had not been adjudicated a lunatic, and the court felt considerable difficulty in making any order at all for payment to the colonial master. But it is obvious from the judgments that, if the lunatic had been judicially declared lunatic, so that his legal status had been altered and the master had been appointed as committee, the court would not have felt any difficulty in making any order which the court thought proper for transferring the annuities to the colonial master. That case, however, did not turn on the Lunacy Acts of this country. So far as authorities are concerned, therefore, *Re Elias* (*ubi sup.*) and *Re Mitchell* (*ubi sup.*) are in favour of the court having jurisdiction to order a transfer of the lunatic's property in the funds of this Government to a properly appointed curator, although the lunatic's personal estate is not actually vested in him in the strict legal sense according to the law of this country. The colonial Act in this case clearly gives the master all the powers necessary to enable him to obtain and dispose of the stocks and shares which we are asked to order to be transferred to him. And, as we are satisfied that the whole is wanted for the maintenance and support of the lunatic, the order prepared by the master, and submitted to us for approval, may be made. Whether, if the whole were not wanted, the colonial master would be entitled to have the whole transferred to him as of right is another matter, and need not now be decided. Sect. 134 of the Lunacy Act of 1890 seems to give the judge in lunacy a discretion. But, in order to render the order right on the face of it, we propose to state in it that the personal estate of the lunatic is vested in the colonial master within the meaning of sect. 134 of the Lunacy Act 1890. The sections of the colonial Act are, in our opinion, ample for the purpose.

Application allowed.

Solicitors for the applicant, *Roy* and *Cartwright.*

Wednesday, Aug. 7.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Brown, Shipley, and Co. (apps.) v. The Commissioners of Inland Revenue (resps.). (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Revenue—Stamp—Marketable security—Promissory note—Contract to give security—Stamp Act 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 82, 122.

An instrument consisted of a promissory note, followed by a statement that it was one of a series of notes which had been secured by the deposit of certain bonds to be held in trust, under an agreement, for the benefit of the holders thereof. The instrument was made and indorsed by a foreign railway company, and was issued in England to a purchaser as security for money lent by him to the railway company. Some o the series had from time to time been dealt with on the London Stock Exchange.

Held (reversing the judgment of the Queen's Bench Division), that the instrument was not merely a promissory note, but was a "marketable security" within the Stamp Act 1891, *and liable to stamp duty as such.*

This was an appeal from a judgment of the Queen's Bench Division (Grantham and Charles, JJ.) upon a case stated by the Commissioners of Inland Revenue under sect. 13 of the Stamp Act 1891 (54 & 55 Vict. c. 39).

The question raised by the case was, whether a certain instrument was chargeable with stamp duty as a promissory note or as a "marketable security," the duty in the one case being 1*l.* and in the other case 10*l.*

The following is a copy of the instrument:

Two thousand pounds sterling. Number 101. Baltimore, Md. Oct. 18, 1893. For value received we promise to pay twelve months after date to the order of ourselves two thousand pounds sterling (2000*l.*), payable with interest, at the rate of five per cent. (5%) per annum at the office of Messrs. Brown, Shipley, and Company, London, England. This note is one of a series of notes amounting to four hundred and fifty thousand pounds sterling, which is secured by the deposit of First Mortgage Gold Bonds (principal and interest of which are guaranteed by the Baltimore and Ohio Railroad Company), which bonds, or a sufficient amount of the proceeds of them, if sold before the maturity thereof, are to be held in trust under an agreement dated the 7th Oct. 1893, made between the said railway company and Brown, Shipley, and Company, for the benefit of the holders thereof. The Baltimore and Ohio Railroad Company. By Charles F. Mayer, President.

Across the face of the instrument were printed in red ink the following words:

We hereby certify that this note is one of the series therein mentioned, and is secured by the deposit of the securities described in the agreement therein referred to. —Brown, Shipley, and Co.

These instruments had all been indorsed in America by the railway company and sent by them to Messrs. Brown, Shipley, and Co., who were merchants in London, and by whom the instruments had been subsequently issued.

When presented to the commissioners the instrument had upon it a duly cancelled foreign bill stamp of the value of 1*l.*

This instrument and the others of the series were handed by Messrs. Brown, Shipley, and Co., in the United Kingdom, to various persons as security for money lent to the railway company and as documents of title in respect thereof.

Instruments of the series had been from time to time dealt with on the London Stock Exchange, but had never been quoted in the official list. All the instruments were duly paid at maturity.

The commissioners were of opinion that this instrument was a "marketable security" within sect. 82 of the Stamp Act 1891, and was chargeable under the head "marketable security" in schedule 1 of the Act with the duty of 10*l.*, being the *ad valorem* duty of 1*s.* for every 10*l.* of the sum of 2000*l.* thereby secured, and they assessed the duty thereon accordingly.

The Queen's Bench Division (Grantham and Charles, JJ.) held that the instrument was not a "marketable security," but was a promissory

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

note, and accordingly reversed the decision of the commissioners.

The Commissioners appealed.

By the Stamp Act 1891 (54 & 55 Vict. c. 39) it is provided as follows:

Sect. 82. Marketable securities for the purpose of the charge of duty thereon include . . . (*b*) a marketable security by or on behalf of any foreign state or government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security), bearing date or signed after the 3rd day of June 1862; (i.) which is made or issued in the United Kingdom, or (ii.) which, though originally issued out of the United Kingdom, has been after the sixth day of August 1885, or is offered for subscription and given or delivered to a subscriber in the United Kingdom; or (iii.) which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom.

Sect. 122. In this Act . . . the expression "marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom.

The *Attorney-General* (Sir R. E. Webster, Q.C.) and *Danckwerts* for the Commissioners.—The document contains a promissory note, but it also contains something more than that. It entitles the holder to claim a share in certain bonds which are held in trust by Messrs. Brown, Shipley, and Co. The real question is as to the effect of the words which follow the actual promissory note. If a document consisting of those words alone would constitute a marketable security, the addition of a promissory note will not make it less a marketable security. A document consisting merely of the last words of this instrument would be one on which, in equity, the holder could sue without needing any further document. To say that the instrument is a promissory note is to give no effect to the last words of it. It is to treat it as of a value depending simply upon the credit of the railway company. This instrument may not be a security in the strict legal sense of the word, but possession of it passes to the holder a right of action to claim the benefit of the deed of trust mentioned in it; and, as it is the proof of a claim to a security, it is to be treated as a security:

Ross v. *The Army and Navy Hotel Company*, 55 L. T. Rep. 472; 34 Ch. Div. 43.

[Kay, L.J.—That decision followed the rule laid down by Turner, L.J. in *Re Strand Music Hall Company* (13 L. T. Rep. 177; 3 De G. J. & S. 147).] The expression "marketable security" used in this Act is very wide, and should receive a wide interpretation. This instrument is very much in the same form as the debentures in

Ross v. *The Army and Navy Hotel Company* (*ubi sup.*).

The expression "debenture" has no definite legal meaning:

Edmonds v. *The Blaina Furnaces Company*, 57 L. T. Rep. 139; 36 Ch. Div. 215;

Levy v. *The Abercorris Slate and Slab Company*, 58 L. T. Rep. 218; 37 Ch. Div. 260.

The instrument is one capable of being bought and sold on the Stock Exchange, because many of this series have in fact been so bought and sold in London:

The Texas Land and Cattle Company Limited v. *The Commissioners of Inland Revenue*, 16 Ct. of Sess. Cas., 4th series, 69; 26 Sc. L. Rep. 49.

Bremner (with *Finlay*, Q.C.) for Messrs. Brown, Shipley, and Co.—This instrument is a promissory note. It is, therefore, only liable to stamp duty as such. It is a "promissory note" within the definition of those words in the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 83, and not the less so because there is added to it a statement that security for its payment has been lodged with someone. See sub-sect. 3, and

Fancourt v. *Thorne*, 9 Q. B. 312.

The latter part of the instrument is a mere statement of what has been done as to the deposit of gold bonds. It creates no contract, and is no part of the contract contained in the promissory note.

Lord Esher, M.R.—The stamp which the Stamp Act 1891 requires to be placed on certain documents can only be in respect of that which appears on the face of the document itself without reference to any other document, and the question in this case therefore is, whether there is anything on the face of this instrument to bring it within the description of "marketable security" which the Stamp Act requires to be stamped. The first part of this document is no doubt a promissory note. It is an unconditional promise to pay a certain sum of money, and it is made in respect of money that has been advanced. But there is something more than this in the document. It has been argued that this something more is nothing but a statement and representation by the company. But does it not carry with it a promise? The representation was made by the company with the intention of inducing some person to purchase the document relying on the representation that he would have security for his loan in the bonds that had been deposited. That amounts to a contract with the purchaser that that right to the security will be given to him. The document, therefore, is not merely a promissory note. It contains besides the promissory note a contract that the holder shall have the security mentioned in it. Then in my opinion it is clearly a "security." The next question is whether it is a "marketable security?" I adopt the explanation of those words which was given by Lord Shand in *The Texas Land and Cattle Company Limited* v. *The Commissioners of Inland Revenue* (*ubi sup.*). They mean a document treated on the Stock Exchange as a thing capable of being bought and sold. This document comes within that explanation, and is therefore liable to stamp duty as a "marketable security." The appeal must be allowed.

Kay, L.J.—I entirely agree. The question is whether this document is a "marketable security" within the Stamp Act 1891. The Act provides for the stamping of promissory notes, debentures, mortgages, and marketable securities. Sects. 82 and 122 explain the meaning of the expression "marketable security." Now the document in question clearly contains a promissory note. But that is not all. It goes on to state that it is one of a series of notes secured by the deposit of First Mortgage Gold Bonds, which bonds, or a sufficient amount of the proceeds of them if sold before the maturity of the document, are to be held in trust for the benefit of the holders thereof. The document is signed by the president of the company, and indorsed before being issued. Now what is the meaning of the latter part of the

document? Is it not a contract to give the purchaser of it a certain security? It is a statement that anyone buying the document shall have the security which is described in it, and a purchaser will not have any right to the security except under the words which are upon the face of the document. Therefore the words upon the face of the document are a contract with the purchaser that he is entitled to share in the security therein mentioned. In the case of ordinary debentures containing a promise to pay and a charge, the holder when the principal becomes due is entitled to bring an action to enforce the charge given by the document. In *Ross* v. *The Army and Navy Hotel Company* (*ubi sup.*) the debentures contained a condition which declared that "the holders of the debenture bonds of this issue are entitled" to the benefit of a certain indenture. The covering deed was held to be void under the Bills of Sale Act 1882, but the court held also that the debentures contained on their face that which amounted to an equitable contract to give a charge upon all the property of the company, and that that contract should be carried into effect. In the present case we have not to deal with any void instrument. There is a contract on the face of the document to give the holder a share in a certain security consisting of bonds which have been deposited with Messrs. Brown, Shipley, and Co. The document, besides containing a promissory note, contains a contract giving a security, and therefore is a security. Then comes the question whether it is a "marketable security." By sect. 122 that expression means a security of such a description as to be capable of being sold in any stock market in the United Kingdom. Some of these documents have in fact been sold on the London Stock Exchange. They are, therefore, "marketable securities" within the Stamp Act 1891, and the appeal must be allowed. I may add that the case of *Ross* v. *The Army and Navy Hotel Company* (*ubi sup.*) was not cited in the argument before the Divisional Court.

Smith, L.J.—I am of the same opinion. The *ratio decidendi* of the Divisional Court is contained in the judgment of Charles, J. He says: "If I had been able to come to the conclusion that the latter part of this document did constitute some contractual relation between the holder of the note and the railway company, different considerations might have been applicable; to my mind, however, the latter part is nothi ig more than a notice to the holders of this promissory note that it has been secured in the manner therein specified, and does not constitute any additional promise on the part of the makers." That is the foundation of his judgment, and I cannot agree with it. The first part of the document is a promissory note, but the question is whether the rest of it is not something more than a mere notice. It seems to me to be a representation that, if anyone will advance 2000*l.* to the company, he shall have as security for the promissory note a right to share in certain bonds deposited with Messrs. Brown, Shipley, and Co., in trust for the holders of the series of notes. That is a representation made to induce persons to lend money to the company, and by it a contract has been made with those persons who have lent money relying upon it. Therefore the latter part of the document clearly amounts to a "security." These documents have been shown to have been dealt in on the Stock Exchange, and they are therefore "marketable securities" within sect. 122 of the Act. The appeal must be allowed.

Appeal allowed.

Solicitors for the company, *Ashurst, Morris, Crisp,* and *Co.*

Solicitor for the commissioners, *Solicitor of Inland Revenue.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Monday, Oct. 28.

(Before North, J.)

Re Goodall; Goodall *v.* Goodall. (*a*)

Revenue—Probate duty—Option to purchase freeholds given in partnership articles—Death of owner of freeholds who was also senior partner—Freeholds purchased from trustee of owner's will, not under option contained in partnership articles—No conversion at death of owner.

A father, about to enter into partnership with his two sons, leased the property of which he was the owner, which was partly freehold and partly leasehold, and in and upon which the business was carried on, to his two sons; and the partnership articles contained a declaration that the sons were trustees of the lease for the firm, and also an option enabling the firm to purchase the buildings and property at a certain price to be exercised within six months from the death of the father. Subsequently a deed was executed between the father and sons which altered the price fixed by the partnership articles, but, subject to that alteration, confirmed the option to purchase given by them. The father then died, leaving a will which provided that the period of six months within which the option to purchase given by the partnership articles was to be exercised, should be extended to three years. The firm did not exercise the option to purchase within six months from the father's death given by the partnership articles; but after the expiration of that period, and within three years from the father's death, they purchased the property from the trustee of the father's will upon a condition not contained either in the partnership articles or the will, that the purchase money should remain on mortgage of the property.

Held, that probate duty was not payable on the purchase money of the freehold part of the property, as such part could not be regarded as converted into personalty at the death of the father, since the purchase thereof was not made under the option to purchase given by the partnership articles.

On the 17th Oct. 1889 Josiah Montague Goodall, and his two sons Montague Goodall and Mortimer James Goodall, entered into a partnership in the business of manufacturing stationers, to be carried on at the Camden Works, under articles of partnership which provided by art. 4 (*inter alia*) that

The premises and buildings known as the Camden Works are partly of freehold tenure and partly lease-

(*a*) Reported by J. Trustram, Esq., Barrister-at-Law.

hold, and are the private property of the said Josiah Montague Goodall, who has by an indenture bearing even date with these presents demised the same to the said Montague Goodall and Mortimer James Goodall for the term of twenty-one years at the annual rent of 2000*l.*, and subject to the covenants and conditions therein contained, and on their part to be observed and performed. The said Montague Goodall and Mortimer James Goodall are hereby declared trustees of the said lease for the firm, and it is hereby agreed that if the firm shall be desirous of purchasing the reversion in fee simple of the said Josiah Montague Goodall in such part of the said premises as is of freehold tenure, and the unexpired residue of the term of years granted in such part of the said premises as is of leasehold tenure, subject to the rent end lessees' covenants reserved by and contained in respect of the last-mentioned premises by the lease under which the said Josiah Montague Goodall holds the same, at the price of 27,000*l.*, and shall within six months from the death of the said Josiah Montague Goodall give to the trustees of his will, or one of them, a notice in writing to that effect, then, and in such case the persons then constituting the firm shall be deemed the purchasers of the freehold and leasehold reversions to the premises aforesaid at the price of 27,000*l.*, subject to the following conditions (namely); firstly, the purchase money shall be paid and the purchase shall be completed on such one of the quarterly days appointed by the said lease granted to the said Montague Goodall and Mortimer James Goodall for payment of rent as shall happen next after the expiration of three calendar months from the date of such notice, and if the purchase shall not be completed on that day the firm shall pay to the said trustees interest on the said purchase money at the rate of 5*l.* per cent. per annum, computed from that day up to the actual completion of the purchase.

At various periods subsequent to the date of the partnership articles Josiah Montague Goodall laid out considerable sums upon the Camden Works, and a new lease thereof was executed to Montague Goodall and Mortimer James Goodall at an increased rent.

By an indenture, dated the 26th Aug. 1892, indorsed on the partnership articles, and made between the same parties, it was provided that the partnership articles should be read as if the new lease of the Camden Works had been referred to in art. 4, and that that article should also be varied by making the purchase money of the Camden Works 30,866*l.*, instead of 27,000*l.*, but that the option to purchase the same should be ratified and confirmed in all other respects. Other deeds were also executed altering the provisions of the partnership deed, but which did not affect the terms of art. 4.

Josiah Montague Goodall by his will, dated the 9th Aug. 1893, gave his residuary real and personal estate (except as therein mentioned) to trustees upon trust to sell in such manner and upon such terms as they should think fit (but subject as regards the Camden Works to the option of purchase given by the partnership articles), and directed his trustees, in case the option to purchase should not be exercised, to sell the Camden Works under the trust for sale thereby given; and the testator, after reciting that under the partnership articles of the 7th Oct. 1889 the persons constituting the firm of Charles Goodall and Son had the option for a period of six calendar months after his death of purchasing the Camden Works at the price of 30,866*l.* proceeded:

Now I hereby declare that such period of six calendar months shall be extended to three years.

Then, after reciting that it was his desire that at his the death members of the firm should also have the option of purchasing the fee simple of certain property therein described adjoining the Camden Works, the testator proceeded:

Now I hereby declare that, if the members for the time being of the said firm shall within three years from the date of my death give to my trustees or one of them a notice in writing to that effect, then and in such case the persons then constituting the firm shall be deemed the purchasers of the said premises at such price as shall be fixed by a competent valuer to be appointed by my trustees and the said persons, but if they cannot agree in the choice of such valuer then such valuation shall be made by two indifferent persons, one to be named by my trustees and the other by the said persons. And I declare that such purchase shall be completed subject to similar conditions as are set forth in the said articles of partnership with reference to the purchase of the present business premises of the said firm. And whereas I am desirous that the members for the time being of the said firm shall exercise the said options; now I hereby declare that, if my said sons Montague Goodall and Mortimer James Goodall and my son Reginald Goodall (if he is or has elected to be a member of the said firm) shall refuse to exercise the said option or to purchase the same additional premises hereinbefore described . . . at a price to be fixed as hereinbefore provided, the shares of my son so refusing shall, notwithstanding any of the trusts and provisions hereinbefore declared and contained, be held by my trustees upon trust for my wife and other children (sons and daughters) who shall be living at my death, in equal shares.

The testator afterwards executed a codicil to his will, but did not alter the above-stated provisions of his will.

The testator died on the 15th Oct. 1893, and no notice in writing or otherwise was given on or before the 15th April 1894, when the period of six months from his death expired, of an intention to exercise the option conferred upon the firm by art. 4 of the partnership articles to purchase the Camden Works. Subsequently to the 28th May 1894, however, the partners agreed with the then sole trustee of the testator's will to purchase the Camden Works for 30,866*l.*, and also the adjoining premises for 3900*l.* on condition that the purchase money should remain on mortgage of the property; and this purchase was completed on the 30th June 1894. In the conveyances of the property the purchase was expressed to be made by agreement between the trustee of the testator's will and the partners.

Probate duty was paid upon the testator's personal estate including the value of such parts of the testator's business premises as were of leasehold tenure, which were valued at the sum of 10,150*l.*; but the Commissioners of Inland Revenue claimed that probate duty was payable on the entire sum of 30,866*l.*, being the purchase money of the whole of the business premises, both freehold and leasehold, on the ground that such freehold premises were converted into personalty in the lifetime of the testator.

This summons was taken out by the sole trustee and executor of the testator's will for the determination of the above question, the defendants being the testator's children, and the Commissioners of Inland Revenue.

Upjohn for the plaintiff.—The entire sum of 30,866*l.* is not liable to probate duty. It is not a sum which the testator's executor would take as

executor, and his right to which would not depend on anything contained in the testator's will. It is not a sum recoverable by virtue of the probate. He referred to

Attorney-General v. *Brunning*, 3 L. T. Rep. 36; 8 H. of L. Cas. 243, judgment of Lord Cranworth.

The liability of property to probate duty depends upon its state at the time of the testator's death, which is the time to be considered in determining the question whether it is liable or not. If realty be converted into personalty, the conversion must be in the lifetime of the testator, and not under the provisions of his will which takes effect after his death. He referred to

Attorney-General v. *Hubbock*, 50 L. T. Rep. 374; 13 Q. B. Div. 275.

In the present case such part of the premises included in the Camden Works as was the freehold property of the testator remained freehold at the time of his death, and therefore is not liable to probate duty.

Vernon Smith, Q.C. and *Vaughan Hawkins* for the Commissioners of Inland Revenue.—The purchase money of the freehold portion of the premises called the Camden Works is liable to probate duty as well as the purchase money of the leasehold part, because the freehold portion must be regarded as having been converted into personalty before the testator's death. The purchase was made under a contract created by the partnership articles, and the extension by the testator's will of the period of the option from six months from the date of his death to three years from that date did not create a new contract, or make the option a new one. The conversion of the freehold part of the property dates from the making of the partnership articles by which the contract for the purchase was created, which contract was afterwards carried out. They referred to

Barclay v. *Messenger*, 30 L. T. Rep. 351.

NORTH, J.—I will not trouble you, Mr. Upjohn. In my opinion in the present case the probate duty is not payable on the proceeds of sale of the real estate. The testator was in partnership with two sons under articles of the 17th Oct. 1889, and the 4th clause of this article provided that certain premises partly freehold and partly leasehold therein fully described, which were the private property of the testator and were used for the purposes of the firm, should be the subject of an option given to his sons, and it is expressed in this way: "And it is hereby agreed that, if the firm shall be desirous of purchasing the reversion in fee simple" of the testator "in such part of the said premises as is of freehold tenure, and the unexpired residue of the term of years granted in such part of the said premises as is of leasehold tenure subject to the rent and lessees' covenants reserved by and contained in respect of the last-mentioned premises by the lease under which" the testator "holds the same at the price of 27,000*l.*, and shall within 'six months from the death of' the testator give to the trustees of his will, or one of them, a notice in writing to that effect, then and in such case the persons then constituting the firm shall be deemed the purchasers of the freehold and leasehold reversion to the premises aforesaid at the price of 27,000*l.* subject to the following conditions." Then the partnership articles go on to state certain terms as to delivery of abstract, payment of purchase money and so on, which I need not go into in detail. By arrangement between the father and the sons certain alterations were made from time to time in the exact position of matters; and by a deed of the 26th Aug. 1892 it was provided that the sum of 30,866*l.* should be the price to be paid instead of the 27,000*l.*, but that in all other respects the option contained in the articles should be ratified and confirmed. That is the last material matter which took place in the testator's lifetime. Certain further modifications were made, but they are not important for this purpose. Then the testator made his will on the 15th Oct. 1893, and in his will he recited the option contained in the articles, as modified by the deed of 1892. He stated that the firm had the option, for a period of six calendar months after his death, of purchasing the business premises of the firm at the price of 30,866*l.*; and then, having accurately defined the position of the parties at that time, he adds: "Now I hereby declare that such period of six calendar months shall be extended to three years." Then there is a long recital with respect to certain other property adjacent to the business premises, and apparently used with them; and then, after referring to that other property, he says: "Now, I hereby declare that, if the members for the time being of the said firm shall, within three years from the date of my death, give to my trustees or one of them a notice in writing to that effect, then, and in such case, the persons then constituting the firm shall be deemed to be the purchasers of the said premises at such price as shall be fixed by a competent valuer, to be appointed by my trustees and the said persons," and so on. So he refers to the existing option under the articles which, he says, shall be extended to three years, and to a new option under the will as to adjoining premises, with respect to which similar privileges are conferred upon the sons. Then comes this: "And whereas I am desirous that the members for the time being of the firm shall exercise the said options; now I hereby declare that, if my said sons" (the two partners and a third son if he should become a partner) "shall refuse to exercise the said option or to purchase the said additional premises hereinbefore described, the shares of any son so refusing shall" be held on trust for certain other persons. The testator died in Oct. 1893, and the option under the partnership articles was not exercised within six months. Nothing was done at all till after the six months had expired, and then a verbal notice was given of an intention to exercise the option. Whether a verbal notice would have done or not is not worth considering, because there has been subsequently a conveyance; and it may be that that would supply any deficiencies in the notice. But it was not until six months had expired that notice was given, even verbally, that the surviving partners would exercise the option. Some time afterwards the property was taken over by the sons. I should say this: that, when they did give notice they only gave notice that they would purchase on certain terms which were not contained either in the partnership articles or in the will, namely, that the purchase money should be left on mortgage for some time; and that appears to have been done. Now, there are three points that might be suggested: first,

that the purchase was made under the option contained in the partnership articles; secondly, that the purchase was made under the option in the will; and thirdly, that the purchase was made, as on the face of the conveyances it is expressed to be, by agreement between the trustee with power to sell and the persons purchasing. The question whether probate duty is payable depends upon the question whether the option under the partnership articles was exercised or not. In my opinion it clearly was not exercised. It was an option to be exercised by notice in writing to be given within six calendar months after the testator's death. It was a contract existing between the parties at the date of the testator's death, and his estate was subject to that contract. If that contract was carried out by the exercise by the sons of the option, the conversion effected by the exercise of the option took effect from the time at which the contract was made; that is a period antecedent to the death of the testator. If, in the events which have happened, there turns out to have been a contract subsisting at the death of the testator for the sale of the property which has been since carried out, the purchase money arising from that sale is subject to probate duty. But unless there was some such contract existing at that time, there was no conversion existing at the date of the testator's death; and if there was no contract which resulted in a conversion existing at the date of the testator's death, a trust for conversion or an option to purchase contained in the will itself would not make probate duty incident to the proceeds of sale of what was, in that view, real estate at the time of the testator's death. Now, I think it is clear that there was a contract pending at the testator's death. If it had been carried out; if the parties had exercised their rights under it, there would have been a conversion. But when the six months expired after the testator's death without the notice required by the articles being given, it was impossible for the sons then to say that under a contract contained in the articles they had any right whatever in this property. If at the time at which they entered into the agreement with the widow they had any right, it could only be under the will by virtue of the provision contained in the will; and the effect of the extension of the period of option in the will was, no doubt, a beneficial disposition by the will in favour of the members of the firm. If the value of the property had increased beyond the price fixed to be paid for it, the extent of that excess in value would have been a beneficial interest given to the members of the firm which they could have taken if they had liked. But that would have been a legacy under the will, and their right arising under the will could not affect the question what property there was at the moment of the testator's death upon which probate duty was actually payable. I have abstained from expressing any opinion whatever upon the question whether the sons did take under the option contained in the will, or by an independent contract with the trustees, because I have not before me the persons interested in that question. However that question would have to be answered, the result so far as regards the Crown is the same; that the probate duty is not ayable because the property was real estate at he time of the testator's death whoever took it under the dispositions contained in the will. In my opinion, therefore, the probate duty is not payable upon the proceeds of sale of the freehold part of the estate. There will be a declaration that probate duty is not payable upon those proceeds. The general rule is, that the Commissioners of Inland Revenue, appearing in an action on the question whether duty is payable or not, get their costs if snccessful, but neither pay nor receive costs if unsuccessful.

Solicitors: *Morley, Shirreff*, and *Co.*; *Solicitor to Inland Revenue.*

Wednesday, Oct. 30.

(Before STIRLING, J.)

Re DARLING; FARQUHAR *v.* DARLING. (*a*)

Will—Construction—Charitable gift.

A gift "to the poor and the service of God" held a good gift to charity.

ELIZABETH CAROLINE DARLING made her will, dated the 13th May 1871, in the following terms:

I, Elizabeth Caroline Darling, desire that at my death all of which I may be possessed, with the exception of a few legacies I may hereafter make, shall go to the poor and the service of God.

The testatrix then made bequests of various legacies to charitable institutions named in her will. She afterwards made a codicil to her will containing a bequest of an annuity and of a sum of money to two several persons. The testatrix died on the 10th Feb. 1895, and her will and codicil were proved on the 9th March 1895. This was a summons by the executors asking what charitable institutions were intended by some of the bequests contained in the will, and for leave to the executors to distribute among certain specified institutions, and the question arose whether the words of the will set out above constituted a good charitable gift.

Phipson Beale, Q.C. and *Dundas Gardiner* in support of the summons.

Graham Hastings, Q.C. and *Onslow*, for the next of kin of the testatrix.—This is not a good charitable gift:

Budget v. *Hulford*, W. N. 1873, p. 175.

There the testator, after giving certain legacies to private persons, to charities, and to individuals for charitable purposes, proceeded: "The residue of my property . . . to be disposed of by my executors in the manner they judge most effectual to promote true religion in the world in general, and the comfort of the servants of God in particular, something after the manner I have made use of in this will." It was held that the gift of the residue was void. They also referred to

Townsend v. *Carus*, 3 Hare, 257.

Ingle Joyce for the Attorney-General.—This is a good gift for a charitable purpose. It is stated in Tudor on Charitable Trusts, 3rd edit., p. 10, that bequests for general religious purposes, as the advancement of Christianity among infidels; for the distribution of bibles and other religious books, "to be employed in the service of my Lord and Master," for maintaining the worship of God,

(*a*) Reported by JOHN SANDERSON, Esq., Barrister-at-Law.

or for the spread of the Gospel, are good charitable gifts. See

Powerscourt v. *Powerscourt*, 1 Molloy, 616;
Felan v. *Russell*, 4 Ir. Eq. Rep. 701;
Re Sutton; *Stone* v. *Attorney-General*, 28 Ch. Div. 464.

Powerscourt v. *Powerscourt* is nearest to the present case. In the latter part of the will there is a good gift to charity, even if the earlier part be considered struck out. The fact that legacies are given is sufficient to pass the whole residue. [STIRLING, J.—I agree with *Powerscourt* v. *Powerscourt*.]

Dibdin for some of the charitable institutions specifically mentioned in the will.

STIRLING, J.—In this case the testatrix commences her will as follows. [His Lordship read the clause above set out and continued:]. The question is whether that is or is not a good charitable gift. When it is said that it is not good, the meaning is that it includes under it objects which are not recognised by the laws of charity. There can be no question that a gift for the benefit of the poor is good, but it is said that that for the "service of God" is not. It is argued that the "service of God" includes much that is not religious, and in a sense that is true. There is an ancient document which is sometimes recited where the congregation is desired to pray for the welfare of those who serve God in Church and State. A distinction is there drawn, as the persons are to pray for those who serve in State as well as Church, but equally the persons prayed for are said to serve God, and therefore in a certain sense acts not religious are done in the service of God. But I have to construe this according to the plain and ordinary meaning of words used by English testators, so that when the "service of God" is spoken of, it must be taken to mean that service in a religious sense, similar to such services as are referred to where in the document which I have mentioned service in church is spoken of. Therefore, I come to the conclusion, even if the point were unaffected by authority, that a gift to the poor or for a religious purpose is good. But the point is not without authority. The same or a similar question came before Manners, L.C., in Ireland (*Powerscourt* v. *Powerscourt*, reported in 1 Molloy, p. 616). There the testator devised 2000*l.* per annum out of certain land to trustees to be laid out at their discretion, until the testator's son came of age, "in the service of my Lord and Master and, I trust, Redeemer." This was held a good charitable devise. The judgment of the Lord Chancellor is this: After referring to several decided cases, he says, "These cases prove that pious uses are a branch of charity and as such are recognised and carried into effect in this court. Now, on reading the passage in question in this will, can anyone doubt that it means to bequeath 2000*l.* a year to pious uses? It has been argued that the service of God includes our duty to our neighbour, as well as that to God, that it involves that great uncertainty and vagueness which rendered the bequest void in *Morice* v. *Bishop of Durham*. I think otherwise, and, considering the words of Sir W. Grant in that case, viz., that no bequest has been established in England without either the word charity or some specific object being pointed out, I am of opinion that a bequest to pious uses sufficiently designates a specific object, and that this cannot be distinguished from a bequest to pious uses." It is disputed that the gift is good; but that case, in my opinion, shows the contrary, and I think it is in point. Therefore I hold that the estate is well given to charity.

Solicitors, *H. W. Lyall*; *Bell, Stewards, May*, and *How*; *The Solicitor to the Treasury*; *Bridges* and *Co.*

QUEEN'S BENCH DIVISION.

Monday, July 29.

(Before POLLOCK, B. and WRIGHT, J.)

THE BRITISH INSULATED WIRE COMPANY LIMITED *v.* THE PRESCOT URBAN DISTRICT COUNCIL. (*a*)

Local government—Urban authority—Contract by—Omission of penalty clause—Validity of contract—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 174, *sub-sect.* 2.

Sect. 174, *sub-sect.* 2, *of the Public Health Act* 1875 *enacts that every contract made by an urban authority under the Act, whereof the value or amount exceeds* 50*l. shall specify the work, &c. to be done, and "shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed:"*

Held, that the provisions of this sub-section are not directory merely, but are imperative and obligatory, and that consequently a contract within the sub-section, which does not specify any pecuniary penalty, is void and cannot be enforced against the authority.

SPECIAL case stated in an action pursuant to the order of Day, J.

On the 12th Nov. 1892 an agreement was entered into between the Prescot Local Board, being the urban sanitary authority under the Public Health Acts for the district of Prescot in the county of Lancaster, of the one part, and the plaintiff company of the other part, for the efficient lighting by the plaintiffs of the streets within the district of the local board upon the terms and conditions therein mentioned.

The local board was an urban authority under the Public Health Act 1875, and the agreement was a contract made under that Act, and under the Local Government Act 1894 the defendants are the same corporate body as the Prescot Local Board under a new name.

Under this agreement the plaintiffs undertook to efficiently light, by means of electricity, the streets, courts, and places in the said district, hitherto lighted by gas, for a period of five years from the 1st Jan. 1893.

The agreement contained various provisions as to the number of lamps to be provided by the plaintiffs, the places where such lamps were to be fixed, the work to be done by the plaintiffs in connection with such lighting, and the times during which such lamps were to be lighted, as well as other provisions for carrying out the agreement.

The local board were bound upon the due and regular performance of the contract by the plaintiffs to pay to the plaintiffs the yearly

(*a*) Reported by E. MANLEY SMITH and W. W. ORR, Esqrs., Barristers-at-Law

sum of 350*l.* by equal quarterly instalments, beginning on the 1st April following, and there was a clause in the agreement that if any dispute or difference should arise touching or concerning the works agreed to be made and done, and the maintenance and supply of electric light as aforesaid, or touching or concerning any other matter or thing whatsoever relating to the said work and maintenance or the construction of the contract, or any rights and liabilities thereunder, then such dispute or difference should be determined by arbitration in the mode and with the consequences prescribed by the Arbitration Act 1889, or any statutory modification thereof.

The agreement was in writing, and was duly sealed with the common seal of the Prescot Local Board, as well as with the seal of the plaintiffs, but it contained no clause specifying any pecuniary penalty to be paid in case the terms of the contract were not duly performed.

The plaintiffs carried out the agreement by supplying the electric light from the 1st Jan. 1893 until the 31st March 1895, and have been paid the amounts payable in accordance with the terms of the agreement for the supply of light to the end of the quarter ending on the 30th June 1894, amounting to 553*l.*

The present action was brought to recover further amounts claimed to be payable under the contract, namely, three quarterly payments of 87*l.* 10*s.* each, payable on the 1st Oct. 1894, the 1st Jan. 1895, and the 1st April 1895, together with a sum for extra lamps, the sum claimed being 278*l.* 9*s.* 9*d.*

The plaintiffs duly supplied the lights, &c, stipulated for by the contract, and, if the contract be valid and binding upon the defendants, and enforceable against the defendants, the plaintiffs would be entitled to the above sum.

The question for the opinion of the court was, whether the agreement is void, or not binding upon, or not enforceable against, the defendants, by reason that it did not specify some pecuniary penalty to be paid in case the terms of the contract were not duly performed.

Arkle (*Lawson Walton*, Q.C. with him) for the plaintiffs.—The point raised here is a novel one, and is whether the concluding words of sub-sect. 2 of sect. 174 of the Public Health Act 1875, which require that the contract shall specify some pecuniary penalty, are imperative, or are merely directory. There is no penalty clause in this agreement, and it is evident that it would be a most difficult thing to have a penalty clause in a case of this kind; a penalty clause that would be equally enforceable, say, for a total interruption of the light or for a trifling breach of the contract, such as the light going out for an hour or so, and the Legislature could never have intended that every contract should, as a mere matter of form, contain a penalty that could never be enforced when it was sued for. The Legislature could never have intended that this should be an imperative direction and binding in every event. They must have intended that it was to be merely a direction to the local board to obtain a measure of liquidated damages, and here the parties have adopted another measure of liquidated damages, namely, a recourse to arbitration for the settling of all disputes and the amounts to be paid as damages in case of a breach of the agreement. Whether the earlier words of the sub-section are directory or not, we submit that, as regards the pecuniary penalty, the clause is merely a directory clause, and that the absence of the penalty does not vitiate the contract or render it void. The point arose upon this sub-section, and was argued before the Court of Appeal in the case of *Melliss* v. *The Shirley Local Board* (53 L. T. Rep. 810, 16 Q.B. Div. 446), but the court expressly abstained from giving any opinion on the question, as they decided the case under the 193rd section, and it became unnecessary to deal with the point raised under the 174th section. In *Young* v. *The Mayor, &c., of Royal Leamington Spa* (49 L. T. Rep. 1, 8 App. Cas. 517), the House of Lords held that the provisions of the 1st sub-section are imperative, but there is no decision that the provisions of this sub-section are imperative also, and certainly Lord Blackburn seems to have considered it an open question and arguable that the 2nd sub-section was only directory. [WRIGHT, J.—Lord Bramwell distinctly says that sub-sect. 2 stands in the same position as sub-sect. 1]. It was argued there that as sub-sects. 3 and 4 were directory, so sub-sect. 2 might well be directory also, and looking at the nature of the provision it must be taken as directory, though the question has never been directly decided. The contract here is not void, and we are entitled to recover the amount due for the supply of light already furnished. The cases of *Nowell* v. *The Mayor, &c., of Worcester* (9 Ex. 457), and *The Attorney-General* v. *Gaskill* (47 L. T. Rep. 566, 22 Ch. Div. 537), were also referred to.

Danckwerts, for the defendants, was not called upon to argue, but stated that the defendants did not willingly raise the point; they were driven into taking the objection by the action of the Local Government Board, who had disallowed previous payments made under the contract.

POLLOCK, B.—I certainly should have said, apart from any authority, that this provision of sect. 174, sub-sect. 2 of the Public Health Act of 1875 was not directory merely, but that it was essential and obligatory. The sub-section enacts that every contract made by an urban authority under the Act "shall specify" the work, materials, &c., and "shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed." That provision is exactly based upon the same grounds as the provisions in other statutes which have made it necessary that contracts shall be in writing or under seal, as the case may be; and I do not see how we can say that that which the Legislature has required shall be done should be treated merely as a voluntary matter, or merely as a directory suggestion. When we consider the other sub-sections (3 and 4) we see that they do not deal with the form of the contract, but only with certain conditions precedent on the part of the local board or urban authority before the contract is entered into. That point was dwelt upon by Lord Bramwell in the case of *Young* v. *The Mayor, &c., of Royal Leamington Spa* (*ubi sup.*), and certainly makes a great distinction. With regard to the other authorities it seems to

me that, as far as they go, they are fairly in favour of the view which I take.

Wright, J.—I am of the same opinion.

Judgment for the defendants with costs.

The plaintiffs appealed.

Before the completion of the arguments, the hearing of the appeal was adjourned with the view of an arrangement being come to between the parties.

Upon a subsequent day (9th Aug.) it was stated that the Local Government Board would sanction the payment of the money alleged to be due, and that it had been arranged that a new contract containing a penalty clause should be entered into in the place of the present one.

The Court (Lord Esher, M.R., Kay and Smith, L.JJ.) thereupon dismissed the appeal upon the agreed terms.

Appeal dismissed.

Solicitors for the plaintiffs, *Norris, Allens*, and *Chapman*, for *J. Leslie* and *Co.*, Liverpool.

Solicitors for the defendants, *Chester, Mayhew, Broome*, and *Griffiths*, for *Henry Cross*, Prescot.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Oct. 25.

(Before Smith and Rigby, L.JJ.)

Sadler *v.* Great Western Railway Company. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice — Parties — Joinder of defendants — Nuisance arising from concurrent acts of different persons—Order XVI., r. 4.

The plaintiff was the lessee of a shop, the premises on one side of which were used as a general receiving office for the G. W. Railway Company, and the premises on the other side as a similar office for the M. Railway Company, and he commenced an action in the Queen's Bench Division making both the companies defendants, and alleging that each of the defendant companies permitted a large number of vans to assemble on the highway in front of its premises with their tail-boards projecting over the footway, and great quantities of parcels, &c., to be conveyed across the footway to and from the vans and their respective premises, and that by their respective combined acts the defendants prevented all access to the plaintiff's premises by vehicle or cycle, and also caused special inconvenience and peril to the plaintiff and his servants and customers on the footway; and he claimed damages and an injunction. It was conceded that the companies were not acting in concert with each other.

Held, by Smith, L.J. (Rigby, L.J. dissenting), that the two companies were separate tort-feasors, and that the plaintiff could not sue them for damages jointly.

Decision of Day, J. affirmed.

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

This was an appeal from an order of Day, J. in chambers.

The plaintiff was the occupier of a shop known as 268, Strand, where he carried on a business for the sale of articles required by cyclists and athletes, and for the storage and repair of cycles. The Great Western Railway Company occupied the adjoining premises on one side, and the Midland Railway Company occupied the adjoining premises on the other, and used their respective premises as railway parcels offices.

The plaintiff, by his statement of claim, alleged that each of the defendant companies caused or permitted a very large number of vans and carts to assemble for long periods of time on the public highway, in front of its premises, with their tail-boards projecting over the footway, and great quantities of parcels, crates, and boxes to be conveyed across the footway to and from their respective premises and the vans and carts, partly by hand and partly by cranes, so as to obstruct the highway and footway, and had thereby caused great inconvenience and peril to the public who might desire to pass along the highway or footway, and special annoyance to the plaintiff as the occupier of the intermediate premises. He also alleged as follows (par. 5):

Further, each of the defendant companies frequently causes or permits access to the plaintiff's premises to be blocked by its vans and carts in manner aforesaid, at the same time while access to such premises is already blocked by vans and carts on the other side of his premises by the other defendant company in manner aforesaid, and by their respective combined acts the defendants thus prevent all access to the plaintiff's premises by vehicle or cycle, and also cause special inconvenience and peril to the plaintiff and his servants and customers on the footway.

The plaintiff claimed—(1) 1000*l.* damages; (2) the like sum from each of the defendant companies; (3) an injunction to restrain the defendants and each of them from continuing the acts complained of.

The Great Western Railway Company took out a summons for a stay of proceedings unless the plaintiff struck out the Midland Railway Company as defendants, contending that the acts of either company alone did not amount to a nuisance; and, as they were not acting in combination with each other, he could not join them as defendants on the ground that their concurrent acts created one.

The master made the order asked, and his decision was affirmed by Day, J. in chambers, and from his decision the plaintiff by leave appealed.

Dickens, Q.C. and *Chester Jones* for the appellant.—Although the acts of either defendant company alone might not injure the plaintiff and not be a nuisance, yet, as their concurrent acts injure him and are a nuisance, he is entitled to sue them jointly:

Thorpe v. *Brumfitt*, L. Rep. 8 Ch. App. 650;
Lambton v. *Mellish*, 71 L. T. Rep. 385; (1894) 3 Ch. 163;
Booth v. *Briscoe*, 2 Q. B. Div. 496.

It is provided by Order XVI., r. 4, that all persons may be joined as defendants against whom any right to relief is alleged to exist jointly. In *Smurthwaite* v. *Hannay* (71 L. T. Rep. 157; (1894) A. C. 494) it was held that the several plaintiffs could not join in one action

because their causes of action were separate and distinct. If one of these defendants is struck out it may deprive the plaintiff of any relief from the nuisance. It is admitted that the two companies do not combine to do these acts; it is their concurrent acts which cause the nuisance.

The Hon. *A. Lyttleton* for the respondents.—There is no authority at common law for joining these defendants in one action. The plaintiff may have a separate cause of action against each railway company, but he has not a joint cause of action. This case is within *Smurthwaite* v. *Hannay* (*ubi sup.*), although the joinder of plaintiffs was in question in that action. Rules 1 and 4 of Order XVI. refer to the joinder of parties, and not to the joinder of causes of action. It would be impossible for a jury to assess the damages if both companies were defendants. The passage in the judgment of James, L.J. in *Thorpe* v. *Brumfitt* (*ubi sup.*), on which the plaintiff relies, was only dictum.

Dickens, Q.C. in reply.

SMITH, L.J.—This is an appeal from a decision of Day, J., who affirmed the master. The plaintiff brought a common law action for damages, claiming 1000*l.* against two railway companies, the Great Western Railway Company and the Midland Railway Company, for committing a nuisance; and he also added, which is an everyday occurrence now, a claim for an injunction. In my judgment this is in substance a common law action for damages to be tried by a jury and a judge. It is conceded that the Great Western Railway Company have not acted in combination with the Midland Railway Company in doing what they have done, and also that the Midland Railway Company have not acted in combination with the Great Western Railway Company in doing what the Midland Railway Company have done. What is complained of is this: The plaintiff has a shop in the Strand, on one side of which the Great Western Railway Company has a receiving office for parcels and goods, and on the other side the Midland Railway Company also has a receiving office. They are two separate and independent companies carrying on separate and independent businesses. One has no control over the other, and both act independently in what they do. It seems to me that each is only responsible for its own acts, and is not responsible for the acts of the other company. I agree that, in considering whether the Great Western Railway Company have committed a nuisance or not, assuming that the Midland Railway Company is struck out, the doings of the Midland Railway Company would have to be taken into consideration in considering what the Great Western Railway Company was doing. And *vice versâ*, if the action had been against the Midland Railway Company the doings of the Great Western Railway Company would have had to be taken into account. But that is not what the plaintiff is trying to do. He is trying to sue jointly two independent and separate alleged tort-feasors, neither of whom has any control or power over the acts of the other tort-feasor. How can he do that? A summons was taken out to stay this action unless one of these companies was struck out. That summons was taken out in accordance with the procedure adopted in a case that came before the House of Lords, viz., *Smurthwaite* v. *Hannay* (*ubi sup.*). These two defendants were joined under Order XVI., r. 4, and the basis of the application to strike out one of them is, that under that rule there is no power under the circumstances of this case to join these two defendants. Now, my brother Day came to that conclusion, and so did the master, and so do I. It seems to me that these two companies, who are, as I say, independent tort-feasors, if they are liable for anything at all ought not to be joined in one action by the plaintiff, and, as I read *Smurthwaite* v. *Hannay* (*ubi sup.*), the question of the joinder of two plaintiffs equally applies to joinder of two defendants. As I read that decision it says, as far as it is applicable to this case, that these two defendants cannot be joined in this case, and I agree with what Mr. Lyttleton said, that *Smurthwaite* v. *Hannay* has decided that Order XVI., rr. 1 and 4, has relation to the joinder of parties and not to the joinder of causes of action. I think I differ from my brother Rigby in this case, because he thinks that there is a joint cause of action against the two and no other. I do not think that it is so, and in my opinion these two torts, if they are torts, are independent torts by the different companies, although, as I have already stated, the acts of each company can be taken into account in considering the acts of one company and deciding whether they amount to a nuisance or not. The acts of both companies may be taken into account, because it may be that the one company ought not to be doing what it was doing, when the other company was doing what it was doing. But that does not make these two causes of action a joint cause of action, or give any right to join one company with the other in one action. If it is said that I am not following loyally the decision of this court in the case of *Thorpe* v. *Brumfitt* (*ubi sup.*) and the judgment of James, L.J., I say that in that case the Lord Justice was not dealing with an action at law or with the question of damages at all, but he was dealing with an action brought for the purpose of restraining a nuisance, and if the plaintiff's counsel in this action had accepted that position, viz., that he would strike out all question of damages and simply ask for the injunction, I will not say what my judgment would have been; but inasmuch as he adheres to the claim for damages also, and I am of opinion that this is a common law action for damages, with a claim for an injunction thrown in, I think that Day, J. properly exercised the jurisdiction he had by making the order which he did make, and I think that it ought to be upheld.

RIGBY, L.J.—I regret that I cannot see the case in the same point of view as my brother Lord Justice. The question turns upon the 5th clause of the statement of claim, in which it is alleged that "each of the defendant companies frequently causes or permits access to the plaintiff's premises to be blocked by its vans and carts in manner aforesaid at the same time while access to such premises is already blocked by vans and carts on the other side of his premises by the other defendant company in manner aforesaid and by their respective combined acts the defendants thus prevent all access to the plaintiff's premises by vehicle or cycle." I do not rely upon the word "combined," because it was fairly ex-

plained as being nothing more than "concurrent." It does not mean combination. Well, that is a substantive matter for a complaint if it is made out to be a nuisance, not two nuisances, but one—a nuisance, to which each of the defendants contributes, and contributes not in such an uncertain degree that the plaintiff does not know which it is, but he says that each of them frequently does it, one by stopping access on his side while access is stopped on the other side by the other, so that altogether any access of a wheeled vehicle to his premises is totally prevented. I conceive that this is a case in which an action can be brought against the defendants jointly. It is suggested that it is a common law action. I confess that I do not know what a common law action is at the present day. There is no such thing as a common law action with reference to a question of this kind. A common law action is brought in a common law division in respect to a matter over which the ancient common law courts had jurisdiction, so much so that in Chancery, in the olden days, the question of injunction never could be raised if the right at law was in dispute, or until the right at law had been settled; and in the olden times, if the case of *Thorpe* v. *Brumfitt* (*ubi sup.*) had arisen, it would have been necessary to send it back to a common law court to find out whether there was a nuisance at all. That has been modified in modern times, but that was the original idea. You rested upon a legal right. James and Mellish, L.JJ. in that case, to my mind, decided that the acts of a plurality of people might in themselves, when concurrently done, create a nuisance where the act of each one of those individuals taken alone would be no nuisance at all, but a mere ordinary exercise of his own right. That, of course, is recognised by Chitty, J. in *Lambton* v. *Mellish* (*ubi sup.*), though I quite agree that that case had directly nothing to do with the question of parties. Now, if the Court of Appeal were right in *Thorpe* v. *Brumfitt*—and I think we are bound to assume that they were right—it appears to me that their decision was in accordance not only with what is convenient but with what is the law, as I understand it, viz., that two or three people, though they do not combine in the sense of planning any action, may in fact act in such a manner, taking into consideration the acts of those acting with them, as to make them liable, and not only liable—I will not say now whether they were jointly liable at common law—but liable to be sued in a joint action under the effect of the Judicature Acts and this rule 4 of Order XVI. At any rate, I am inclined to think that they would be suable at common law for a nuisance. It appears to me that, suppose there be a carriage road which I have a right to use, and there are two people who have a similar right to use it, and if one of them were on the road he would not stop me, but if two of them were on the road, though it might be by reason of a dispute between themselves and not by reason of a bargain between themselves, if they got in my way and actually stopped me, I conceive that they would be doing an injury to my right of way, and might be sued I should have supposed at common law. But at all events that being the state of things, there being an action which is an action for an injunction, what right has one defendant to say, "I will not be restrained unless my co-defendant is removed from the action, and unless you get an injunction against him (if you get it at all) in an independent action?" I know of no such right. It appears to me that it is singularly inconsistent that such a doctrine should be laid down, and it appears to me that unless we are absolutely forced by some doctrine, or by some decision which has not been brought before us, it is not desirable to lay down any such rule. If it is said that damages being asked for is a reason why the action should be stayed, I again want authority for that. I have never heard of, or I do not remember, any authority, and no authority has been cited before us. The relief sought, or I should say the main relief sought, is the injunction to do away with the state of things which, if the statement of claim be correct, must be doing perpetual and grave injury to the business of the plaintiff. That I should look upon as the main thing, not as an incident: What does it matter? It is not as an incident that an injunction is granted. An injunction is granted according to the rules which used to govern the Court of Chancery. If, indeed, there be a difficulty about assessing damages against these defendants separately, or if it be an impossibility, well that is all the worse for the plaintiff. He may fail—I say nothing about that, for it is not necessary to do so—he may fail in establishing his right to damages; but I do not see how any objection can be taken to his injunction, and the injunction, as I said before, is the main part of the relief that he asks for. As to the case in the House of Lords of *Smurthwaite* v. *Hannay* (*ubi sup.*), I understand it to decide that you cannot bring plaintiffs, and by parity of reasoning you cannot bring defendants, before the court jointly where the causes of action vested in the different plaintiffs or the causes of action that exist against the different defendants are separate. I do not look upon this case as one where the liability of the defendants is severable. No doubt in the action they allege it, but in clause 5 the plaintiff alleges what may be a much more formidable case, that the concurrent action of the two creates a nuisance; therefore, if my judgment had to decide this matter, I should differ from the learned judge, but, of course, as my learned brother does not take the same view his decision stands.

SMITH, L.J.—There will be no costs.

Solicitors for the plaintiff, *Kennedy, Hughes*, and *Kennedy*.

Solicitor for the Great Western Railway Company, *R. R. Nelson*.

June 25, 26, *and* 27.

(Before LINDLEY, LOPES, and RIGBY, L.JJ.)

Re THE CADOGAN AND HANS PLACE ESTATE LIMITED: *Ex parte* WILLIS. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Building agreement—Piece of land for roadway—Maintenance—Acquirement of such land—Whether covenant implied.

Every obligation which on a fair construction of the language of a deed is imposed on one of the

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

parties thereto amounts to an express covenant by him to perform that obligation. But the language must clearly show an intention that there should be an agreement between the covenantor and the covenantee to do or not to do the particular thing referred to.

Decision of Williams, J. reversed.

THE above-named company was incorporated in 1875. In the ordinary course of its business the company entered into a building agreement, executed under the seal of the company, and dated the 18th Dec. 1882, with William Henry Willis, whereby underleases were to be granted of the several plots of land delineated on a plan annexed to the agreement for the unexpired residue of a term of ninety-nine years from Michaelmas 1874, and Willis was to erect upon such plots dwelling-houses fronting to Lennox-gardens, and stables and coach-houses at the back of such houses fronting to Lennox-mews. Willis also agreed to pave the roadway to the mews in front of the plots, and coloured blue on the plan, to the satisfaction of the surveyors of the company and of the ground landlords for the time being, and also of the vestry and other proper authorities.

At the date of the agreement Lennox-mews was marked out and roughly formed, although not metalled or channelled. The mews, at its entrance from Milner-street, was not, either at the date of the agreement or at the present time, of the width shown on the plan annexed to the agreement, but was less by a small triangular piece of land, which was not indicated on the plan, on the west side of the entrance to the mews, such triangular piece of land not having been thrown into the mews.

Prior to the execution of the agreement a plan, identical with that annexed to the agreement, was submitted by the company to, and approved by, the Metropolitan Board of Works. The triangular piece of land was included in the mews, both by the plan attached to the agreement and by that submitted to the Metropolitan Board of Works.

In pursuance of the agreement the company, in 1887, procured the grant to Willis, or his nominees, of leases of the several plots of land upon which Willis has erected houses and buildings as provided by the agreement. One of such leases, dated the 25th March 1887—being that relating to the portion of the mews at the entrance from Milner-street—had a plan annexed thereto, which showed the entrance to the mews as it existed in fact, that is, exclusive of the triangular piece of land.

That lease contained a covenant by the lessee whereby he undertook to maintain or pay for the maintenance of the roadway of the mews until the same should be taken to and repaired by the parish or other local authority. Willis had covenanted to indemnify his nominee against this liability.

The mews was duly paved by Willis, and an application was made to the vestry to take over the roadway. The vestry authorities, however, declined to do so on the ground that the mews, at the entrance from Milner-street, was not of the width shown in the plan approved by the Metropolitan Board of Works.

The triangular piece of land in question never belonged to the estate of the company, and the company refused to procure it for Willis. The result was, that Willis was liable for ninety-nine years from Sept. 1874 to maintain and repair the roadway to the mews. He claimed damages or compensation in respect of this liability.

The company having gone into voluntary liquidation, a summons was taken out by the liquidator, under sect. 138 of the Companies Act 1862, to have it determined and declared that Willis was not entitled to prove as a creditor of the company in respect of his claim.

On the 4th May 1895 the summons came on to be heard before Williams, J., sitting as an additional judge of the Chancery Division, when the following judgment was delivered:

WILLIAMS, J.—[His Lordship stated the facts of the case as above set forth and continued:]—On the evidence I find that the Metropolitan Board of Works would not have approved of the plan had not the roadway included the triangular piece of land, and further that Mr. Willis undertook the liability which he did with his nominees in respect of the maintenance of the roadway on the faith that the roadway had been approved by the Metropolitan Board of Works. The triangular piece of land does not now and never did belong to the estate of the company. The result is, that Mr. Willis is liable for ninety-nine years from Sept. 1874 to maintain and repair the roadway to the mews, and this is the basis of his claim for damages or compensation from the company. The objection made to his claim seems to be, that there is nothing in the building agreement imposing on the company any obligation to provide the land for a roadway of the dimensions shown in the plan annexed to the agreement. I think that this objection fails, for, although the agreement contains no express words to that effect, the plan is clearly incorporated in the agreement, and includes by implication a warranty that such a roadway can be made on the land of the company. Then it is objected that the claim for damages is barred by the Statute of Limitations. But the fact that the obligation of the company is under seal seems to be an answer to that. Further, it is objected that Mr. Willis has lost his right to compensation by having taken the leases with the road delineated as it in fact exists. I do not understand the basis of that objection. The roadway has not been conveyed or demised to Mr. Willis or his nominees. Mr. Willis has in no way altered the position of the company for the worse by taking these leases. The company never were able from the first to satisfy their warranty. A good deal was said in the argument as to its being too late for the claimant, Mr. Willis, to bring an action for specific performance and to claim compensation. I do not think I need decide that point; but if I had to decide it I think I should say it was not too late. The claimant seems to have made his claim the moment he knew the facts. I give judgment in favour of the claimant with costs. The amount of proof must be ascertained by inquiry at chambers.

From that decision the liquidator now appealed.

Phipson Beale, Q.C. (with him *A. C. Clauson*), for the appellant, stated the facts of the case and the question raised. [He was stopped by the Court.]

A. à Beckett Terrell for the respondent.—There was a representation here by the company that

the road would be made up, and that representation was not outside the contract:

Grant v. *Munt*, Coop. 173.

The company having annexed to the building agreement a plan, showing the triangular piece of land in question as included in the roadway of the mews, must be understood to have held out expectations that they would provide the land for the roadway of the dimensions shown in the plan:

Peacock v. *Penson*, 11 Beav. 355.

If it is manifest from a deed that a covenant was intended the court will imply that covenant:

Knight v. *The Gravesend and Milton Waterworks Company*, 2 H. & N. 6.

Some warranty must be implied that the roadway could be made as it appeared on the plan:

Thorn v. *The Corporation of London*, 34 L. T. Rep. 545; 1 App. Cas. 120.

The respondent's case rests on an implied covenant on which he could bring an action.

No reply was called for.

LINDLEY, L.J.—I am unable to take the same view in this case as the learned judge in the court below has done. He has made an order declaring that Mr. Willis is entitled to prove as a creditor of this company, which is in course of being wound-up, in respect of the claim made by him against the company for such amount as shall be ascertained by the inquiry directed. Now, in order to make that intelligible I will read the claim alluded to. [His Lordship did so, and stated the facts of the case, and read the material clauses of the building agreement and the covenant in the lease to maintain the roadway of the mews. His Lordship continued:] It was intended, and it is admitted on all sides that it was the intention that this company should, if they could, procure that triangular piece of land and throw it into the mews, and make the mouth of the mews there wider. The question we have to consider is whether there is anything here which binds the company to Mr. Willis to obtain that triangular piece of land and to widen the mouth of the mews. The only other point which is important at this stage of the proceedings is this: The company apparently had made this plan showing the mews coloured blue, with the mouth widened according to the plan. They laid that plan before the Metropolitan Board of Works, and the Board of Works approved of it. It is said now that the Board of Works never would have approved of it if the mouth had not been widened. That may be so; I do not know. Now, under those circumstances the underleases were granted, or leases really, of the houses as they were erected, and of the coach-houses and stables as they were erected. The last lease that was granted was dated the 25th March 1877, at which time the mews was precisely as it was before — that is to say, the mouth of the mews had not been enlarged. Notwithstanding that, the leases of the coach-houses and stables were taken by Mr. Willis or his nominees, and, so far as I know, there was no objection. The scheme originally contemplated of granting underleases of this property appears to have been departed from, and what they did was this: The persons who bought these houses, I suppose, from Mr. Willis, bought up the reversion. They made some arrangement by which a lease was granted by the ground landlord, so that there were no underleases granted at all. Now, the stable just opposite to this triangular piece of land was demised by the lease of the 25th March 1887, which, as I have already remarked, was the last lease granted. It contained the covenant by Mr. Willis, or the lessee of Mr. Willis, that the immediate lessee was to pave the mews, and so on, as it then stood. There can be no question at all about that. Mr. Willis says (and I have no doubt correctly) that he has given a covenant of indemnity that he would pave until he could persuade the local authority to take the mews over. In consequence, it is said, of the mouth of the mews next to Milner-street being still contracted, and not so wide as was contemplated, the local authority will not take it over. Consequently Mr. Willis cannot induce them to release him from his covenant to repair the mews. That is his grievance. The company have been wound-up, and now Mr. Willis has carried in a claim for damages or compensation by reason of the continuance of the liability to repair this roadway longer than it otherwise would have existed. His case is this: "If you had widened the mouth of that mews, as you said you would, I should have got rid of my liability." Now that case involves this: that there was some obligation on the part of the company to procure that triangular piece of land so as to enable Mr. Willis to pave it and present it to the local authority in a shape which would induce them to take it over. Now where is that obligation to be found? We are asked to imply a covenant to the effect that the company would buy at any cost this triangular piece of land and throw it into the mews so as to enable Mr. Willis to pave it in accordance with the agreement. It is said that the intention of the parties appearing from this agreement and plan annexed is so plain that the company must be taken to have agreed to that. If it can be made out from the document with the plan that the company really did undertake that, although it is not to be found in those express words—if we could get at that, there would be foundation for holding that there was an implied covenant to do it. But I confess that I cannot find it, and it appears to be in the highest degree improbable that the company would have done anything of the kind. No doubt at one time they thought they could get it without any difficulty. But if it had been contemplated that they should do it at all hazards and all costs, I cannot help thinking that there would have been some special bargain about it. I have no doubt that at one period Mr. Willis could have got this as cheaply as the other people. So far as the legal obligation is concerned I can find no greater obligation imposed on the company to get this triangular piece of land than on Mr. Willis. I infer that there was an expectation that they would do it; but a binding agreement that they would do it I cannot find. Upon these grounds I feel that I ought to take a different view from that taken by the learned judge in the court below, who spelled out of the agreement and plan an implied agreement to acquire the triangular piece of land. I think that he went too far. Consequently the appeal must be allowed, and the claim will be dismissed with costs both here and below. The summons was by the liquidator to declare that Mr. Willis was not entitled to prove as a creditor.

Therefore, the order will be to discharge the order of Williams, J., and to declare that Mr. Willis is not entitled to prove as a creditor in respect of his claim.

LOPES, L.J.—I cannot think that the learned judge in the court below was right in implying the covenant which he did imply. The claimant says that there is to be implied from the deed and plan a covenant that the company would procure this triangular piece of land coloured blue. Now, I take it that the rule of law as to implied covenants is this: Any words in a deed which impose an obligation on any person amount to a covenant by him; but the words must be so used as to show an intention that there should be an agreement between the covenantor and the covenantee to do or not to do the particular thing. If that is the true rule of law—and I have no doubt that it is—I cannot find any such intention which can be inferred from the words used in this deed coupled with the plan. Now, this triangular piece of land at the time of the agreement in question did not belong to the company, and, of course, the company knew that perfectly well. I have very great doubt in my own mind whether, in all probability, the claimant did not know it. I do not doubt that the company at the time that that agreement was executed intended if they possibly could to get possession of this triangular piece of land. Probably they also thought that, if they did not get possession of it, the claimant himself would be able to get possession of it at very little cost. But I can find nothing in the words of the deed, coupled with the plan, imposing on the company any obligation to procure this triangular piece of land. It is not suggested that there is anything expressed imposing such an obligation. It is admitted that there is nothing of the kind, but it is said that it is to be implied. I can find nothing which would justify such an implication. I presume that, in order to justify such an implication, the words must be such as to manifestly justify the inference contended for. I am of opinion, therefore, that the learned judge in the court below was wrong in drawing the inference from the deed which he did draw. I think, therefore, that the appeal must be allowed, with costs.

RIGBY, L.J.—I am of the same opinion. I think that there is some confusion in this case between what is an express covenant and what is an implied covenant. It appears to me that every obligation which on a fair construction of a deed is thrown on one of the parties who executes the instrument—every obligation which on a fair construction he takes on himself—is an express covenant to perform that obligation. An implied covenant must be something that is not expressed. Everything that follows from the true construction of the document is express although very often it is a difficult matter to construe the document. But when once you have construed it, there is an express covenant. There are implied covenants known to the law. But with regard to all agreements I think it will now be found that the tribunals are more and more disposed to refuse to imply what the parties did not express, and to hold that no implication arises unless there is something amounting nearly to a certainty. By "amounting nearly to a certainty," I mean that there is something which the tribunal sees must have been meant by the parties. In olden times it was not quite so. An implied covenant, for instance, in a lease for quiet enjoyment where not a word is said about quiet enjoyment, is a true case of implied covenant. And the moment you say anything in the deed in the nature of an express covenant for quiet enjoyment the implied covenant is gone. Now, is there in the document in the present case an express covenant? I mean, can we by construction arrive at the conclusion that the company did in words, whether very plain or very difficult, covenant to acquire the triangular piece of land in question? Certainly I can find nothing of the kind. It is all rested on this, that Mr. Willis undertakes to pave—I use the one word—the road marked blue. There is nothing more than that. There is no language which I can find which by any means of construction can throw the obligation to provide the access to this road on the company. Is it then to be implied? I think not. This particular little plot of ground might have been acquired for the purpose of being paved either by the company or by Mr. Willis. Now it is said that we must imply a binding agreement that the company would have got it for Mr. Willis when he could have got it himself. This is a very insignificant matter compared with the magnitude of the transaction. To get that triangular piece of land I have no doubt at the time when this agreement was entered into would have been a comparatively small matter. The whole land would greatly improve the value of the adjoining house, and it is not to be supposed that the owner of that property would, by putting a fancy price on this little strip of ground, the use of which to the house is not very apparent, have brought the scheme to a standstill, or have prevented it being carried out. Then why must we imply that the company are to do something for Mr. Willis in order to enable him to carry out his covenant, something which he could do for himself without any particular hardship, without any great expense. He covenants absolutely, expecting no doubt that this triangular piece of land would be got somehow, but having no reason for saying that it must necessarily be got by the company. That it was looked upon as being of no importance at the time is manifested by the fact that years roll by, and in 1887—five years after the date of this agreement—no steps had been taken by either party to acquire that triangular piece of land or the right of turning it into the road without acquiring the property in it. When the leases were granted of the different houses, the covenant applied only to the state of the property as it then existed. I do not think by any ingenuity can it be said that the covenant entered into by the different lessees had any relation to any mews other than that actually in existence. I mean the road to the mews as shown on the plan of the last of the leases, that of the 25th March 1887. It seems to me that, whether by oversight or whether deliberately done, this has been treated as a matter of small importance, and that at any rate Mr. Willis has come under no obligation to any person now to pave that triangular piece of land which is at the end of the road leading into Milner-street. He certainly is under no obligation now. The obligation arises from the agreement. The leases have been granted. The equivalent covenant has been entered into,

not with this company, because in the state of things that was unnecessary—but with the head landlord who actually granted the leases. And taking Mr. Willis's statement, whether proved or not—I dare say it is proved because it is not questioned—as correct that he has indemnified them against their obligation, it is only an indemnity against an obligation to pave the road as it stands. I cannot find that either in the original inception of this scheme or in the course that things have taken, and the way in which Mr. Willis has been induced to indemnify the different lessees against the covenant they have entered into, anything amounting to an implied covenant is to be found in that agreement, that possession of that strip of land will be given to him by the company.

Appeal allowed.

Solicitor for the appellant, *H. A. Graham.*

Solicitors for the respondent, *J. L. Tomlin* and *Son.*

Nov. 4 *and* 6.

(Before the Lord Chancellor (Halsbury), Smith and Rigby, L.JJ.)

Re Bell; Jeffery *v.* Sayles. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Mortgage — Reversionary interest under will— Fund in hands of trustees—Puisne incumbrancers—Claim by mortgagee to receive whole trust fund mortgaged.

The trustees of a fund, which has been mortgaged by the beneficiary entitled thereto to first and subsequent mortgagees, are not compellable to pay over the whole amount of such fund in their hands on the application of the first mortgagee, but only such part thereof as represents his mortgage debt, in accordance with the settled practice adopted in a case where a mortgaged fund is in court.

Decision of Kekewich, J. reversed.

William Bell, by his will dated the 8th June 1866, after appointing executors and trustees thereof, directed his trustees to stand possessed of a sum of 8000*l.* upon trust to invest the same as therein mentioned; and upon further trust to pay the annual income thereof, or of the investments thereof, to his daughter, Eliza Morton, for her life, and after her death upon trust for her child or children who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age, or marry under that age, and if more than one equally. And the testator further directed that, in default of such issue, the legacy or sum of 8000*l.*, and the investments thereof, and the annual income thereof, should be held by his trustees in trust as to one moiety to divide the same equally between the four children of his sister Janet Wells, as tenants in common, and who should be deemed to have vested interests in their respective shares at his decease, and as to the remaining moiety upon the trusts therein mentioned in favour of his son Bainbridge Bell and his children.

The testator died on the 11th Aug. 1866.

Eliza Morton died on the 27th Nov. 1894 without issue, and in accordance with the trusts of the will the legacy of 8000*l.* and the investments thereof, of the income of which Eliza Morton had been tenant for life, became divisible in the manner following: As to as well the capital as the income of one equal moiety of the investments representing the legacy, upon trust to divide the same equally between Janet Wells, Dudley Wells, James Anderson Wells, and Richard Sidney Wells, the four children of the testator's daughter Janet Wells; and as to the remaining moiety, upon trusts in favour of Bainbridge Bell and his issue.

The trustees of the will had received notice that Dudley Wells's share was subject to the following incumbrances created by him: Mortgage of the 31st May 1879 in favour of George Garland for 380*l.* and interest, such mortgage having subsequently become vested in William Jeffery. Charge of the 18th Sept. 1880 in favour of Williams and Graham for 70*l.* and interest and costs. Assignment of July 1882 in favour of a trustee for Dudley Wells's creditors.

By the deed of the 31st May 1879 Dudley Wells had assigned his share under the will to George Garland, his executors, administrators, and assigns, with full power for George Garland, his executors, administrators, and assigns, to sue for, recover, and receive, and give valid receipts for all or any part of the moneys thereby assigned or expressed so to be in the name or names of Dudley Wells, his heirs, executors, or administrators, or otherwise to hold the premises to George Garland, his executors, administrators, and assigns, subject to a proviso for redemption on payment of 380*l.* and interest. This security was transferred to William Jeffery.

By the deed of July 1882 Dudley Wells had assigned his share under the will to a trustee for the benefit of his creditors subject to the mortgage.

In Jan. 1895 William Jeffery gave formal notice to the trustees of the will to pay over to him the whole of Dudley Wells's share, as he was the proper person to receive the same, and alone could give the trustees a full discharge.

This the trustees declined to do, but expressed their willingness to pay him what was due on his mortgage.

Thereupon William Jeffery took out an originating summons against the trustees of the will, asking for a direction to the defendants, as such trustees, to pay over to him, as mortgagee, the amount in their hands representing Dudley Wells's share of the legacy, less duty; or in the alternative, for an order that the trusts of the will, so far as regarded such share, might be administered under the direction of the court without general administration of the testator's estate.

The summons was adjourned into court, and came on to be heard before Kekewich, J. on the 18th June 1895, when the following judgment was delivered:

Kekewich, J.—The argument on behalf of the defendants in this case has raised a question of novelty. That question is, whether the assignee of a *chose in action*, that is to say, of a sum of money in the hands of trustees, when that assignment, though taking the form of an assignment, in substance amounts to a mortgage, is not only entitled to give a discharge to the trustees, but is

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

entitled to call upon the trustees to pay him the whole amount. He is in a position to give a receipt, and to say, "Whatever equities there may be subsisting between myself and others claiming behind me either as puisne mortgagees or otherwise shall be settled between me and them, and you are not concerned with them." It is said on behalf of the defendants that the assignee of a *chose in action* in the hands of trustees is not in that position. To my mind he is, subject to this observation: The trustees, say, of a will—this is the case of a will—are bound to regard the title of the assignee. They are bound, of course, to investigate his title, and to see that the mortgage is in proper form, duly executed and duly stamped, and to see that according to law it gives the assignee a right to sign a receipt in full, and to discharge the trustees, and in other respects to make certain that the person who claims as derivative *cestui que trust* occupies the position which he says he does occupy. They are bound to do that, but they are equally bound to take notice of any subsequent charges or any subsequent assignments, and they are bound to protect them also. Therefore, if they are called upon to make over a sum of money to the person whom they believe undoubtedly to be the first assignee, of course they would be bound to pay. For their own protection, and because it is their duty to others, the trustees ought to give notice to those others that they are required to make the payment, and give them the opportunity of asserting their rights. Precisely what they ought to do, and the precise steps which they ought to take, must of course vary according to the circumstances of each particular case. For instance, if there is a charge in favour of some thoroughly competent person who has communicated through a solicitor, the trustees' duty is not only plain, but simple. But if there is a person of unsound mind interested, they may find themselves in greater difficulty, and they may have to consider whether the person of unsound mind is so found or not so found, and whether they have to communicate with the person who is guardian *ad litem* or the person appointed as committee in lunacy. In all cases I think that they ought to give those persons the opportunity of fighting for their own hands. But, in my opinion, they are not bound to fight for them. The trustees are bound not to pay over the money until they have given such persons that opportunity, on account of their duty to them and also, as I say, for their own protection; and they are bound to see that that opportunity is a fair one. When that is exhausted it seems to me that the trustees' duty is done. They can require a discharge in full, and if after that any of the other persons say, "You parted with a fund unfortunately to an insolvent, and whatever rights there are, are of no practical value, therefore we come back to you," the trustees would then be entitled to say, "We have done our duty, and it was for you to assert your rights. We were not bound to engage in litigation and refuse to make payments which were legally demanded simply for your protection, when you had every chance of asserting your own rights." That seems to be the position of trustees where money is in their hands which has been assigned or charged. Now, what was the position of the trustees in the present case? I am dealing now only with Dudley Wells's share of the legacy. He had assigned it by a deed, and counsel are agreed that it is a mortgage; that is to say, it is an absolute mortgage, subject to an equity of redemption. That gives William Jeffery, the plaintiff here, the right to give a discharge for the whole money to the trustees. If by a receipt indorsed upon the deed or otherwise producible, William Jeffery had acknowledged the receipt in full, subject to the duty which I have just mentioned, the trustees would be discharged. There cannot, I think, be any doubt about that, and it would be extremely dangerous for trustees to do anything else. But then there are puisne rights created. I do not know if there were any other mortgages, but it matters not whether there were or were not, because the only one which gives any trouble is this: It appears that there had been an adjudication in bankruptcy against Dudley Wells, the mortgagor, and that had been converted by arrangement into an assignment for the benefit of creditors, and his effects, including the reversionary interest, were invested by a deed of assignment in a trustee for the benefit of creditors. The trustees of the will, therefore, had some little difficulty. That deed of assignment was executed so long ago as July 1882, and the trustee of that deed had died. But it was not until the year 1895, after this dispute had arisen and after the issue of the originating summons, that a new trustee was appointed. He was appointed apparently by the Court of Bankruptcy. Now what ought the trustees of the will to have done? I am not prepared to say exactly what they ought to have done, and to whom they ought to have notified this demand of William Jeffery. To do that would make it necessary to go into the bankruptcy law as it existed then, and to search the proceedings and find out exactly what the legal rights were. But that there was some way of giving that proper notification I entertain no doubt. They might in some way have notified to the creditors, or have made some application to the Court of Bankruptcy, or have found out in some way in whom the property was vested. If the property was not properly vested in some official in the Court of Bankruptcy it was vested in the legal personal representative of the deceased trustee. But the trustees of the will did nothing. They sat quiet and said, "We want a discharge from the trustee of the deed of assignment." That to my mind they were not entitled to. I think that they entirely mistook their position. The result is, that William Jeffery, in order to get that which he formally claimed, has been obliged to come here; and I think that the trustees of the will must pay so much of the costs of William Jeffery's summons as refers to Dudley Wells's share of the legacy. [His Lordship then dealt with certain other questions raised, and ultimately made an order that the defendants as trustees of the legacy and will should pay to the plaintiff as mortgagee the amount in their hands representing the share of Dudley Wells in the said legacy after retaining out of such share the amount of their costs, charges, and expenses (if any) properly incurred in relation thereto (such costs, charges, and expenses to be taxed by the taxing master) . . . and should pay to the plaintiff one moiety of his costs of this action (such costs to be taxed and certified in moieties by the taxing master).]

From that decision the defendants now appealed.

Warrington, Q.C. and *Johnston Edwards*, for the appellants, submitted that the order made by Kekewich, J. was wrong, and that there was no authority which supported it.

Marten, Q.C. and *W. G. Lemon* for the respondent, the plaintiff. [The LORD CHANCELLOR.—What is the practice in the Chancery Division in such a case as this where the fund is in court?] If the first mortgagee applied he would have his mortgage debt paid, and the balance would be carried to a separate account with liberty to apply. [RIGBY, L.J.—Is it not the invariable practice of the court to have all the incumbrancers before it previously to distributing the fund? If that is the practice of the court, is it not the duty of the trustees to act on the same principle?] Trustees have no discretion to refuse to pay over a mortgaged trust fund on the application of the mortgagee:

Re Foligno's Mortgage, 32 Beav. 131.

[The LORD CHANCELLOR.—What is there here which is parallel to that case? It does not say that the trustees are bound to pay over the mortgaged trust fund. You must show that they are bound.] A mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reconveyance upon repayment to the mortgagee, is "an absolute assignment (not purporting to be by way of charge only)" within sect. 25, sub-sect. 6, of the Judicature Act 1873 (36 & 37 Vict. c. 66):

Burlinson v. *Hall*, 50 L.T. Rep. 723; 12 Q. B. Div. 347, 351;

Tancred v. *The Delagoa Bay and East Africa Railway Company*, 61 L. T. Rep. 229; 23 Q. B. Div. 239.

Johnston Edwards replied.

The LORD CHANCELLOR. — I am unable to concur in the judgment of Kekewich, J. I am due elsewhere, so the reasons for my decision I will leave my learned brothers to state.

SMITH, L.J. — In this case a testator died, leaving a will. His nephew, Dudley Wells, is entitled to a share of a legacy under that will amounting to 1000*l.* Dudley Wells mortgaged that share to George Garland for 380*l.* and interest, who transferred the mortgage to William Jeffery. There are also puisne incumbrancers on that share. Dudley Wells became insolvent, and executed a deed of assignment in favour of a trustee for his creditors. In this state of circumstances William Jeffery, entitled as first mortgagee, took out an originating summons asking for a direction that the trustees of the will might be ordered to pay over to him the amount in their hands representing Dudley Wells's share. The puisne incumbrancers were not before the court. It is manifest that every farthing to which William Jeffery is entitled is the 380*l.* and interest and costs. The first question is, Is he entitled to demand that the whole 1000*l.* should be paid to him? Kekewich, J. has decided that he is. Was Kekewich, J. right in making that order? I put it to Mr. Marten thus: Why did not the trustees of the will satisfy the claim of William Jeffery by giving him 400*l.* out of the 1000*l.*? He admitted that, if the fund were in court, the order would have been that the trustees of the will should take that course. If that be so, why if the fund is not in court should the trustees act otherwise? It seems to me clear in this case, notwithstanding the argument addressed to us by Mr. Marten, that, although the sum of 1000*l.* represents the security of the first mortgagee, and that the first mortgagee is entitled to give a receipt in full, Kekewich, J. was wrong in ordering the 1000*l.* to be handed over to William Jeffery. But Kekewich, J. has gone even further. He said, "You had no business to resist the claim of William Jeffery to the whole amount of Dudley Wells's share in your hands," and he ordered them to pay the costs. I cannot agree to that. It seems to me that the trustees were justified in refusing to pay over the whole sum. I think therefore that that part of Kekewich, J.'s order must be reversed, and also the part as to costs. As regards administration of this fund it seems to me that no administration is required, for the facts are known.

RIGBY, L.J.—I am of the same opinion. In this case William Bell bequeathed 8000*l.* to trustees in trust. The money became theirs at law, but trusts were declared of it and under them Dudley Wells became entitled to one-eighth or 1000*l.* Now an action has been brought, the proceeding being by way of originating summons, in which it is sought to make liable the present trustees of the legacy, because they declined to pay over the whole sum of 1000*l.* to William Jeffery—he being the transferee of a first mortgage executed by Dudley Wells of his share. The trustees had notice that there were puisne incumbrancers, or at any rate that Dudley Wells had made an assignment of his equity of redemption in that legacy to a trustee for the benefit of his creditors. Now, I am of opinion that the trustees were not bound to pay the 1000*l.* I shall not go into details in giving my reasons. I think that there are very many reasons. I rest my decision on what is the acknowledged practice of the Chancery Division in such cases. No one has cited a case to the contrary. No one has suggested that if the money had been in court it would have been ordered to be paid to the first mortgagee. If the court does not think fit to make an order for payment to the first mortgagee of the whole fund, why should trustees be bound to do so? I do not think that they are bound. They have a right to settle their account for costs, and then their duty is to distribute the fund in their hands according to the amount claimed by the various incumbrancers respectively. Now, as I have already said, an originating summons has been taken out which asks for an order on the trustees to pay over to the first mortgagee the amount in their hands representing Dudley Wells's share. That is entirely wrong and misconceived, and the order made by Kekewich, J. ought to be set aside. The summons asks in the alternative for an order for the administration of the legacy, or portion of that legacy. There is no reason for making any order for administration. There is no conceivable dispute as to the figures. Therefore, why go into that? It seems to me that the only proper thing to do with regard to the summons will be to reverse the order made by the learned judge in the court below and dismiss the summons with costs.

Appeal allowed.

Solicitor for the appellant, *E. F. M. Ryan.*
Solicitors for the respondent, *Hepburn, Son, and Cutcliffe.*

Tuesday, Nov. 5.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

HODDER *v.* WILLIAMS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Sheriff—Execution—Forcible entry—Building not a dwelling-house.

In levying execution under a writ of fi. fa. *a sheriff is justified in breaking open the outer door of premises occupied by the judgment debtor provided they are not occupied by him as part of his dwelling-house.*

THIS was an appeal from the judgment of Williams, J., after the trial of the action with a jury.

The action was brought against the sheriff of Dorsetshire for trespass in breaking into the plaintiff's premises in Chancery-lane, Bridport, and seizing his goods.

The plaintiff was a judgment debtor. For the purpose of executing a writ of *fi. fa.* the sheriff's officer went to the premises in question, and finding them locked asked the plaintiff who was standing outside to open the door. The plaintiff refused to do so. The officer then broke in the outer door of the premises, and entered and seized goods of the plaintiff.

The premises consisted of a shop and workshop, and a place for storing goods. The plaintiff was a coachbuilder, and used the premises for the purposes of his business. They were merely business premises, no one lived there.

At the trial of the action before Williams, J. with a jury, the jury assessed the damages at 50*l.*; but the learned judge after the verdict ruled that the forcible entry by the sheriff's officer was lawful, and he therefore gave judgment for the defendant.

The plaintiff appealed.

Macaskie for the plaintiff.—The ruling of the learned judge was wrong, and judgment should have been entered for the plaintiff for 50*l.* The sheriff was not justified in breaking in. In the earliest case on the subject, decided in 44 Eliz., "it was adjudged for law by the whole court that if a *fi. fa.* be directed and delivered to the sheriff, he may not break the outer door of the house, and enter and do execution:"

Anon., 1 Brownlow, 50.

There is nothing to show that "house" in that case means dwelling-house. The maxim that "a man's house is his castle" was laid down in the first resolution in *Semayne's case* (5 Rep. 91; 2 Sm. L. C. 114). That resolution is not confined to a man's dwelling-house, *i.e.*, the place where he sleeps; neither are the other resolutions of the court so confined. I admit that there is one case in which it was held that the sheriff was entitled to break into a barn standing in a field, because it was not part of a dwelling-house:

Penton v. *Brown*, 1 Keble, 698; Sid. 186.

In the first place that case is distinguishable. It was a case of a levy on goods the property of some one other than the owner of the barn; and was only a decision upon the meaning of the fifth resolution in *Semayne's case*, which implies that in the case of the pursuit of the goods of the owner of the house, the sheriff may not break in even after denial on request made. Moreover, Windham, J. in that case, held that there was no place where the sheriff could make demand. Further, in the present case, the premises are the shop, &c., where the plaintiff carried on his business, and where he probably was to be found all day long; whereas in *Penton* v. *Brown*, the premises broken into were a barn in a field, a place to which the owner would go only occasionally. There is no later case extending the decision in *Penton* v. *Brown*, and it ought not to be extended. The reasons of the judges in *Penton* v. *Brown* are obscurely reported, and the case should not be followed except where the circumstances are exactly the same. Secondly, if the case is indistinguishable from the present, it is submitted that it was wrongly decided, and should be overruled. Lord Bowen was clearly of opinion that it was a wrong decision:

The American Concentrated Must Corporation v. *Hendry*, 68 L. T. Rep. 742; 62 L. J. 388, Q. B.

There is no reported decision in which it has been approved. A sheriff is in no better position than a landlord distraining for rent:

Brown v. *Glenn*, 16 Q. B. 254:
Ryan v. *Shilcock*, 21 L. J. 55, Ex.

Channell, Q.C. (*E. U. Bullen* and *Muir Mackenzie* with him).—The doctrine of the inviolability of a man's house is confined to his dwelling-house, and the defendant was therefore justified in breaking into the premises in this case. The law was so decided in *Penton* v. *Brown*. Even if that case did not so decide, it has been supposed to have done so by all text-book writers and judges for the last 200 years and more; and the court ought not to overrule the case now: (see Comyn's Digest, Bacon's Abridgment, Watson on the Office of Sheriff, Impey on the Practice of the Office of Sheriff.) This was the view of the law taken by Lord Mansfield, C.J., in *Lee* v. *Gansel* (1 Cowp. 1), by Lord Campbell, C.J., in *Brown* v. *Glenn* (*ubi sup.*), and by Lord Blackburn in

Hobson v. *Thellusson*, 16 L. T. Rep. 837; L. Rep. 2 Q. B. 642; 36 L. J. 302, Q. B.

Lord Bowen gives no indication at all in *The American Concentrated Must Corporation* v. *Hendry* (*ubi sup.*), that he would not have followed the decision of *Penton* v. *Brown* in the case of a sheriff. [He was stopped.]

Macaskie, in reply, referred to the difference of the reports of Lord Blackburn's judgment in *Hobson* v. *Thellusson*, as given in the Law Reports and the *Law Journal* Reports.

Lord ESHER, M.R.—It seems to me that in this case we should apply the good rule that an ancient decision, such as *Penton* v. *Brown* (*ubi sup.*), which is more than two hundred years old, upon a matter of practice, which is one of continual occurrence in the ordinary dealings of life, should not be overruled. The case is still stronger when it has been handed down through the centuries from book to book by careful writers and commentators, in text books which are being continually acted on by people in the daily affairs of

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

life. Even if we were of opinion that the decision was wrong we ought not to overrule a case decided two hundred years ago, the principle and reason of which has been since frequently recognised by great judges. Now, the first direct decision we have to deal with is *Penton* v. *Brown* (*ubi sup.*). The judges who decided that case acted upon what in their view had been laid down in *Semayne's case* (*ubi sup.*) *Semayne's case* decided that the privilege of inviolability exists only in favour of a person in connection with his own dwelling-house. What is the meaning of "dwelling-house?" It is a word in ordinary use, and we all know what it means. In *Semayne's case* it was resolved that "the house of every one is to him as his castle and fortress," and the learned editors of Smith's Leading Cases, in their note upon *Semayne's case*, say that "the maxim that 'a man's house is his castle' only extends to his dwelling-house; therefore a barn, or outhouse, not connected with the dwelling-house may be broken open in order to levy an execution." Lord Mansfield, C.J., in *Lee* v. *Gansel* (*ubi sup.*), clearly adopted that view of the law, and gives as the ground of it "that otherwise the consequences would be fatal, for it would leave the family within naked and exposed to thieves and robbers." The same view of the law was evidently adopted also by Lord Campbell, C.J. in *Brown* v. *Glenn* (*ubi sup.*), and by that most exact lawyer, Lord Blackburn, in *Hobson* v. *Thellusson* (*ubi sup.*). The matter is one with which sheriffs all over the country have to deal daily, and there is one consensus of opinion among those great judges that I have mentioned, and all text-book writers upon the subject, that the doctrine of the inviolability of a man's house extends only to his dwelling-house, and therefore a sheriff in executing a writ is entitled to break into premises which do not come within the meaning of the term "dwelling-house." The view of all lawyers has been uniform from the beginning, and we cannot give way to the argument which is now brought before us for the first time. The premises in this case were not a dwelling-house, whatever else they may have been, and the sheriff was therefore justified in breaking open the outer door. The appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The doctrine which forbids a sheriff from breaking into a dwelling-house in order to execute a writ of *fi. fa.* is very ancient, and proceeds upon the ground that a man and his family ought to be protected in the occupation of their dwelling-house. "Every man's house is his castle" is the maxim, but the privilege extends to dwelling-houses only, and therefore a barn or other building not connected with a dwelling-house, nor within the curtilage, may be broken open by a sheriff for the purpose of executing a writ of *fi. fa.* The leading authority on the subject is the case of *Penton* v. *Brown* (*ubi sup.*), decided in the reign of Charles II. The case has been referred to as good authority by every text-book writer since that date on the law applicable to sheriffs, and by Lord Mansfield, C.J., Lord Campbell, C.J., and Lord Blackburn. We cannot overrule a case which has such a long line of authorities in its favour. Therefore, a man is protected from the breaking open by the sheriff of the outer door of his dwelling-house, but he is not so protected in the case of barns or other buildings not within the curtilage, unconnected with his dwelling-house. In this case the forcible entry of the sheriff was justified, and the judgment of Williams, J. was right. The appeal will be dismissed.

KAY, L.J.—I am of the same opinion. We have not now to deal with a case of a landlord distraining for rent, but of a sheriff executing a writ of *fi. fa.* As was observed by Lord Campbell, C.J., in *Brown* v. *Glenn* (*ubi sup.*), "a distinction may reasonably be made between the powers of an officer acting in execution of legal process and the powers of a private individual who takes the law into his own hands and for his own purpose. There is another well-known distinction, that a landlord cannot distrain at all hours, whereas the sheriff is under no such restriction." The question before us is whether the sheriff is entitled to break open the outer door of a workshop which is entirely unconnected with a dwelling-house. In *Penton* v. *Brown* (*ubi sup.*), decided in 15 Car. 2, it was held that the door of a barn, which was not a dwelling-house nor within the curtilage, might be broken open by a sheriff acting under the mandate of the law, he being in a different position from a landlord distraining for his rent. That distinction is referred to by the editors of Smith's Leading Cases in their notes to *Semayne's case*. They say that the maxim that "a man's house is his castle" only extends to his dwelling-house: therefore a barn, or outhouse, not connected with the dwelling-house may be broken open in order to levy an execution (*Penton* v. *Brown*); but not to make a distress for rent (*Brown* v. *Glenn*)." Now, it is admitted that, in every text-book upon the subject, that doctrine is laid down as having been decided in *Penton* v. *Brown* (*ubi sup.*). Then, in *Brown* v. *Glenn* (*ubi sup.*), Lord Campbell, C.J. says: "In *Penton* v. *Brown* it was decided on demurrer that the outer door of an outhouse might be broken open for the purpose of executing a *fi. fa.*" The question came again before the court in *Hobson* v. *Thellusson* (*ubi sup.*), and there, as reported in the *Law Journal*, Lord Blackburn said: "I do not think that the sheriff's officer was bound to go off at once and take a crowbar to break open the doors, although no doubt that might have been done, as the goods were in a warehouse, and not in a dwelling-house . . . He certainly might have broken the doors open and seized the goods." The question before the court was, whether the sheriff was negligent in not seizing the goods before ten o'clock, at which hour a certain deed was executed, and the court held that he was not negligent because he was not bound to break in at once. Now, it has been argued that the passage from Lord Blackburn's judgment which I have read is not to be relied upon, because the report of the case in the Law Reports is not quite the same. Lord Blackburn is there reported to have said this: "I think the officer was not bound to go to the office earlier than he did; and that he proceeded with due diligence; and that he was not bound to break open the door of the warehouse at once without further inquiry, in the absence of any direction from the execution creditor to proceed with the utmost dispatch." It seems to me that those words come to the same thing. The effect of the judgments of Lord Blackburn and Mellor, J. is that the sheriff was not bound to break in at

once, and the judgments would in my opinion be irrational if the sheriff had no power at all to break in. It has also been argued that *Penton* v. *Brown* (*ubi sup.*) has been disapproved of by Lord Bowen, in the case of *The American Concentrated Must Corporation* v. *Hendry* (*ubi sup.*). But all that he says is, "In *Penton* v. *Brown* it was indeed held that a sheriff for purposes of execution might break a barn which was in a field, as distinct from a barn which was parcel of a house, but the court agreed that if the barn had been adjoining to a parcel of the house, it could not lawfully have been broken. The law so laid down in *Penton* v. *Brown* as to a sheriff's rights with regard to a detached outhouse in a field, appears to me to be a departure from older law." He does not say that the decision in *Penton* v. *Brown* is not law, nor that it ought now to be overruled. I think that the decision in *Penton* v. *Brown* ought not now to be overruled, nor any alteration made in the long course of practice that has existed for the last 200 years and more. The judgment of Williams, J. was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Nicholson, Graham* and *Graham*, for *Richard Tucker*, Bridport.

Solicitors for the defendant, *Lovell, Son*, and *Pitfield*, for *Symonds* and *Son*, Dorchester.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Aug. 2.

(Before KEKEWICH, J.)

Re WRIGHT; KIRKE *v.* NORTH. (*a*)

Practice—Admissions—Payment into court—Parties—Joinder—Rules of Court 1883—*Order XVI. rr.* 1, 11; *Order XVIII., r.* 6; *Order XXXII., r.* 6.

A motion was brought by some of the plaintiffs in this action, asking that the defendant might be ordered to pay certain trust moneys into court to the credit of the action on the ground that he had admitted in his defence that the moneys had been in the hands of W., of whom the defendant was executor and legal personal representative.

Held, that the motion could not be made by some of the plaintiffs independently of the others, but that they must all concur.

THIS was an action brought by Mrs. Kirke, a widow, as tenant for life under her marriage settlement, and her children (of whom all but one were infants) as reversioners, against the defendant, William George North, the executor and legal representative of John Wright deceased, Wright being one of the two trustees of the settlement, and against the surviving trustee, to make good certain sums alleged to have been lent by the trustees contrary to the terms of the trust. The defendant North, in his defence, stated that the sums had been lent with the knowledge and consent of Mrs. Kirke. This was a motion on behalf of reversioners, asking that the defendant North might be ordered to pay the trust moneys into court to the credit of the action on the ground that he had admitted in his defence that the moneys had been in the hands of Wright.

Renshaw, Q.C. and *Hadley* for the defendant North.—We take the preliminary objection that Mrs. Kirke, the tenant for life should have been joined with the reversioners on the motion.

Brown v. *Sawer*, 3 Beav. 598;
Butlin v. *Arnold*, 1 H. & M. 715.

Marten, Q.C. and *Boome* for the motion.—Under the present practice one or more plaintiffs may apply for and obtain relief, and no cause or matter shall be defeated through non-joinder of parties:

Rules of Court 1883, Order XVI., rr. 1, 11; Order XVIII., r. 6; Order XXXII., r. 6.

KEKEWICH, J.—I think this preliminary objection must prevail. In construing the rules of procedure in this division of the High Court we have to regard the former settled practice of the Court of Chancery. The two cases cited by Mr. Renshaw prove conclusively what the practice of the court was. The question is, has the new procedure altered that practice? Now the rule, which seems to me to point in words more strongly than any other in Mr. Marten's favour, is rule 6 of Order XXXII.: "Any party may at any stage of a cause or matter;" that certainly in words without going further, points to any plaintiff or defendant applying; but on reading the rule through it will be seen that there is a necessary limitation: "Any party may at any stage of a cause or matter, where admissions of fact have been made." Therefore, to come within that rule, you must have a case where admissions have been made by the party against whom the application is made—admissions in favour of the party who is making the application; and that is more apparent when a little further on you find, "Without waiting for the determination of any other question between the parties." It seems to me that to construe the rule as meaning that any one of the plaintiffs may apply as against any one of the defendants, is to construe it far more widely than the language will properly bear, even without regard to the old practice. Rule 6 of Order XVIII. does not, I think, affect the case at all. It says: "Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant." The real object of that rule is merely to get rid of the enormous mischief of the old practice of misjoinder; and that is evident from the fact that Order XVIII. is headed, "Joinder of causes of action." Rule 11 of Order XVI. really deals with the same point. It says: "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of the parties." Then falling back on rule 1 of Order XVI. we come, no doubt, to the most useful amendment—one which I know, from my own experience, to be of the very greatest advantage to suitors, for it enables the court to do justice at the trial or judgment. It commences in a general way: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." This is a beneficial rule, and enables the court, when the action comes to trial, so to model the judgment as to do justice between the parties. I have had several cases in which Order XVI. has been applied. One of then was a case in which a mother and daughter made claim against trustees

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

for a breach of trust. The daughter was an infant at the date of the breach of trust, and it was admitted that there was no defence whatever as against her. As against the mother it was said, and said truly, that she had been an inciting party, and that the breach of trust was committed at her request, with the result that the relief sought by the daughter was made to fall on the mother, the proper shoulders. Under the old practice the court would unfortunately have been obliged to dismiss that action, and the infant would not have had the benefit of it, because, joined with her mother, she could not have brought the action. As it was, she was able to bring the action. That is the meaning of the rule, but it is not meant that the parties should be joined together in a slipshod manner, and then applications should be made one against the other, confusing the pleadings and the issue.

Solicitors: *Swann* and *Co.*, for *Tweed* and *Son*, Horncastle; *Oldman*, *Clabburn*, and *Co.*, for *Willders* and *Son*, Holbeach.

Wednesday, Aug. 7.

(Before KEKEWICH, J.)

WILLIAMS *v.* QUEBRADA RAILWAY, LAND, AND COPPER COMPANY. (*a*)

Practice — Production of documents — Fraud— Solicitor and client—Privilege—Order XXXI., r. 19A., *sub-rule* 2.

The plaintiff, in his statement of claim, charged the defendant company with fraud. On a summons for production and inspection of documents:

Held, that no distinction could be drawn between crime and a civil fraud, and communications between the company and their solicitor as to the subject-matter of the alleged fraud were not privileged from production.

IN 1883 and 1885 the directors of the defendant company passed resolutions for the creation and issue of 6 per cent. debenture stock, constituting a first charge by way of a floating security upon the undertaking and property of the company. In 1886 the company, with the consent of the debenture stock-holders, created and issued 6 per cent. prior mortgage debentures, charged also by way of a floating security, in priority to the debenture stock, upon the company's undertaking and property.

On the 1st Sept. 1884 the company made default in payment of the interest due on the debentures and debenture stock, and on the 3rd Sept. this action was brought by John Williams on behalf of himself and all others the holders of debentures and debenture stock in the defendant company to enforce their securities. The plaintiff, by his statement of claim, alleged that on the 22nd Feb. 1894 an agreement was entered into between the company and Messrs. Matheson and Co., the sole consignees and agents for the sale of the company's ores, whereby the company charged all their property with a large sum of money alleged to be due from them to Messrs. Matheson and Co., but without disclosing the existing charges. Paragraph 22 of the statement of claim stated:

When the last hereinbefore-stated agreement was entered into, the company was insolvent, and its stoppage was to the knowledge of the parties imminent, and the charge created by the said agreement was not given in the ordinary course of business, or for the purpose of enabling the company to continue its business, but to defeat and delay the holders of debentures and debenture stock, and the said agreement is utterly void, or in the alternative, the charge thereby created is subject, as to all the property therein comprised, to both the debentures and the debenture stock.

The plaintiff claimed as against the company and Messrs. Matheson and Co. declarations to establish the priority of the debentures and debenture stock over Messrs. Matheson and Co's. agreement of charge; to have both classes of debenture securities enforced and to have the agreement set aside. In Nov. 1894 the company went into voluntary liquidation, and liquidators were appointed.

The liquidators filed an affidavit of documents, paragraph 2, of which was as follows:

The said defendant company object to produce for inspection certain portions of the minute and agenda books comprised in the first part of the first schedule hereto, on the ground that they contain matters not relevant to the matters in question in this action, and also such other parts of the said minute and agenda books which contain copies of or extracts from counsel's opinions, and the defendant company's solicitor's advice on matters on which the defendant company required and obtained opinions and advice.

The said defendant company also object to produce the documents comprised in the second part of the said first schedule, on the ground that, other than so far as they consist of such parts of the minute and agenda books as last aforesaid, they are papers which have at different periods been submitted to counsel to advise the company upon their affairs before action brought, and also comprise papers submitted to counsel during the progress of this action for the purpose of his advising the defendant company and their solicitors, and are therefore privileged.

This was a summons asking for the production and inspection of the documents mentioned in paragraph 2 of the liquidators' affidavit.

A. R. Kirby for the plaintiff.—We charge the defendant company with fraud in our statement of claim. There is no distinction between a civil fraud and a criminal charge, and privilege cannot be claimed:

Reg. v. *Cox*, 52 L. T. Rep. 25; 14 Q. B. Div. 153.

The liquidators are officers of the court, and should produce all documents in their possession.

Aldred Rowden for the defendants.—I submit that communications between a party and his solicitor are privileged:

Minet v. *Morgan*, 28 L. T. Rep. 573; 8 Ch. App. 361.

A civil fraud is not the same as a criminal charge:

Bray on Discovery, pp. 352-3;
Reg. v. *Cox*, 52 L. T. Rep. 25; 14 Q. B. Div. 153:
Charlton v. *Coombes*, 4 Giff. 372;
Follett v. *Jefferyes*, 1 Sim. N. S. 1;
Re Postlethwaite, 56 L. T. Rep. 733; 35 Ch. Div. 722.

By consent of counsel the documents, the production of which were objected to, were handed up to the judge.

KEKEWICH, J.—This case is, in my opinion, one of unusual gravity and importance. It is of the highest importance, in the first place, that

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

the rule as to privilege of protection from production to an opponent of those communications which pass between a litigant, or an expectant or possible litigant and his solicitor should not be in any way departed from. However hardly the rule may operate in some cases, long experience has shown that it is essential to the due administration of justice that the privilege should be upheld. On the other hand, where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the court. It is said this case is not one of fraud. Shortly it is this: The plaintiff and those he represents are the holders of debentures and debenture stock of the defendant company. They say, "We have a first charge on the property of the company, and our first charge is obstructed by another charge given by the defendant company in favour of their agents, but really with an intent to defeat and delay our security. Ours is a floating security, not to come into effect until certain circumstances take place, including a winding-up of the company." Then it is alleged that the company was insolvent, and that they found it useless for them to continue to carry on business, and they had to stop, but that in order to prevent for a time this inevitable result they gave a charge in favour of their agents, and as the plaintiff alleges they did it in such a way as to defeat the holders of first debentures. That is what I understand the plaintiff's case to be, and it is said that is not a charge of fraud. It is difficult to say it is not commercial dishonesty. It is in my opinion commercial dishonesty of the very worst type, and that is fraud. Then the company, which is now in liquidation, makes by its liquidators an affidavit of documents, including minute books, and it appears that the company have in their minute books not only a minute of a resolution passed by the board of directors as to this charge, but copies of or extracts from the opinions of counsel and advice of the company's solicitors with reference to this charge; and they say they are not bound to produce these because they are confidential communications between them and their legal advisers which ought to be protected from production. It is obvious that, if this objection holds good, justice may be defeated; but it may be right that justice in this case should be defeated in order to uphold the general administration of justice. But is it right that justice should be defeated in this case? It is said that this, being a case of fraud, is taken out of the ordinary rule, and that no protection can be claimed, on the ground of privilege, in a case which is one of fraud. The case of *Reg.* v. *Cox* (52 L. T. Rep. 25; 14 Q. B. Div. 153) is referred to, and there, after full argument, the judgment of the Court for Crown Cases Reserved (consisting of Lord Coleridge, C.J., and Hawkins, Stephen, Watkin Williams, and Mathew, JJ.) was delivered by Stephen, J. It was a considered judgment, going into the whole law upon the subject; and it goes the length of saying that it is a principle established by many cases that, where there is a charge of fraud, the protection of confidential communications between a client and his solicitor on the ground of privilege is not allowed. But it is argued that that was a criminal case, and that, in civil cases, the rule has been laid down only where there is something more than a charge of fraud against the defendant—where, for instance, the solicitor or attorney to the defendant has himself been a party to the fraud; and no doubt there are many passages to that effect to be found in the authorities, besides the passage that has been read from Mr. Bray's exceedingly useful book on discovery, but I do not find that passage upheld by the judgment in *Reg.* v. *Cox*. No doubt, also, the case of *Reg.* v. *Orton*, cited in that case, in which Cockburn, C.J. gave an elaborate judgment, was a criminal case; but the judgment in *Reg.* v. *Cox* is based on general principles, and does not draw any distinction between a case of crime and a case of civil fraud; and certainly, in *Reg.* v. *Orton*, Cockburn, C.J. said nothing to lead to the conclusion that, to oust the privilege, the attorney must be a party to the fraud. A fraudulent person intending to commit a fraud would take great care not to let his solicitor know of the fraud if he could possibly avoid doing so; his object would be to deceive his solicitor as well as everyone else. In such a case, as Cockburn, C.J. said, "If the client had a dishonest purpose in view in the communication he makes to his attorney, with the view of making the attorney the innocent instrument of carrying out the fraud, it deprives the communication of the privilege." If, in such a case as that, privilege attached to the communication, justice would be very easily defeated. In my opinion, the observations of Stephen, J. apply to a case where the solicitor to the party charged with fraud is not himself charged with being a party to the fraud. It appears to me that the case of *Reg.* v. *Cox* is applicable to civil as well as criminal cases. In *Re Postlethwaite* (56 L. T. Rep. 733; 35 Ch. Div. 722), where *Reg.* v. *Cox* was considered, North, J. refers to the judgments of Lord Cranworth in *Follett* v. *Jefferyes* (1 Sim. N. S. 1), and of Turner, V.C. in *Russell* v. *Jackson* (9 Hare, 387, and says at p. 726 of 35 Ch. Div.: "Both those cases are of very high authority, and they both received the approval of the full Court for Crown Cases Reserved in *Reg.* v. *Cox*. It seems to me, therefore, that, if the case alleged by the statement of claim be true, there can be no professional privilege for the documents in question." I was extremely reluctant to order the production of these documents without knowing something about them. It might be that after all privilege had not been aptly claimed, or I might inadvertently and unfairly to the defendants make them produce a number of documents which could only be used for the purpose of harassing them, and might have no direct bearing on the matters in question; and therefore I endeavoured to fall back upon the rules. Sub-rule 2 of rule 19A of Order XXXI. says this: "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." The old practice that existed long before the Judicature Acts on the common law side was always for the judge to take the documents and determine for himself whether they should be produced or not. That was occasionally done also on the equity side. I remember one case in which an important document was produced to the Master of the Rolls

in order that he might say whether it ought to be produced to the other side or not; and I also know, of my own experience, that the late Sir James Hannen always insisted on seeing documents in probate actions. My difficulty was whether I could insist on seeing the documents in question here, because the rule says "for the purpose of deciding as to the validity of the claim of privilege," and I had already made up my mind that the claim of privilege was invalid. I wished to see them because I wished to stop, if I could, the production of useless documents, the production of which would only harass and do no good, but would only cause trouble and costs. Mr. Rowden assented to my seeing them. I have seen them, and I have come to the conclusion that the plaintiff's counsel must have an opportunity of looking at them. That they are relevant is perfectly clear to my mind, but whether they support the plaintiff's charge of fraud I will not say. I ought not to express any decided opinion whether they do or do not, but I do say that they require the closest investigation on behalf of the plaintiff. Therefore there must be an order in the usual form for the production and inspection of these documents, and the defendants having been unsuccessful must pay the costs of this application in any event.

Solicitors: *Ashurst, Morris, Crisp,* and *Co.*; *Henry Kimber* and *Co.*

Tuesday, Oct. 29.

(Before ROMER, J.)

ROOKE *v.* DAWSON. (*a*)

Charity—Scholarship fund—Refusal of trustees to award scholarship to candidate obtaining the highest marks—Action by person claiming to be entitled to scholarship.

Under the provisions of a deed founding a scholarship, the scholarship was to be awarded to the pupil leaving a certain school and fulfilling certain other conditions, "who should pass the best examination in subjects to be determined upon from time to time by the examiner or examiners for the scholarship." The trustees announced an examination for June 1894, *at which the plaintiff and another boy were the only candidates, and the plaintiff obtained the larger number of marks, but the trustees declined to award the scholarship, the examiner having reported that neither candidate was deserving of quite so valuable a scholarship. The plaintiff commenced an action against the trustees for a declaration that he was entitled to the possession and enjoyment of the scholarship, subject to performing the conditions contained in the trust deed.*

Held, that, upon the true construction of the trust deed, no boy was entitled to the scholarship, unless in the examiner's opinion he had passed a satisfactory examination in the subjects selected, and that if a boy, though the best of those who competed, was unable to pass a satisfactory examination, then the examiner ought to say (as he had in effect said here) that there was no boy who had passed the best examination so as to be entitled to the scholarship.

(*a*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

THE plaintiff in this action was William Stanley Rooke by Alfred Bradley Rooke his father and next friend. The defendants were Edward Bousfield Dawson, John Gotch Hepburn, Samuel Edwards, and Richard John Hodgson, who were the trustees of a scholarship fund in connection with the Protestant Dissenters Grammar School at Mill Hill. The action was for a declaration that the plaintiff was entitled to the possession and enjoyment of the scholarship, and the defendants were sued as the trustees of an indenture of settlement of the 31st Jan. 1854.

The scholarship, which is known as the Bousfield Scholarship, was founded by the late Robert Bousfield in 1853, the fund being settled and the trusts declared by the said indenture.

It was thereby declared that the trustees for the time being thereof should stand possessed of the capital sum of 1000*l.*, and the investments thereof, as a fund or endowment for the support of a scholarship in connection with the Protestant Dissenters Grammar School at Mill Hill, in the parish of Hendon, Middlesex, to be called the Bousfield Scholarship, upon the trusts and subject to (amongst others) the rules following, viz., (1) that the scholarship should be of the value of such net yearly income as the capital sum of 1000*l.*, or the investments thereof, should from time to time produce; (2) that it should be tenable for three years; (3) that the holder of it should pursue his studies during such three years at University College, London, or at New College, London; (6) that the scholarship should be awarded to the pupil leaving Mill Hill School, and going to such college as aforesaid, who should pass the best examination in subjects to be determined upon from time to time by the examiner or examiners for the scholarship, who were from time to time to be chosen by the trustees for the time being, subject to the approval of the committee of the school, but no boy was to be eligible for examination who had been in the school less than three years at the end of the current half-year, or who should be under sixteen years of age on the 1st July then next ensuing; (8) that when any vacancy should occur by death or other means within a period of three years from the last avoidance of the scholarship, if no half-yearly payment should have become due to the scholar elect so avoiding it, then the next highest boy at the last examination who was duly qualified to hold the scholarship should succeed thereto, but if there should be no such boy, or if any half-yearly payment should have been made, or become due to the scholar so avoiding the scholarship, the scholarship should remain vacant till the following June, and whenever the scholarship should for any cause whatever, not be filled up, or should be vacant on any one or more of the said half-yearly days of payment, the said trustees for the time being should be at liberty and were thereby empowered to appropriate the income during such vacancy, and not applicable under the foregoing rules to the purposes of the trust, either by adding it to the capital, or by accumulating it as a fund to meet any expenses contingent on the administration of the trust at the discretion of the said trustees for the time being.

The scholarship having become vacant in 1893, an examination was held in June of that year by examiners duly appointed in accordance with the provisions of the indenture.

There were four duly qualified candidates, of whom Benjamin Mason Cook was placed first by the examiners, John Harrison Milnes second, and the plaintiff third, and the scholarship was awarded to Cook. He, however, resigned it in the following September, before any half-yearly payment had become due to him. The trustees did not, thereupon, award the scholarship to Milnes under rule 8, the examiners in their report having stated that, in the event of Cook not accepting the scholarship, they did not feel justified in recommending the candidate who stood second on the list at the examination of June 1893.

Another examination was therefore held in June 1894, at which two candidates presented themselves, viz., the plaintiff and Herbert Murray Spicer. The plaintiff obtained 570 marks and Spicer 496 out of a possible 1350, but the examiner reported that he was unable to detect any marked difference between the candidates, and that neither was deserving of quite so valuable a scholarship, and he suggested dividing it between them.

The plaintiff entered as a student at University College, London, in Oct. 1894. The trustees did not award him the scholarship, though he applied to them to do so.

The said John Harrison Milnes disclaimed by a deed-poll any right he might have had to the scholarship under rule 8, as having been second in the examination of June 1893.

The scholarship was worth about £50 a year.

The conditions of award issued by the trustees, and acted on by the examiners, ever since 1858 never varied, and the first of such conditions was that "The scholarship will be awarded to the pupil leaving Mill Hill School who shall in the opinion of the examiners pass the best examination, and show sufficient knowledge in subjects to be determined upon from time to time."

The plaintiff commenced this action on the 18th Dec. 1894, claiming (1) a declaration that he was entitled to the possession and enjoyment of the scholarship subject to his performing the conditions expressed in the indenture of the 31st Jan. 1854; and (2) an order directing the defendants forthwith to put the plaintiff in possession and enjoyment of the said scholarship.

On the 24th Jan. 1895 the defendants moved before Chitty, J. for an order staying all further proceedings in the action on the ground that the certificate of the Charity Commissioners had not been obtained pursuant to sect. 17 of the Charitable Trusts Act 1853. On that motion Chitty, J. held (72 L. T. Rep. 248; (1895) 1 Ch. 480) that the claim presented did not show a case of contract between the plaintiff and the trustees, and that the plaintiff's alleged individual equitable right related to and involved the partial execution or administration of the trusts of the charity deed, and therefore that the action could not proceed without the certificate of the Charity Commissioners.

The necessary certificate having been obtained, the case came on for hearing before Romer, J. on the 29th Oct. 1895.

Hopkinson, Q.C. and *Wurtzburg* for the plaintiff. —Under the deed of Jan. 1854, the scholarship was to be awarded to the pupil leaving Mill Hill School and going to the prescribed college, who should pass the best examination in subjects to be determined upon by the examiner. The plaintiff clearly passed the best examination, and he fulfilled all the prescribed conditions. He is, therefore, entitled to the scholarship.

Birrell, Q.C. and *Micklem*, for the defendants, were not called on.

ROMER, J.—In my opinion this action fails, and on this short ground, that, according to the free construction of the trust deed, no boy is entitled to the scholarship unless he shall have passed an examination for the scholarship in subjects to be determined upon by the examiners; and clearly the examiner is the person who is to say whether, for this scholarship, the boy has passed a satisfactory and proper examination. If a boy, though the best of those who competed, was not able to pass a satisfactory examination for this scholarship (and considering what the scholarship is, one should have regard to its nature, and the amount awarded, and so forth) then clearly the examiner ought to say that there is no boy who has passed the best examination so as to be entitled to the scholarship. Now, here, as a matter of fact, the examiner, as appears from his report, has, in effect, said that no candidate has passed so as to deserve so valuable a scholarship as this, that is to say, this scholarship. In other words, he has in effect said that no boy has passed the examination required for this scholarship. That being so, the plaintiff here is not entitled to the scholarship, and it appears to me that the trustees have acted quite rightly in what they have done. I must dismiss the action with costs. The costs of the motion to stay will be costs in the action.

Solicitors for the plaintiff, *Rooke* and *Sons*.

Solicitors for the defendants, *Pennington* and *Son*.

QUEEN'S BENCH DIVISION.

Friday, Oct. 25.

(Before Lord RUSSELL, C.J. and CAVE, J.)

MOORE (app.) *v.* PEARCE'S DINING AND REFRESHMENT ROOMS LIMITED (resps.). (*a*)

Margarine—Using in refreshment-house—Exposed for sale—Margarine Act 1887 (50 *&* 51 *Vict. c.* 29), *s.* 6.

The sale of margarine in a refreshment-house as a condiment with other food to be consumed on the premises is not a sale by retail within sect. 6 *of the Margarine Act* 1887 (50 *&* 51 *Vict. c.* 29).

Respondents were proprietors of a refreshment-house, where bread with margarine spread upon it and haddock with a piece of margarine as a condiment to it, were sold to be consumed on the premises. No margarine was sold to be taken away. The large piece of margarine from which that used in the shop was taken was exposed to the view of customers, and so were the buttered slices of bread. On neither was there any label within sect. 6 *of the Margarine Act. The appellant summoned the respondents for exposing margarine for sale by retail without a label contrary to the provisions of sect.* 6. *The magistrate dismissed the summons.*

Held, that the dismissal was right.

SPECIAL case stated by a metropolitan magis-

(*a*) Reported by J. A. STRAHAN, Esq., Barrister-at-Law.

trate under the provisions of the Summary Jurisdiction Acts.

The following passage from the judgment of Lord Russell, C.J. sufficiently sets forth the material facts in the case:

"The respondents in this case keep a refreshment-house. It is strictly a refreshment-house. Nothing is sold to be taken away. The customer calls for what he wants, and eats what he calls for before leaving the premises. Notices are posted about the shop to the effect that nothing is used in the establishment but a mixture of pure Danish butter and margarine. What are called 'slices'—that is slices of bread with butter spread over them—are sold at the price of one halfpenny each. Haddock is also sold, and with it is given, if desired, a piece of butter; but, whether the butter is taken or not the price is the same. The large piece from which the butter used in this way is taken is kept on a shelf behind the counter, but in full view of everyone entering the shop. Numbers of slices from which customers are supplied are kept on the counter uncovered. On neither the butter nor the slices is there a notice such as would satisfy sect. 6 of the Margarine Act. It is admitted that all the butter used is margarine within the definition of that term in sect. 3.

"On the 22nd Jan. the appellant Moore went into the respondent's shop, and after having been served with coffee and dry bread asked for threepence worth of the margarine from which that used in the shop was taken. Thereupon the respondents' manager promptly refused to serve him, and informed him that the butter was not sold to be taken away, but only to be used with bread and haddock to be consumed on the premises."

The appellant summoned the respondents for that they, being dealers by retail in margarine, did expose for sale margarine without a label as required by sect. 6 of the Margarine Act 1887 (50 & 51 Vict. c. 29).

Sect. 6. Every person dealing in margarine in the manner described in the preceding section shall conform to the following regulations:

Every package, whether open or closed, and containing margarine, shall be branded or durably marked "margarine" on the top, bottom, and sides, in printed capital letters, not less than three-quarters of an inch square; and if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square, "margarine;" and every person selling margarine by retail save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, "margarine."

The magistrate dismissed the summons.

The prosecutor appealed.

Morton Smith (*Dickens*, Q.C. with him) for the appellant.—The question here is, whether the Act applies to the case of margarine exposed for sale for consumption on the premises. [Lord Russell, C.J.—The question rather is, whether the Act applies to the case of margarine exposed for sale as a condiment with other food to be consumed on the premises.] My contention is, that the words "sale by retail" include every kind of sale—that is, they apply in every case where the margarine is not given away. [Cave, J.—Then, if I ordered butter sauce in an eating-house and it was made of margarine, you think that the waiter, in order to keep clear of crime, should serve it to me either in a stamped package or in a stamped paper wrapper?] No, I contend there are three kinds of sale contemplated by the Act: sale by package where the amount sold is considerable; sale with paper wrapper where the margarine is sold to be taken away; and sale for consumption on the premises, whether in the form of pats or as a condiment to food. In all cases where the piece from which that sold is taken is exposed to the customer's view it should be marked according to the Act. Here the margarine was exposed:

Crane v. *Lawrence*, 63 L. T. Rep. 473; 25 Q. B. Div. 152.

It was for sale by retail, inasmuch as it was not given away for nothing.

John Ogle, for the respondents, was not called on.

Lord Russell, C.J.—Undoubtedly the question raised in this case is one of much importance. The object of the Act was to protect the public from being imposed upon as to the article which they were buying. Now here, whether an offence has been committed or not, there is no ground for imputing any intention to impose on customers. The trading was plainly open and above board. Nevertheless the respondents may have contravened the provisions of the statute. To understand those provisions it is necessary to look at the preamble, and also at sects. 4 and 6 as the learned counsel has done; but the question we have to decide is, whether the respondents have committed an offence within the middle part of sect. 6. Before deciding this we must look at the final part of that section, because, in our opinion, it shows the kind of sale by retail for which exposure is contemplated in the middle part of the section. "Every person" the final part runs, "selling margarine by retail save in a package" which is not in question here, "shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square 'margarine.'" These words cannot be taken to apply to all manner of sales. They cannot be taken to apply to sales such as proved here. Examples given by my learned brother and me during the argument show what absurdities would arise from attempting to apply the machinery of this section to the business carried on in this refreshment-room. The absurdity is so plain that counsel himself abandoned the contention that the buttered bread or the haddock and butter should be handed to the customer in a paper wrapper, and confined himself to arguing that the large piece of butter from which that used was taken should have a label on it as being exposed for sale by retail. But the latter part of the section must be looked to to see the kind of sale by retail contemplated by the Act, and only two kinds are there referred to—sale in a package and sale in a paper wrapper. That being the case there was no exposure for sale by retail at all within the meaning of the section. The mere selling in the one case of slices of bread with margarine smeared upon them, and in the other of haddocks with pieces of butter added as was

done in this case, does not bring the respondents within the Act.

CAVE, J.—I am of the same opinion for the same reasons.

Appeal dismissed.

Solicitor for the appellant, *C. Urquhart Fisher.*
Solicitor for the respondents, *Thomas Charles.*

Friday, Oct. 25.

(Before Lord RUSSELL, C.J. and CAVE, J.)

BISCHOP (app.) *v.* TOLER (resp.). (*a*)

Trade description—Place where goods were made—Merchandise Marks Act 1887 (50 *&* 51 *Vict. c.* 28), *ss.* 2 *and* 3.

The place or country in which any goods were made or produced is not the place or country in which the greater part of the material of which they consist was manufactured, but that in which the process which made them a finished product was gone through.

B. had in his possession for sale certain goods to which was applied the trade description "Le Dansk, French Factory." Ninety per cent. of the material of which they were composed was produced in France; ten per cent. was afterwards added in England. Until the latter was added the goods were known in the trade as oleomargarine, afterwards as "Le Dansk."

Held, that the country where the goods were made or produced was England, and that the description "Le Dansk, French Factory" was a false trade description within sect. 3, 1 (*b*) *of the Merchandise Marks Act* 1887 (50 *&* 51 *Vict. c.* 28), *as amounting to a representation that they were made in France.*

SPECIAL case stated by a metropolitan magistrate.

The appellant, Samuel Bischop, was employed as manager, and had sole charge of a shop, No. 59, Oxford-street, the owner of which—one Auguste Pellerin—did not reside in England. The shop was for the sale of a certain kind of margarine known in the trade by the name of "Le Dansk." The stock of Le Dansk kept in the shop was not exposed to the view of customers, but was stored in a cupboard which was opened only to take out boxes containing the substance. There were, it appeared, no notices in the shop to the effect that Le Dansk was margarine, save one in the cupboard where the stock was kept. About the shop, however, were many empty cardboard boxes, on which were stamped, in large letters, the words "Le Dansk, French Factory"; and on the counter were empty tin boxes, on which were stamped the words "Le Dansk, Paris"; and on the window of the shop, and at the top of the front of the house, were large display notices with the words "Le Dansk."

The evidence went to show that "Le Dansk" ("*le*" French for "the" and "Dansk" Danish for "Danish") was a fancy name which Pellerin had registered as a trade mark before the passing of the Merchandise Marks Act 1887 (50 & 51 Vict. c. 28). It was known in the trade as referring to a superior kind of margarine, in the preparation of which Danish butter was used. It appeared that in the present case the substance was composed of oleomargarine to the extent of 90 per cent., and of English milk and Danish butter to the extent of 10 per cent. The oleomargarine was manufactured at a factory in Paris called the "Le Dansk Factory," while the English milk and Danish butter were added at a factory at Southampton called the "French Factory." On the 21st Jan. 1895 the respondent Toler bought in the shop managed by the appellant two pounds of "Le Dansk." The substance was supplied to him by the wife of the appellant in cardboard boxes similar to those about the shop, save that besides the words "Le Dansk" there were stamped upon them in letters a quarter of an inch square the word "Margarine." It would seem that the tin boxes marked "Le Dansk, Paris," were not used for the sale of margarine by the appellant.

The respondent summoned the appellant for having in his possession for sale certain goods, to wit, margarine, to which was applied a false trade description, contrary to sects. 2 and 3 of the Merchandise Mark's Act 1887 (50 & 51 Vict. c. 28).

Sect. 2.—(2.) Every person who sells, or exposes for, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any . . . false trade description is applied . . . shall . . . be guilty of an offence against this Act.

Sect. 3.—(1.) For the purposes of this Act. . . . The expression "trade description" means any description, statement or other indication, direct or indirect . . . (*b.*) as to the place or country in which any goods were made or produced, or . . . (*d.*) as to the material of which any goods are composed. . . . The expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect. and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act.

The magistrate convicted the appellant, holding that there had been a false trade description of the goods sold to the respondent within both sect. 3, sub-sect. 1 (*b*), and the same (*d*). Bischop appealed.

Bonsey (with him *George Elliot* and *Fitch*) for the appellant.—As to sub-sect. (*d*), I contend that the name "Le Dansk" cannot be a false trade description as to the material of which the goods are composed since it is not in any way descriptive of the material. It is a fancy name known in the trade as meaning a kind of margarine. This substance is margarine. Besides the name is a trade mark registered before the passing of the Act, and see sect. 18 of Act. As to sub-sect. 1 (*b.*) I contend that neither "Le Dansk" nor "Le Dansk. French Factory," amounts to a false trade description as to the place or country where the goods were made or produced, since the goods here were produced in France. The real process of manufacture took place at the Le Dansk Factory at Paris. All that was done at Southampton was to add a little milk and butter.

Fletcher Moulton, Q.C. and *Morton Smith*, for the respondent, were not called upon.

Lord RUSSELL, C.J.—In my judgment this conviction must stand. The charge against

(*a*) Reported by J. A. STRAHAN, Esq., Barrister-at-Law.

the appellant was that he had in his possession for the purpose of sale a material to which was applied a false trade description. It was sought to support this charge on two grounds. The first was that the description applied to the goods was false as to the material of which the goods were composed. I do not think it necessary to give any final opinion on this point; but I may say that, if this were the only ground, I am inclined to think it would not be sufficient to support the conviction. Though the name "Le Dansk" indicates to the trade a particular kind of margarine, it indicates to the public nothing as to the material of which the thing is composed. The fact that the words are registered as a trade mark might also afford a further defence under this head. But, as I have said, there is a second ground, and on it I think the conviction can be supported. That second ground is that there was here a false representation that the article was in fact of foreign origin. It is stated in the special case that there is a factory at Paris where the foundation of the article is manufactured. When the foundation leaves the factory it is merely oleomargarine, and it is so called. On coming to the factory at Southampton it is mixed with butter and milk. After this process has been gone through the product is a compound substance which gets the trade name of "Le Dansk." Therefore, for the first time the article receives the name of "Le Dansk" at Southampton. It is then for the first time the finished product known under that name. Under that name it was sold to the public as if it were manufactured in France, and this I think justified the magistrate in holding that the name under which it was submitted to the public was a false description as to the place or country where it was manufactured or produced.

Cave, J.—I entirely concur.

Solicitors: for the appellant, *Neve* and *Beck*; for the respondent, *Urquhart Fisher*.

Friday, Oct. 25.

(Before Lord Russell, C.J. and Cave, J.)

Toler (app.) *v.* Bischop (resp.). (*a*)

Margarine—Sale by retail—In or with a paper wrapper—Margarine Act 1887 (50 & 51 *Vict. c.* 29) *s.* 6.

The respondent sold margarine by retail in thin cardboard boxes with a ribbon of paper round each box to keep it closed. Over ribbon and box was stamped "margarine" in letters a quarter of an inch square. When the appellant bought a quantity of margarine the respondent delivered the box containing it to him wrapped up in an unstamped paper covering, but it was not clear whether the outside paper covering was put on at the request or not of the appellant. The magistrate dismissed a summons against the appellant for selling margarine not in or with a paper wrapper with "margarine" stamped on it contrary to sect. 6 *of the Margarine Act* 1887 (50 & 51 *Vict. c.* 29).

Held, that the dismissal was right.

Per Lord Russell, C.J.: The cardboard box with ribbon constituted a paper wrapper within sect. 6, *even though covered with another wrapper.*

Per Cave, J.: A paper wrapper to satisfy sect. 6 *must be an outer wrapper.*

Case stated by a metropolitan magistrate.

The respondent was the wife of the manager of a shop in Oxford-street, in which margarine of the kind known as Le Dansk was sold. The margarine was not exposed for sale, being kept in a cupboard which was only opened to take out what was from time to time sold. In the cupboard was a label marked margarine, but there were no notices about the shop to show that Le Dansk was not pure butter.

On the 21st Jan. Toler bought from the respondent two pounds of Le Dansk. It was handed to him in a thin cardboard box with the word "margarine" stamped partly on the box and partly on a ribbon of paper put round the box to keep it closed. This box was, before Toler received it, wrapped up in a piece of paper not having the word "margarine" stamped upon it, but it was not clear whether this outer wrapper was put on by the respondent in the ordinary way of business or at Toler's request. Toler summoned the respondent for having sold margarine by retail and not having delivered the same in or with a paper wrapper on which was printed in capital letters not less than a quarter of an inch square "margarine" contrary to the provisions of sect. 6 of the Margarine Act 1887 (50 & 51 Vict. c. 29). The magistrate dismissed the summons. Toler appealed.

Fletcher Moulton, Q.C. (with him *Morton Smith*), for the appellant.—The margarine sold here was sold either in a package in which case the letters of the word margarine not being three-quarters of an inch square were too small, or in a paper wrapper, in which case the wrapper is the outer covering, which here had not printed on it the word "margarine" at all.

Bonsey (with him *George Elliot* and *Fitch*) cited the case of

Jones v. *Jones*, 58 J. P. 653.

Lord Russell, C.J.—The dismissal must stand. The substance of the charge is that the respondent sold margarine without a wrapper bearing the word "margarine" in letters of a certain size contrary to the provisions of sect. 6 of the Margarine Act. Now, sect. 6 consists of three special provisions, each applicable to the sale of margarine under different circumstances. The first provision is that "every package, whether open or closed, and containing margarine, shall be branded or durably marked "margarine" on the top, bottom, and sides, in capital letters, not less than three-quarters of an inch square." This provision applies to sales in considerable quantities, and has no bearing on sales such as appear here. The second provision is, "And if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square 'margarine.'" That is to say, when it is exposed for sale, it must be labelled in such a way that persons going into the shop may see what it is. Here the margarine was not exposed. The third provision is, "Every person selling margarine by retail, shall in every case deliver the same to the pur-

(*a*) Reported by J. A. Strahan, Esq., Barrister-at-Law.

chaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square 'margarine.'" The question here is whether in the sale in this case this provision was duly observed. Now, it is important to note the words "in or with" since they show that the object of the act is not to secure that the margarine shall be wrapped or folded in a paper stamped margarine; but that the purchaser should be supplied with clear means of knowing what he is getting. What are the facts of this case? The small parcel of margarine sold is put into a box made of the same material as paper. The box is stamped margarine in letters at least a quarter of an inch square. The stamped box is put into a ribbon of paper, on or with which is an advertisement with the word margarine stamped on it in letters of similar size. Now, I would hesitate a long time before holding that the paste-board box is not a paper wrapper within the Act, but taking the box and the paper ribbon together I have no hesitation in holding that it is. It is, however, contended that the stamped wrapper in order to satisfy the Act must be the outer wrapper. A wrapper is none the less a wrapper, because it is afterwards wrapped up in another wrapper. This view is strongly supported by the case of *Jones* v. *Jones*, cited by Mr. Bonsey. At the same time I think it is a pity the magistrate was not asked at whose motion the outer wrapper was put on. If it was put on by the respondent to conceal the word margarine the proceeding was to say the least highly censurable; but if, as seems more probable, it was put on at the request of the appellant, the object could only have been to trap the respondent into a breach of the Act, and it would be monstrous to prosecute.

CAVE, J.—I have arrived at the same conclusion, and will merely state my reasons why we do not give the respondent costs. I cannot help thinking that to satisfy sect. 6 it is the outer paper wrapper which must be stamped. Considering the object of the Act is to give the purchaser notice of what he is buying, I cannot see how the fact that an inner wrapper is stamped can be considered a compliance with the Act. Here, however, we do not know whether the outer wrapper was put on at the request of the vendee or by the vendor in the ordinary way of business. If it was put on at the request of the vendee I cannot understand how one can think it was put on for any other purpose than trapping the vendor into a breach of the Act. If put on by the vendor as the ordinary way of transacting business, then the object plainly was to evade the Act. In either case I am inclined to think that an offence was probably committed; but in the former case the penalty should not be more than one farthing. I am strongly of opinion that the outside wrapper was put on at the request of the vendee, and therefore I think the appeal should be dismissed, but as probably a technical offence was committed it will be dismissed without costs.

Solicitors: for the appellant, *C. Urquhart Fisher*; for the respondent, *Neve* and *Beck*.

Saturday, Oct. 26.

(Before CAVE and WRIGHT, JJ.)

TANNER (app.) *v.* OLDMAN (resp.). (*a*)

Metropolis—Building structure or work—Contract entered into before passing of Act—London Building Act 1894 (57 *&* 58 *Vict. c.* 213), *s.* 212.

The exemption from the operation of the London Building Act 1894 (57 *&* 58 *Vict. c.* 213) *contained in sect.* 212 *applies to contracts entered into before the passing of the Act, not merely for the erection of specific buildings, but also for the carrying out of a general scheme of buildings, the plans and details of which have not been yet agreed upon.*

Shortly before the passing of the London Building Act 1894 *A. entered into a contract with B. to erect a number of houses on certain lands belonging to B., and afterwards to take a lease of these lands at a certain rent. The plans, elevations, and specifications of the houses were to be subject to the approval of B., and the houses were to be built at the rate of ten each year till* 1899, *when the contract would be completely executed. After the London Building Act came into operation, A. proposed to build a number of these houses in accordance with the Metropolitan Building Act* 1855, *but in contravention of the London Building Act* 1894.

Held, that the exemption contained in sect. 213 *entitled him to do so.*

SPECIAL CASE stated by a metropolitan magistrate.

On the 3rd Jan. 1894 the respondent entered into an agreement with the Master and Four Wardens of the Fraternity of the Act and Mystery of Haberdashers (hereinafter called the Company), to erect not less than forty-three houses on four plots of land, situated in the district of Hatcham, of which plots the company were the owners. These houses were to be built at not less than a given expense, and of such classes and descriptions, in such position, in such manner, and otherwise as should have been previously approved by the company's surveyor. Six of them were to be completed, and in all respects fit for habitation, on or before the 25th March 1895; ten more on or before the 25th March 1896; ten more on or before the 25th March 1897; ten more on or before the 25th March 1898; and the remaining houses on or before the 25th March 1899. The said works were to be executed in accordance with the regulations of the Metropolitan Building Act 1855, and any other Act of Parliament, whether local or general, for the time being affecting the premises, and of the Greenwich District Board of Works, and of any body having jurisdiction over the premises. The agreement also fixed the rents which were to be paid by the respondent to the company in respect of the said land and houses, and provided for the granting of leases by the company to the respondent of the land and houses for terms of eighty-one years from the 25th March 1894; but nothing in the building agreement was to be construed into a demise at law of the land, or any part of it, so as to vest any estate in the respondent, who was to have a right to enter upon the land at any time or times previously to the 25th March 1899, for the purpose only of building

(*a*) Reported by J. A. STRAHAN, Esq., Barrister-at-Law.

and executing the said works. And, if the respondent should fail in the performance of all or any of the provisions of that agreement, the company should have power, by notice in writing, to determine the same, and enter upon the land, and all building materials and articles thereon, and to retain the same as their own absolute property.

This agreement was entered into *bonâ fide* without any intention of evading the London Building Act 1894 (57 & 58 Vict. c. 213), which passed on 22th August 1894, and came into operation on 1st January 1895.

On or about the 16th March 1895 the respondent served upon the appellant, who is the district surveyor under the London Building Act 1894 for the district of Hatcham, a notice under sect. 145 of the London Building Act. This notice referred to five houses to be erected on one of the plots before mentioned in pursuance of the agreement. At the same time, the respondent showed the appellant plans from which it appeared that the proposed houses, while in accordance with the provisions of the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), that being the Act relating thereto in force immediately previous to the passing of the London Building Act 1894, would be in contravention of those of the London Building Act 1894. Whereupon the appellant served the respondent with notice of objections under sect. 150 of the latter Act. The respondent being dissatisfied with the surveyor's decision appealed to the magistrate. The magistrate disallowed the objections, being of opinion that the contract under which the works were to be carried out was a contract entered into before the Act was passed, and therefore by sect. 212 not within the operation of the Act.

Sect. 212. Notwithstanding anything contained in this Act a building structure or work which has been commenced before and is in progress at the commencement of this Act, or which is to be carried out under any contract entered into before the passing of this Act, may be completed subject to and in accordance with the provisions of the Acts relating thereto as in force immediately previous to the passing of this Act.

The surveyor appealed.

Cripps, Q.C. (with him *Daldy*) for the appellant. — The exemption contained in sect. 212 applies only to contracts for the carrying out of specific buildings. The agreement here is not a building contract as that phrase is known in the trade, but an agreement for the development of a building estate. Evidently the parties anticipated that any new legislation would affect the agreement as a clause requiring the builder to observe the provisions of such legislation is introduced. [CAVE, J.—That clause cannot affect the interpretation of the Act. It was introduced merely to protect the building owner.]

Jelf, Q.C. (with him *J. P. Grain*) for the respondent. — In the Metropolitan Building Act 1855 there is a clause (sect. 110) making that Act expressly applicable to existing contracts, and making provision for compensation for any damage arising through such application. If the present Act was intended to apply in the same way we might reasonably expect a similar clause here.

Cripps, Q.C. in reply.—This being a contract for the development of a building estate its execution might have stretched out over any number of years. But sect. 110 of the Metropolitan Building Act 1855 was repealed by the Statute Law Revision Act of 1875 (38 & 39 Vict. c. 66), and therefore was regarded by the Legislature as a temporary measure not applicable to contracts which might continue for an indefinite time, such as this one. Sect. 212 of the London Building Act 1894 is *in pari materiâ* with sect. 110 of the Metropolitan Building Act.

CAVE, J.—The point we are called upon to decide is a comparatively small point, in one sense, and necessarily does not admit of very much argument one way or the other. On the other hand it is a point of importance for persons who contract for the erection of buildings. The language of the Act is this. [Reads sect. 212.] Now, in this case is a building structure to be carried out under this contract of Jan. 1894? I think it is. It appears to me there can be only one answer to that question. There are several building structures which are to be carried out under that contract, and it is by virtue of that contract, and by virtue of that contract alone, that they can be carried out, because, but for that contract, the builder would be a trespasser in entering upon the lands and putting buildings upon them. Mr. Cripps has asked us to narrow the meaning of the word "contract," and read it as if the word were "specification"—in other words, to hold that it was a specification which is referred to in the Act. If that is what the Legislature had meant nothing would have been more easy for them than to have substituted "specification" for "contract." Now a specification is generally no doubt part of a building contract, but it does not follow that there must be a specification in a contract to make it a contract under which the building is carried out. When these buildings are carried out at the time set out for them in the contract it seems to me they will be carried out under the contract, and under no other contract whatever, and therefore that the case comes within the clear and plain meaning of the Act. I see no ground upon which we can restrict the meaning of the word contract in the way suggested. In my judgment, therefore, the magistrate was right.

WRIGHT, J.—I am of the same opinion. I cannot help thinking that, when you get an Act of this description passed through Parliament as a local and personal Act, capable of being opposed in Parliament by anyone having interests affected by it, you ought to treat a clause like sect. 212 as something in the nature of a compromise agreement by which opposition is bought off. I think, therefore, rather a wide construction ought to be given it. At any rate, in the present instance, I do not see any sufficient ground for narrowing it at all below its width according to the natural meaning of the words.

Appeal dismissed with costs.

Solicitor for the appellant, *W. A. Blanchard.*

Solicitors for the respondent, *Watson, Sons*, and *Room.*

Monday, Nov. 11.

(Before Lord RUSSELL, C.J., GRANTHAM and WILLIAMS, JJ.)

SANDFORD (app.) *v.* BEAL (resp.). (*a*)

Registration of electors — Notice of objection — Omission—Mistake—Amendment.

The omission of merely formal matter in a notice of objection to a voter when such omission arises through a mistake, and is not of such a nature as to make it likely to mislead or cause hardship, may, and should, be amended by the revising barrister.

B. served notice of objection to A, whose name was on the list of voters for the parish of St. S. in the parliamentary borough of E. The notice set out the number of A. on the list and the grounds of objection, but omitted to state the parish in the list of which A.'s name appeared, contrary to the form given in the Registration Order 1895. *There were twenty-seven parishes in the borough of E. The revising barrister held that the omission rendered the notice bad, but having found as a fact that it arose through mistake, and had misled no one and caused no hardship, he amended it and allowed the objection.*

Held, that the revising barrister was right.

Bridges *v.* Miller (20 *Q. B. Div.* 287) *distinguished.*

SPECIAL CASE stated by the revising barrister at Exeter:—

In the parliamentary borough of Exeter there are twenty-seven separate parishes or precincts. Each of these has its own overseers, and there are besides nineteen different assistant overseers. One parish is in two, another in three, and another in four separate wards. There is a list of freemen of the borough and of each parish; and each ward of a parish has usually an occupiers list of three divisions, a lodger list, and a list of freeholders with rights reserved to vote for the parliamentary elections of the borough.

The appellant's name appeared on the D. No. 1 List of Occupiers in the parish of St. Sidwell, St. Sidwell's Ward, Division 1, as follows:

1337.—Sandford, Joseph. 16, Salem-place.—Dwelling-house.—Salem-place.

The respondent served a notice of objection on the appellant. This notice, as far as it is necessary for present purposes to cite it, was as follows:

To Mr. Joseph Sandford.—No. on list, 1337.—I hereby give you notice that I object to your name being retained on Division 1 of the Occupiers List as a parliamentary voter for the parliamentary borough of Exeter, and as a burgess for the municipal borough of Exeter, on the following grounds, &c.

This notice was an old form in use under the Registration Order 1889, but under the Registration Order 1895 (issued by the Local Government Board under the powers conferred on Her Majesty in Council by sect. 76 (7) of the Local Government Act 1888 (51 & 52 Vict. c. 41), the notice should have contained after the words "Division 1 of the Occupiers List" the further words "of electors for your parish of St. Sidwell."

Sixty other notices similar to that served on Sandford had been served on other persons in the occupiers list, and their cases had been consolidated with that of the appellant.

(*a*) Reported by J. A. STRAHAN, Esq., Barrister-at-Law.

On the notice of objection coming before the revising barrister he held that the omission of the name of the parish rendered the notice bad. He found, however, as a fact, that the objector (the respondent) had not intended to mislead, that the omission arose purely through mistake, and that no mistake, hardship, misleading, or deception had arisen or was likely to arise from the omission. This being so, he held that, under sect 28 (2) of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), he was able to amend the notice so as to bring it into conformity with the Registration Order 1895, and he did so amend it. On a ground stated in the notice so amended he held that the appellant's vote was bad, and he expunged his name from the list. There was the same result in the sixty other notices of objection already mentioned. Sandford and the sixty others whose votes were disallowed appealed.

E. U. Bullen, for the appellant, contended that the revising barrister had power to amend mere mistakes, not to supply omissions. [Lord RUSSELL, C.J.—The barrister has found this is a mistake.] But in finding facts, the barrister must exercise a judicial discretion. If this was a mistake at all, it was a mistake of law not of fact. The revising barrister has no power to make such an amendment as would turn a bad objection into a good one:

Bridges v. *Miller*, 20 Q. B. Div. 287.

He also cited

Bollen v. *Southall*, 41 L. T. Rep. 470; 15 Q. B. Div. 461;

Mortlock v. *Farrer*, 5 C. P. Div. 73.

Ward Coldridge, for the respondent, was not called upon to argue.

Lord RUSSELL, C.J.—The learned counsel has shown his ingenuity in finding something to say in support of this appeal, but really it is unarguable. The notice of objection was to the name of Joseph Sandford. It specified his number on the list as 1337. Though, as counsel pointed out, there are some twenty-seven parishes in the division, and each has a list beginning with No. 1—that is the numbering of the electors, for the whole division is not consecutive—yet it was not, nor could it be, suggested that Joseph Sandford appeared on any other list than that for St. Sidwell's under the number 1337 or under any other number. Such being the case, the revising barrister reasonably and properly found that the omission of the name of the parish was not misleading or calculated to mislead. He held nevertheless that it rendered the notice of objection bad. I am not prepared to say that his decision here was right. Much might, I think, be said on the other side. But assuming the notice was bad, why should the barrister not amend it? He has found that the omission was a pure mistake, and that it was not misleading. Under such circumstances he could and should amend. The case of *Bridges* v. *Miller*, so much relied on by the learned counsel, has no bearing on this case. There there was no proper ground of objection stated in the notice of objection, and the revising barrister amended so as to supply one. Here the objection is in substance good, and there is merely an inaccuracy in its form. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Templeton* and *Cox*, agents for *A. E. Dunn*, Exeter.

Solicitors for the respondent, *Preston, Stow,* and *Preston*, for *Friend* and *Beal*, Exeter.

Monday, Nov. 11.

(Before Lord Russell, C.J., Grantham and Williams, JJ.)

Drax (app.) *v.* Ffooks (resp.). (*a*)

Registration of electors — Parochial electors— Ownership qualification — Married woman — Parliamentary register — Local Government Act 1894 (56 *& 57 Vict. c.* 73).

The only qualification entitling a person to be on the register of parochial electors established by the Local Government Act 1894 (56 *& 57 Vict. c.* 73) *is the fact that the person in question is on the parliamentary register or the local government register for the parish. Accordingly a married woman owning but not occupying property in a parish, being debarred by want of occupancy from getting on the local government register, and being debarred by her sex from getting on the parliamentary register, cannot be placed on the register of parochial electors.*

A., a married woman, owned freehold property in the parish of B. sufficient to qualify her to be on the register of parliamentary voters of the parish, had she been a man. Her husband had no interest in this property, nor was he on the register in respect of it. She did not, however, occupy any property in the parish. She claimed to be put on the register of parochial voters for the parish in respect of her property qualification. The revising barrister disallowed her claim.

Held, that his decision was right.

Special case stated by the revising barrister for Northern Dorset:—

The appellant was a married lady living more than three miles from the parish of Milborne St. Andrew. She was owner in her own right of freehold property in that parish of sufficient value to sustain a claim on her part, had she been a man, to be placed on the list of freeholders for the parish entitled to vote at parliamentary elections. Her husband was not interested in this freehold property, nor was he on the register in respect of it.

The appellant claimed in respect of this property to have her name entered on the parochial electors list of Milborne St. Andrew. The claim was perfectly regular in form, and was duly published. It was unopposed.

On the claim coming before the revising barrister he held that, by sect. 43 of the Local Government Act 1894 (56 & 57 Vict. c. 73), a married woman could only claim to be placed on the parochial electors list in respect of an occupation qualification, such as would entitle her if unmarried to be on Division 3 of the occupiers list of voters for the parish; and he, therefore, disallowed the present claim as bad in law. The claimant appealed. Edward Archdall Ffooks, the clerk of the County Council of the administrative county of Dorset, was named respondent by the revising barrister.

(*a*) Reported by J. A. Strahan, Esq., Barrister-at-Law.

The following are the sections of the Local Government Act 1894 (56 & 57 Vict. c. 73) referred to in the argument and judgment on appeal:—

Sect. 2.—(1.) The parish meeting for a rural parish shall consist of the following persons, in this Act referred to as parochial electors, and no others, namely, the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish.

Sect. 3.—(1.) The parish council for a rural parish shall be elected from among the parochial electors of that parish or persons who have during the whole of the twelve months preceding the election resided in the parish or within three miles thereof. . . . (2.) No person shall be disqualified by sex or marriage for being elected or being a member of a parish council.

Sect. 20. (2.) A person shall not be qualified to be elected or to be a guardian for a poor law union unless he is a parochial elector of some parish within the union . . . and no person shall be disqualified by sex or marriage for being elected or being a guardian. . . .

Sect. 43. For the purposes of this Act a woman shall not be disqualified by marriage for being on any local government register of electors, or for being an elector of any local authority, provided that a husband and wife shall not both be qualified in respect of the same property.

Sect. 44. —(1.) The local government register of electors and the parliamentary register of electors, so far as they relate to a parish, shall together form the register of the parochial electors of the parish. . . .

(5.) Where in that portion of the parliamentary register of electors which relates to a parish a person is entered to vote in a polling district other than the district comprising the parish, such person shall be entitled to vote as a parochial elector for that parish, and in addition to an asterisk there shall be placed against his name a number consecutive with the other numbers in the list.

(6.) Where the revising barrister in any list of voters for a parish would (*a*) in pursuance of sect. 7 of the County Electors Act 1888 (51 Vict. c. 10), place an asterisk or other mark against the name of any person; or (*b*) in pursuance of sect. 4 of the Registration Act 1885 (48 & 49 Vict. c. 15) erase the name of any person otherwise than by reason of that name appearing more than once in the lists for the same parish; or (*c*) in pursuance of sect. 28 of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), as amended by sect. 5 of the Registration Act 1885, place against the name of a person a note to the effect that such person is not entitled to vote in respect of the qualification contained in the list; the revising barrister shall, instead of placing that mark or note, or erasing the name, place against the name, if the person is entitled to vote in respect of that entry as a county elector or burgess, a mark signifying that his name should be printed in Division 3 of the list, or if he is entitled to vote only as a parochial elector, a mark signifying that he is entitled to be registered as a parochial elector, and the name so marked shall not be printed in the parliamentary register of electors, but shall be printed, as the case requires, either in Division 3 of the local government register of electors or in a separate list of parochial voters.

Alexander Macmorran for the appellant.—The point is, whether a married woman can claim in respect of an ownership qualification to be placed on the parochial register. The revising barrister held that the effect of sect. 2 (1) was that no one was entitled to be put on a parochial register except he or she was first on the local government

register, for which occupation of property within the parishes is necessary, or on the parliamentary register on which only males are entitled to be placed as voters:

Chorlton v. *Lings*, L. Rep. 4 C. P. 374;
Chorlton v. *Kissler*, L. Rep. 4 C. P. 397.

I contend that sect. 3 (2) abolishes all disqualifications of sex or marriage as far as election to a parish council is concerned, and since the appellant lives more than three miles from the parish her sex will be made a disqualification if it keeps her off the parochial register (sect. 3 (1). See also sects. 20 (2) and 43. I contend further, that, under sect. 44 (5) and (6), it is clear that persons may be placed on the parliamentary register who are not entitled to vote at parliamentary elections. [Lord Russell, C.J. referred to sect. 4 (9) of the Registration Act 1885 (48 & 49 Vict. c. 15).]

No counsel appeared for the respondent.

Lord Russell, C.J.—I must express the regret of the court that in considering this important point we have not had the assistance of counsel for the respondent. In my judgment, however, the revising barrister was right, and the appeal must be dismissed. The question is, whether a married woman can claim, in respect of the ownership of property, to be placed on the parochial register as a parochial elector. The question turns on certain sections of the Local Government Act of 1894. Sect. 2 (1) of that statute enacts in effect that parochial electors shall be made up of two classes and of two classes only—those on the local government register who for shortness may be called those with a burgess qualification, and in the second place those on the parliamentary register. By sect. 44 (1) the local government register and the parliamentary register are together to make the parochial register. To get on the parochial register it is necessary, then, to get upon either the local government register or the parliamentary register. But to get on the local government register it is necessary to occupy property in the parish The appellant does not occupy any such property. Can she then get on the parochial register as a parliamentary elector? The lady cannot get on the parliamentary register by reason of her sex. It is possible her name might get on the list as the owner of freehold property, but whether this be so or not it cannot be on the parliamentary register for any effective purpose. Counsel for her has contended that sect. 3 (2) provides that no person shall be disqualified by sex or marriage for being elected a member of a parish council, and by sect. 43 it is provided that a woman shall not be disqualified by marriage for being on any local government register of electors or for being an elector of any local authority. As to both these enactments this observation may be made: Neither professes to give a qualification. All that either does is to prevent an existing qualification being taken away. As I understand them, their true reading is, that if a woman is otherwise qualified to be elected the fact that she is a woman, or is a married woman, will not be sufficient to take her qualification away. Counsel has also referred to sect. 44 (5) and (6). Those provisions, however, refer merely to what are known as duplicate qualifications for the parliamentary vote. They are intended to retain for parochial purposes voters whose names would but for them have been erased from the lists of all parishes save one. Instead of erasure an asterisk or other mark is to be placed after such names. These provisions have no application here, for the simple reason that women's names never properly appeared, either once or in duplicate, on the parliamentary register.

Grantham, J.—I am of the same opinion. At first I had some difficulty, but that difficulty arose from the fact that I did not sufficiently realise for the moment that sect. 43 applies merely to the disqualification of marriage, not that of sex, and that sect. 3 refers to sex. Remembering this, it is clear that all the Act says is that, if a married woman is qualified to be put on the register, the mere fact of sex or marriage will not disqualify her. The Act itself confers no new qualification.

Williams, J.—This lady is not disqualified on account of her sex, but because she has not the statutory qualification for the parliamentary franchise. It may be that the reason she is not qualified for the parliamentary franchise is because of her sex. But the reason she is not entitled to be put on the parochial list is not because she is a woman, but because she has not the parliamentary franchise. *Appeal dismissed.*

Solicitors for the appellant: *Bell, Brodrick*, and *Gray*, agents for *Parker*, Blandford.

June 13, *July* 29, *and Aug.* 8.

(Before Pollock, B. and Wright, J.)

The London County Council (apps.) *v.* The Churchwardens and Overseers of the Parish of Lambeth (resps.). (*a*)

Poor rate—Beneficial occupation—London County Council—Purchase and occupation of lands to be held as a public park—Liability to be rated—London Council (General Powers) Act 1890 (53 *&* 54 *Vict. c. ccrliii.*), *ss.* 4. 5.

The London County Council are liable to be rated for the relief of the poor in respect of their occupation of lands and buildings, which they have purchased and laid out as a public park and recreation ground, under the provisions of the London Council (General Powers) Act 1890, *which empowers, but does not compel, the council to purchase certain lands to be laid out and maintained as a public park.*

The proper basis of assessment in such cases considered.

Case stated by consent and by order of Bruce, J., pursuant to sect. 11 of 12 & 13 Vict. c. 45, upon an appeal by the London County Council to the Court of Quarter Sessions for the county of London against a poor rate.

1. In a poor rate made by the respondents for the parish of Lambeth, on the 7th April 1894, the appellants are assessed as occupiers of the premises and hereditaments hereinafter mentioned, in the several amounts shown by the extract from the rate-book as follows:

No. 1473. Name of occupier: London County Council. Name of owner: ——. Description of pro-

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

perty rated: House. No. of house and name or situation of property: Norwood-road. Gross estimated rental: 184*l*. Rateable value: 154*l*. Poor rate at 1*s*. 9*d*. in the £: 13*l*. 9*s*. 6*d*.

No. 1475. Name of occupier: London County Council. Name of owner: Blackburn, JJ. Description of property rated: Land. No. of house and name or situation of property: Norwood-road. Gross estimated rental: 180*l*. Rateable value: 171*l*. Poor rate at 1*s*. 9*d*. in the £: 14*l*. 19*s*. 3*d*.

No. 1483. Name of occupier: London County Council. Name of owner? ——. Description of property rated: Lodge. No. of house and name or situation of property: Norwood-road. Gross estimated rental: 12*l*. Rateable value: 10*l*. Poor rate at 1*s*. 9*d*. in the £: 17*s*. 6*d*.

No. 1487. Name of occupier: London County Council. Name of owner: ——. Description of property rated: Cottage. No. of house and name or situation of property: Norwood-road. Gross estimated rental: 30*l*. Rateable value: 24*l*. Poor rate at 1*s*. 9*d*. in the £; 2*l*. 2*s*.

2. The appellants, the London County Council, are the governing body of the administrative county of London, and under divers Acts of Parliament hold, maintain, and regulate certain public parks, recreation grounds, and open spaces.

3. Previously to the passing of the London Council (General Powers) Act 1890 (53 & 54 Vict. c. ccxliii.), the said hereditaments and premises, known collectively as Brockwell Park, were in private ownership, and were included in the valuation list for the time being in force in the said parish and upon which the poor rate mentioned is based, and were assessed to the poor rate of the said parish.

4. The appellants, pursuant to the powers conferred by the said Act of 1890, in the year 1891 acquired the said hereditaments, and the same were conveyed to them by deed dated the 26th March 1891 as hereinafter mentioned.

5. From the time the said hereditaments were acquired by the appellants, the appellants have been rated and assessed for the said hereditaments to the poor rates of the said parish made respectively on the 11th April 1891, the 26th Sept. 1891, the 9th April 1892, the 29th Sept. 1892, the 8th April 1893, and the 7th Oct. 1893; but payment of the rates for the said hereditaments was not demanded in respect of the poor rates made on 11th April 1891, the 26th Sept. 1892, and the 8th April 1893. The house and land were from the 26th March 1891, until the 6th June 1892, unoccupied and unused.

6. Sects. 4 and 5 of the said London Council (General Powers) Act 1890 (53 & 54 Vict. c. ccxliii.) are as follows:

(4.) The council may purchase and take by agreement certain lands in the parish of Lambeth, in the county of London, known as Brockwell Park, as shown on the plan of Brockwell Park, and when the council shall have acquired the same, they shall hold the same and every part thereof as a park, and shall lay out and maintain and preserve the same and every part thereof as a park, for the perpetual use thereof by the public for exercise and recreation, and may from time to time exercise all necessary powers for the maintenance and preservation of the same as a park, provided that the council may, if they think fit, inclose the said lands or any other part thereof with a view to the better or more effectual preservation thereof for public use, and retain or remove, alter, enlarge, or adapt any buildings thereon, for any purpose which they may think conducive to the public benefit.

(5.) The council may erect and maintain in the said park huts and lodges, for the accommodation of keepers, constables, and other persons employed by the council in connection with the maintenance and management of the park, and also such other convenient and ornamental buildings as they may think requisite for refreshment rooms, band stands, conveniences, and other like purposes.

7. By the before-mentioned deed of the 26th March 1891 the said hereditaments were conveyed to the appellants to hold the same unto and to the use of them, their successors, and assigns for ever to the end and intent that the same may be used as and for a public park under the provisions of the said London Council (General Powers) Act 1890, and they now hold the same under the powers and subject to the provisions in the said Act contained.

8. Brockwell Park occupies about 78 acres, and is inclosed on all sides,

9. The house, numbered 1473 in the said rate-book (formerly the mansion house), is a two-storied building which has been divided by the appellants into two parts, completely separated from one another by partition walls, and entered by separate entrances being the original front and back doors respectively of the old mansion house.

10. Of the part which is entered by the original front door, the ground floor and basement are occupied as refreshment rooms, the same being held for the year ending 31st March 1895, under a licence or agreement, while the upper floor, consisting of several good-sized rooms, is unused. Such last-mentioned rooms might be let to a tenant from year to year for 20*l*. a year, if right of access at all times could be given to him consistently with the provisions of the said Act and the bye-laws hereinafter mentioned.

11. The part which is entered by the original back door, consisting of eight living rooms and a small office is occupied by the resident superintendent of the park and his family. Such resident superintendent is reasonably necessary for the protection and proper management of the said park for the purposes of the said Act. He is paid by the appellants a salary, in fixing which is taken into account the fact that he has the rooms rent free, water and gas being found by the appellants. Similar accommodation in the way of rooms could not be found for him in the immediate neighbourhood of the said park for a less rent than 40*l* a year as tenant from year to year.

12. The buildings, yard, and premises formerly used as coachhouse, stables, and outbuildings in connection with the said mansion house, have been partly converted for public use into a gymnasium for children, conveniences for men and women and a children's shelter, and partly into a cottage for a constable to live in, consisting of four living rooms, a carpenter's shop for the use of men specially employed by the appellants on necessary repairs in the said park, a lock-up store, an office, a tool shed, and a bothy for the men to have their meals in. The said cottage, shop, store, shed, and bothy, as well as the said gymnasium, conveniences, and shelter are all properly used as aforesaid by the appellants for the purposes of managing the said park under the said Act, and it is considered necessary by the

County Council, and is proper for the protection of the said park and its contents that the said constable should reside in the said cottage. Such last-mentioned cottage could not be let except at a merely nominal rent to any one except in connection with the whole establishment formerly constituting the mansion house.

13. The lodge and cottage numbered 1483 and 1487 in the said rate-book are small cottages, the former containing three rooms, and the latter containing five rooms and having a small yard at the back, the only entrance to each being inside the park gates. These cottages are used as residences for two constables who are allowed by the appellants to occupy them rent free in consideration of the extra duty they undertake of looking after the gates of which they have keys and protecting the park at night. It is considered necessary by the County Council, and is proper for the protection of the said park and its contents, that the said constables should reside in the said cottages. If the said cottages could be let by the County Council unhampered by the provisions of the said Act and the bye-laws hereinafter mentioned they would fetch rents sufficient to support the figures in the said rate-book.

14. All the land in the said park, numbered 1475 in the said rate-book, is open to the public at large as a park and recreation ground during the day time; but at night the gates are locked and the public are not admitted. This is necessary for the protection of the park and to prevent its being turned to improper uses at night.

15. Certain bye-laws have been made and are applicable to the said park amongst other open spaces under the 14th section of the said Act and the constables are by warrant required to enforce the same under the 17th section of the said Act. By No. 1 of such bye-laws (the whole of which may be referred to by either party) the following acts and things (amongst others) are prohibited and declared to be offences, viz. :

> 36. Refusing to leave any park, garden, or other inclosed place at or after the time of closing the gates in the evening if requested to do so by any officer or police constable, or wilfully remaining therein after the gates are closed in the evening, or climbing on or over the gates, fences, or railings.

And by No. 2 penalties are provided for a breach of the bye-laws.

16. The grass in the said park is kept down by the appellants so as to be in a fit state for public use partly by mowing and partly by grazing. The grazing is done under an agreement or licence with a licensee, by which such licensee is entitled to the grazing of this and several other public open spaces in consideration of a payment. The above is a reasonable and economical course for the appellants to take for the purpose of carrying out their duties under the 4th section of the said Act.

17. Amongst other arrangements reasonable and proper for the recreation of the public the appellants have laid out and maintain thirty lawn tennis grounds and thirteen cricket pitches in the said park.

18. The necessary expenses of maintaining the park as a whole with the buildings on it for the purposes of the said Act far exceed any sums of money which are or could be derived from licences for the supply of refreshments or for grazing rights or otherwise. The actual expenses exceed 2000*l.* a year.

19. If the hereditaments assessed in the said rate had remained in the same state of use and occupation in which they were prior to the passing of the said Act the rateable value thereof would have been sufficient to support the figures set out in the said rate.

20. The total purchase money for the said park in 1891 was 117,000*l.*, of which 62,000*l.* only was provided by the appellants, the balance being made up of contributions from other public bodies.

21. If the appellants had had a duty to provide an open space for the public in the said locality, and for the purpose of carrying out that duty had had the power and the wish instead of purchasing the said park, to take it as lessees or tenants and pay a rent for the same, they would have had to pay a rent for the same sufficient to support the figures in the said rate.

22. The respondents contend that the facts as above stated show an occupation of all or some of the said hereditaments by the appellants, and that such occupation was under the circumstances above stated a beneficial occupation, and that even if the occupation of the appellants was in fact not beneficial to them, yet they were properly rated to the relief of the poor in sums justifying the said respective rates.

23. The appellants contend that under the circumstances they are not rateable at all for any portion of the said property, or that if rateable the rateable value is nil.

The questions for the opinion of the court are—(1) Whether the appellants are rateable in respect of all or any and if any which portion of the said hereditaments. (2) If the appellants are rateable whether they are rateable at a nominal amount only in respect of all or any and if any what portion of the said hereditaments.

If the court should be of opinion that the appellants are rateable for the whole of the said hereditaments upon the same basis as their predecessors the late occupiers thereof, then the rate is to stand.

If the court should be of opinion that the appellants are rateable for the whole of the said hereditaments upon the basis that the rateable value depends on what they would have to pay by way of rent if they had rented the said hereditaments instead of purchasing them, then also the said rate is to stand.

If the court should be of opinion that the last preceding supposition is incorrect, but that nevertheless the appellants are rateable for the said hereditaments taken separately on the basis of there being notwithstanding the said Act of Parliament a beneficial occupation of (*a*) the hereditaments formerly comprised in the old mansion house, numbered 1473, (*b*) the land numbered 1475, (*c*) the lodge numbered 1483, or (*d*) the cottage numbered 1487, then the rate is for the purposes only of this case to be amended by changing the rateable value of (*a*) from 154*l.* to 77*l.*, of (*b*) from 171*l.* to 85*l.*, of (*c*) from 10*l.* to 5*l.*, and of (*d*) from 24*l.* to 12*l.* respectively, with corresponding reductions in each case of the gross estimated rentals.

If the court should be of opinion that all the said hereditaments, or any portion or portions thereof, are either not rateable or rateable at *nil*.

then the rate is to be quashed, or quashed *pro tanto* as the case may be.

If the court should be of opinion that none of the above contentions or bases are right, the rate is to be amended in accordance with the judgment of the court whatever it may be.

Bosanquet, Q.C. (*Avory* with him) for the appellants.—The London County Council are not rateable at all for any portion of this property. They occupy the premises solely for the benefit and recreation of the public, and with respect to all such open spaces and public parks acquired by them, and maintained for the benefit of the public, there is no beneficial occupation by the county council, and therefore they are not liable to be rated in respect of the same. The case finds that the necessary expenditure for maintaining the park as a whole for the purposes of the Act far exceeds what the appellants could let the premises for, either for the supply of refreshments, or otherwise in a manner consistent with the objects of the Act; and the appellants cannot let or dispose of any part of the premises, except for the purposes of the Act, as there is no power under the Act to enable them to let these particular premises, corresponding to the power under sect. 9, to let some other premises acquired by them. Moreover the fact that at night the gates are locked, and the public necessarily excluded during that time—a provision which the case finds to be necessary for the proper maintenance of the park—would prevent any tenant taking the house. The occupation here was of no value to the appellants, and that is laid down by the House of Lords as the true test of beneficial occupation, in the case of

The London County Council v. *The Churchwardens, &c., of Erith*, 69 L. T. Rep. 725; (1893) A. C. 562.

There being no beneficial occupation, the appellants are not liable to be rated: *Hare* v. *The Churchwardens, &c., of Putney* (45 L. T. Rep. 337; 7 Q. B. Div. 223), where it was held that the Metropolitan Board of Works were not liable to be rated in respect of Putney Bridge, which they had acquired for the purpose of making it free to the public. Property may be rateable on the possible profits, but here there was no profit, and hence the property is not rateable:

Duke of Buccleuch v. *The Metropolitan Board of Works*, 27 L. T. Rep. 1; L. Rep. 5 H. of L. 418;
Jones v. *The Mersey Docks and Harbour Board*, 12 L. T. Rep. 643; 11 H. of L. Cas. 443;
Mayor, &c., of Lincoln v. *The Overseers of Holmes Common*, 16 L. T. Rep. 739; L. Rep. 2 Q. B. 482.

The cases of *The West Bromwich School Board* v. *The Overseers of West Bromwich* (13 Q. B. Div. 929), reported as *Reg.* v. *The West Bromwich School Board* (52 L. T. Rep. 164), where it was held that a school board were rateable in respect of a school, and *Reg.* v. *The School Board for London* (55 L. T. Rep. 384; 17 Q. B. Div. 738), where it was held that the school board itself ought to be considered as a possible tenant, do not really conflict with the principles above laid down.

Lawson Walton, Q.C. (*Lewis Coward* with him) for the respondents.—The appellants were rightly assessed. There was a beneficial occupation by them, and the cases show that, in estimating the rateable value, the appellants themselves ought to be taken into account as possible or hypothetical tenants of these premises, and that the premises ought to be rated on that basis:

Reg. v. *The School Board for London (ubi sup.).*

Cur. adv. vult.

Aug. 8.—The written judgment of the court (Pollock, B. and Wright, J.) was delivered by

Wright, J.—There are no absolute exemptions from rateability, except (1) express statutory exemptions, and (2) the exemption incident to the appropriation of the land to purposes of public government. With these exceptions, all land is rateable, if its occupation is, or can be beneficial, even though its purpose is merely fiduciary: see *Jones* v. *The Mersey Docks* (*ubi sup.*) per Lord Westbury. The value may, indeed, be nothing or nominal after payment of expenses; and even where there might, in fact, be some value, the statutory test—namely, what it is worth to let by the year—may sometimes preclude assessment. Formerly also it used to be held that there was no beneficial occupation in the case of lands either so used for local public purposes or so appropriated by statute that the hypothetical tenant, taking it from the local authority, could not hope to make any profit out of the land in the actual circumstances, and consequently (as was thought) there could not be found any tenant who would give any rent at all. So long as this view prevailed, many lands and works, the actual occupation of which was obviously beneficial and valuable, though not productive of direct pecuniary profit, escaped assessment. But it was established by the cases of *Reg.* v. *The School Board for London* (*ubi sup.*), *The Mayor, &c., of Burton-on-Trent* v. *The Assessment Committee of Burton-on-Trent* (62 L. T. Rep. 412; 24 Q. B. Div. 197), and finally by the *London County Council* v. *The Churchwardens of Erith* (*ubi sup.*), that the local authority itself must in general be taken into account as a possible tenant to whom the occupation may be beneficial, even if not profitable, and who may satisfy the statutory test, because it might be worth while to pay a rent for what is necessary or beneficial to have, without reference to pecuniary profit or loss from the occupation of the particular land, and the possession of which avoids the necessity or occasion for expenditure for the provision of other and perhaps more costly works. In such cases an upper limit of the beneficial value to the local authority is necessarily the cost or rent at which it could provide or obtain a lease of similar works or lands. That cost or rent is not the absolute measure—one reason being that such a rent might more than represent the cost of purchasing or constructing new works, or the cost might more than represent the rent—nor probably in practice would the assessment very closely approximate to either limit; but either may be an important element in the valuation. There are, indeed, some cases in which even the application of this doctrine will not result in any assessable value. Such would be the case of a bridge which has become dedicated to the public free of toll. In such a case a local authority, owning and occupying the bridge, may have no beneficial occupation at all *quâ* occupier. The only benefit which any one derives, or can derive, is not a benefit from the occupation, but a benefit

as a member of the general public from the dedication, and the local authority considered as a possible tenant, could not find it advantageous to give any rent in order to occupy the bridge, and would not be assessable. But such cases are probably rare, and in most cases of local public works a benefit is derived from the occupation, and is assessable. The only respect in which the present case differs from the case of *Reg.* v. *The School Board for London* (*ubi sup.*), or the case of *The Mayor, &c., of Burton-on-Trent* v. *The Assessment Committee of Burton-on-Trent* (*ubi sup.*), seems to be that in those cases the authority was under an obligation to provide the same or similar accommodation or work, and therefore must almost necessarily find it worth while to pay something for the existing accommodation or work rather than provide a substitute, whereas in the present case the county council are not bound to provide parks. It seems, however, to be obvious that even so the occupation of the park may be beneficial, although not so necessarily beneficial as it would be if some park were obligatory. The park is provided, and is presumably valuable, for purposes of health and recreation, to the inhabitants of the locality, for whom their representatives, the county council, with the assent of Parliament, have thought proper to provide it, and almost certainly there must be some rent which the county council would be willing to give rather than forego this park, or provide another. The result, therefore, is the same as if they were bound to provide one, except that it is or may be less easy to determine what rent they would be willing or would find it worth their while to give. The appeal, therefore, fails in substance, and it remains only to determine what is the proper basis of assessment. We think that none of the suggestions contained in the 23rd paragraph of the case can be regarded as absolutely correct, and we can only remit the case to find what is the beneficial value, subject to the following limitations: No regard ought to be had to the former valuations or assessments made before the park existed as such. The actual cost of acquiring the site and laying out this or a similar park, or the interest on such cost, appear not to be relevant unless in so far as they may tend to show that the council might be willing to pay a rent representing that cost, or, at any rate, a substantial rent, rather than have no park. The rent which they would have to pay for such a park is no criterion, because for many reasons that rent may be more than the possible or actual beneficial value. The valuation ought not, however, in any case to exceed such rent. Lastly, we think that the different parts of the property ought not to be separately assessed. They are occupied as a whole for one purpose, and could not be separately let without interfering with that purpose.

Appeal dismissed. Case remitted.

Solicitor for the appellants, *W. A. Blaxland.*
Solicitor for the respondents, *William Honey.*

Tuesday, Nov. 12.

(Before Lord RUSSELL, C.J., GRANTHAM and WILLIAMS, JJ.)

REG. *v.* JENNINGS AND OTHERS. (*a*)

Industrial Schools Act 1866 (29 & 30 *Vict. c.* 118), *ss.* 14, 15—*Child dealt with under, without fresh summons—Benevolent not penal legislation.*

A child under the age of fourteen was brought before magistrates charged with larceny, which charge was dismissed. Thereupon the magistrates, purporting to act under sects. 14 *and* 15 *of the Industrial Schools Act* 1866, *ordered the child to be sent to an industrial school. No fresh summons was issued against the child other than that charging him with larceny.*

Held, that there was jurisdiction to make the order without a fresh summons, the Industrial Schools Act being not a penal but a benevolent and protective Act for the benefit of children.

RULE *nisi* for a *certiorari* to bring up and quash an order of the justices of Stonehouse division of Devonshire, whereby they ordered one Albert Simons to be sent to an industrial school.

The boy attended before the justices upon a summons charging him with stealing a boat. This charge was dismissed, but the magistrates having the child before them, and hearing from the mother who was present that he refused to go to school and associated with young thieves, made an order under sects. 14 and 15 of the Industrial Schools Act that he should be sent to an industrial school.

The father of the child then obtained this rule.

The justices were not represented by counsel.

E. U. Bullen for the applicant.—The justices had no power to make this order upon a summons charging the child with larceny. The proper way of "bringing" a child before justices to be dealt with under sect. 14 of the Industrial School Act is by summons:

Reg. v. *Moore*, 52 J. P. 375.

A person cannot be convicted of au offence different from that charged in the information or summons:

Martin v. *Pridgeon*, 28 L. J. 179, M. C.;
Reg. v. *Brickhall*, 10 L. T. Rep. 385; 33 L. J. 156, M. C.

[Lord RUSSELL, C.J.—I agree, but this Act is a piece of social legislation with the benevolent object of safeguarding the child; and he may be before the magistrates without any fault at all, under sect. 15.] The Act is penal and must be strictly construed.

Lord RUSSELL, C.J.—In this case a rule *nisi* for a *certiorari* has been obtained to bring up an order of justices by which they, purporting to act under the Act 29 & 30 Vict. c. 118, ordered a child of the applicant to be sent to an industrial school. The rule was obtained upon the allegation that the justices had no jusrisdiction to make an order for two reasons: first, that there was no evidence which would bring the child within sect. 14; and secondly, that the justices could not deal with the child at all under the Act unless there was a specific charge brought against him under the Act, and the child was brought before the magistrates upon that charge. As to

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

the first of these reasons, the affidavit of the magistrates satisfies us that there was ample evidence before them to bring the child within sect. 14. As regards the second reason, the child was brought before the magistrates charged with larceny. Now, a number of cases have been cited to show that he could not be dealt with upon another charge, and with those cases I agree. But the question is, have they any application to the statute before us? In my judgment they have not. This is not a statute of a criminal kind. It is rather one of a benevolent and protective kind towards children, and one of its objects is to offer an alternative treatment of children instead of punishing them. The whole scheme of the Act is this, that if a child is brought in any way before justices, and the circumstances make it desirable that he should be dealt with under sects. 14 and 15, then, if the facts of the case justify them in doing so, the justices may deal with the child under those sections. Now, without going into all the facts in this case, it is clear that this child came within those sections. He was troublesome to his parents, and had got into bad company. One of the parents was present, and showed satisfactorily that the child was within the section, and the parent made no objection to the order of the magistrates. I think, therefore, the justices had jurisdiction to make the order, and the appeal must be dismissed.

GRANTHAM and WILLIAMS. JJ. concurred.

Solicitors: *Law* and *Worssam*.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

July 22 and Aug. 12.

(Before WILLIAMS, J.)

Re DENNIS; *Ex parte* DENNIS. (*a*)

Bankruptcy — Money paid into court to meet certain debts—Annulment of receiving order—Application by debtor for payment out six years after payment in—Statute of Limitations —Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *ss.* 35, 36.

By the Bankruptcy Act 1883, *sect.* 35, *the court has power to annul an adjudication on proof that the debts are paid in full, and where an adjudication is annulled all dispositions of property duly made by the official receiver are valid, but the debtor's property shall vest in the appointee of the court, or in default shall revert to the debtor on certain terms, and by sect.* 36 *a debt due to a creditor who cannot be found shall be considered as paid in full if paid into court.*

The court will deal with the annulment of a receiving order upon the same basis that it deals with the annulment of an order of adjudication.

A debtor having paid all his creditors in full except two, who could not be found, and having paid into court the debts of these two, obtained an order annulling the receiving order made against him. No proof had been put in by these two creditors for their debts, nor was any claim made to the money in court. Six years afterwards the debtor applied that the money paid in might be paid out to him.

Held (refusing the application), that the money paid into court belonged to the creditors whenever they liked to come for it, and that the Statute of Limitations did not bar their rights.

But held further, that, if the court were satisfied that there was practically no possibility of the creditors or their representatives turning up and claiming the money, and reasonable security was given by the debtor for the replacement of the money in such an event, the court would authorise the official receiver to pay the money out to the applicant.

THIS was an application by the debtor for an order that certain moneys which had been paid into court might be paid out to him.

On the 19th Nov. 1888 a receiving order was made against the debtor. Subsequent to that date and prior to March 1889 the debtor paid in full the debts of all his creditors except two who could not be found, and whose debts were placed in the statement of affairs as 40*l.* 10*s.* and 13*l.* 10*s.* respectively. On the 12th March 1889 the receiving order was rescinded by the court on the debtor's application. The order rescinding the receiving order stated that the debtor had paid into court the whole amount of the debts for which he could not produce receipts showing they had been paid in full. Neither of the two creditors put in a proof or laid claim to the money in court.

On the 12th April 1895 the official receiver wrote informing the debtor that there was a balance in court to the credit of his estate of 51*l.* 19*s.* 7*d.*, which was held subject to the claims of the two creditors. The official receiver, however, refused to hand it over to the debtor without an order of the court, and this was an application by the debtor that the money might be paid out to him.

J. F. P. Rawlinson for the debtor.—My application is that this money should be paid out to the debtor. The receiving order made on Nov. 19 1888 was by order of the court rescinded on March 12 1889, and though no doubt it is true that sects. 35 and 36 of the Bankruptcy Act 1883 deal only with the annulment of an adjudication, and there is no express provision in that Act with regard to the annulment of a receiving order, still according to the case of *Re Hester; Ex parte Hester* (60 L. T. Rep. 943; 22 Q. B. Div. 632), it would seem that the rescission of a receiving order should be dealt with on the same footing as the annulment of an adjudication. Now sect. 35 provides for the case of the annulment of an adjudication, where, amongst other things, "it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full"; and then sect. 36 goes on to define what is the meaning of "paid in full," and says that any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, and that any debt due to a creditor who can't be found or identified is to be "considered as paid in full if paid into court." In the case of a bond being given where the debt is disputed, the Statute of Limitations applies and begins to run from the date of the bond, and where the money is paid into court the statute begins to run when the receiving order is

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

rescinded. The right of action is suspended while the receiving order exists as the appearance of the debt in the statement of affairs, and the payment into court, operate as an acknowledgement of the debt. But when the receiving order is gone, then the creditor's right of action revives and the statute begins to run. No trust is created by the payment into court, or if any trust is created it is at the most a trust on condition that the debt is proved for, and if this is not done for six years the money returns to the debtor who paid it into court.

Muir Mackenzie for the official receiver.—This money which the debtor claims was paid into court; and money when so paid into court goes to a statutory account, called the "Bankruptcy Estates Account," which is kept by the Board of Trade at the Bank of England. This is all provided for by sect. 74 and sect. 101 of the Bankruptcy Act 1883, and money so paid in cannot be paid out except under the order of the court. The Board of Trade raise no objection to the application, but submit that it is entirely a question for the court.

Rawlinson in reply.

WILLIAMS, J.—I wish to say that in my judgment I ought to deal with the annulment of a receiving order upon exactly the same basis that I should deal with the annulment of an order of adjudication. Annulment of an order of adjudication is governed by the 35th and 36th sections of the Bankruptcy Act 1883. The 35th section says: "Where in the opinion of the court . . . it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication." Then the 36th section says; "For the purpose of this part of this Act, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor, who cannot be found or cannot be identified, shall be considered as paid in full, if paid into court." It is suggested that the present case is within the Statute of Limitations, and that as these creditors have not applied for the amount which was paid into court to cover their claims, that the debtor is entitled to have the money back. I cannot assent to that. If I were dealing with the annulment of an adjudication under these sections it clearly could not be argued. What sect. 36 provides for is, first in respect of disputed debts. Here a bond is sufficient, and in that case it may very well be that the effect of annulling the adjudication, or annulling the receiving order, is to make the Statute of Limitations apply, and I know of nothing which would prevent the statute applying, because in such a case there is no trust in favour of the creditor, and there is nothing that amounts to a payment to take the case out of the statute. But the section makes a difference in the case of debts which are not disputed. There, it does not provide for the giving of a bond, but that the money shall be paid into court. In my opinion it is not paid into court as security at all. It is paid into court for the creditor whenever he likes to come for it. Therefore that contention has entirely failed. Now I am very anxious, if I can, here to help the debtor. It was his money originally; and, if really no one is going to claim the money it does seem rather hard that he should not be able to get it back again. All I can do in the case is this. I will not now make any order that the official receiver shall pay the money back, but I think I may say that if the official receiver is really satisfied that these creditors for whose benefit this money was paid into court cannot be found, or that their personal representatives cannot be found, then, if he reports that, and if the debtor will give a bond, or such other security as the official receiver may think reasonable, to replace the money in case the creditors or their representatives should appear, I will make the necessary order authorising the official receiver to pay the money out. But that is going very far. Considering that this money is, in a sense, paid in in trust for the creditors, in my opinion the court ought not to part with the money unless it is satisfied, first, that there is practically no possibility of the creditor or his representative turning up and claiming the money; and, secondly, even where that is proved, then that reasonable security be given for the replacement of the money.

Solicitors for the debtor, *Morse* and *Simpson*.
Solicitor for the Board of Trade, *W. Murton*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 24 *and* 25.

(Before the PRESIDENT (Sir F. Jeune) assisted by TRINITY MASTERS.)

THE LORD BANGOR. (*a*)

Collision—Fog—Easing, stopping, and reversing—Duty of tug and tow—Regulations for Preventing Collisions at Sea, art. 18.

The obligation which rests on a steamship approaching another steamship in a fog to stop, unless the indications are such as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another, does not rest on a tug and tow; and hence a tug and tow which were being navigated as slowly as possible were held not to blame, although the tug did not stop when there were indications of danger.

THIS was an action *in rem* instituted by the owners of the barque *Clan Galbraith* against the owners of the steamship *Lord Bangor*, to recover damages occasioned by a collision between the two vessels in St. George's Channel on the 12th May 1895.

Shortly before 4.50 a.m. on the day in question the *Clan Galbraith*, a four-masted barque of 1933 tons register, was proceeding down the St. George's Channel on a voyage from Dublin to Swansea. There was a fog, and the *Clan Galbraith*, which was in tow of the tug *Flying Vulture*, was making about one to two knots an hour. The barque's foghorn and the whistle of the tug were being sounded at short intervals. Under these circumstances those on board the *Clan Galbraith* alleged that they heard the whistle of a steamer.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

which proved to be the *Lord Bangor*, a long way off, and about on the port beam. The whistle of the *Lord Bangor* continued to be heard, and appeared to be getting nearer. After a short time the *Lord Bangor* was seen coming towards the *Clan Galbraith* on her port beam, and about a ship's length off, and with her stem she struck the port side of the *Clan Galbraith*.

The plaintiffs alleged (*inter alia*) that those on board the *Lord Bangor* improperly failed in due time or at all to ease, stop, or reverse the engines.

The defendants, on the other hand, pleaded that no foghorn or fog signal was heard from the *Clan Galbraith*, and charged the plaintiffs (*inter alia*) with improperly neglecting to order the tug towing their ship to stop and reverse and with a breach of art. 18 of the Regulations for Preventing Collisions at Sea:

Art. 18. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary.

Aspinall, Q.C. and *Butler Aspinall* for the plaintiffs.—Although a tug and tow are for some purposes regarded as a steamship, there can be no obligation when approaching another vessel to reverse, because such action would throw tug and tow out of command. The duty must be confined to going as slowly as possible whilst remaining in a position to act if required. Here the tug was in fact going as slowly as she could.

Sir *Walter Phillimore* and *Stephens*, for the defendants, *contrà*.—In *The Knarwater* (63 L. J. P. D. A. 65; 6 R. 784) the court seemed to think it was the duty of the tug and tow to stop and act as if they formed a steamship. [The PRESIDENT.—But there the tug and tow were going at a speed greater than was necessary, and made no attempt to slacken it.]

Aspinall, Q.C. in reply.

The PRESIDENT.—This is another of those cases following the recent cases of *The Ceto* (62 L. T. Rep. 1; 6 Asp. Mar. Law Cas. 479; 14 App. Cas. 670), *The Lancashire* (69 L. T. Rep. 250. 663; 7 Asp. Mar. Law Cas. 352, 376; (1894) A. C. 1), *The Knarwater* (*ubi sup.*), and some others, in which questions arise as to the duty of vessels approaching one another in a fog. The law with regard to their conduct has been, perhaps for the first time, enunciated in the case of *The Ceto* (*ubi sup.*), and what it is is now made perfectly clear in the subsequent case of *The Lancashire* (*ubi sup.*). It is, as Lord Herschell expressed it, and as Lord Esher seems to have assumed, "That when a steamship is approaching another vessel in a dense fog, she ought to stop, unless there be such indication as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another." That is to say, as indeed *The Ceto* does say, that art. 18 in these circumstances is applicable, and the principle which it lays down imposes a duty upon a steamship to stop. We have to apply that principle in the case of both these vessels. I will take first the case of the defendants' vessel, the *Lord Bangor*, and see whether or no it was her duty to stop in the circumstances of the case. [His Lordship then reviewed the evidence, and found that, even assuming that the *Lord Bangor* was not in fault in failing to hear the foghorn of the *Clan Galbraith*, which was in fact clearly sounded, she was to blame for not having stopped before the collision when her master knew from the whistles of the tug that there was a vessel drawing across his bows, and had indication of danger. His Lordship proceeded:] Now then as to the other vessel. At first sight it strikes one that what is good for one vessel must be good for the other, and if the *Lord Bangor* heard indications which ought to have led her to suppose that there was risk of collision, in the same way those on the *Glan Galbraith* and her tug must have had the same indications. Of course, the circumstances are not the same, because in their original story those on the *Glan Galbraith* put their case as having heard a whistle on their beam, which continued on their beam. No doubt, therefore, the position was not quite the same as that of a vessel which heard a whistle on her starboard bow, gradually drawing across her bows. Assuming the story of the *Clan Galbraith* to be correct, it seems to me clear that the indications were such as to show that the vessels were approaching one another, and that there might be danger, and hearing the whistle on her port beam, and keeping the same bearing, it certainly could not be the position of vessels passing well clear. That is the view the Trinity Masters take. Then comes a further question, and that is a question which I confess gives me some little trouble from one's want of practical experience in such matters. Therefore I desired to consult the Trinity Masters very clearly in the matter, and to act mainly on their guidance. Assuming, as I now assume, that, if the tug and tow together had been a steamer, and that, according to the rule, she ought to have stopped, does the same obligation exactly rest on the tug and her tow? Now, no one can doubt that the case of *The Knarwater* (*ubi sup.*) shows that many of the ordinary obligations of a steamer are shared by a tug and her tow, because, to a great extent, the tow and tug together partake of the nature of a steamer. They are bound in many cases by the same rules, and there are a great many things which a steamer ought to do which a tow and tug can and ought to do. Therefore there is an obligation on them to do those things. Is that true in this particular case? Assume that the obligation on a steamer was to stop, is there anything in the nature of things in the case of a tow and tug which makes a modification of that rule essential? On this point I have consulted the Trinity Masters, and they tell me that they think there is. In this way. Of course a tug can do a great many things with her tow in the way of stopping and altering her course. If she is approaching another vessel, she can tow ahead or astern, or a variety of things of that kind. But where it is a matter of stopping, apart from the question of casting off, is it practicable for a tug and tow to reduce themselves to a condition of absolute standstill? The Trinity Masters tell me that, in their judgment, it is not, and one can see in that the ordinary common sense of the matter. If a tug absolutely stops what happens? The weight of the wire rope will draw the tow up to the tug, and, if it be a screw, there will be the risk of fouling the propeller. Then it becomes necessary for the tug to go ahead a little bit, and she must draw the tow after her, and so you cannot obtain a position of absolute standstill. In this case was the

movement of the tug and tow more than was necessary, they being a tug and tow? The facts appear absolutely clear that it was about as slow as it possibly could be. The helmsman said it was so slow that there was practically no movement, and the captain said they had no way on at all. It is clear that the movement was extremely slow, partly because the stem of the *Lord Bangor* sustained no damage at all, and partly because it is clear, on the story of the *Lord Bangor*, that when she was something like a ship's length off her head was pointed before the foremast of the *Clan Galbraith*, and though she put her own helm hard-a-port and reversed her engines, she only struck the *Clan Galbraith* somewhere near the jiggermast, which was no great distance from the point to which she headed when she first ported. So that, as the *Lord Bangor* was going at very slow speed, it appears to me that the *Clan Galbraith* was scarcely moving through the water. The tug and tow were going as slow as they could if the rope was to be kept fairly taut. It seems to me that that condition of slowness was not brought about by their having heard the whistle. If it existed before, owing to the fog or any other cause, they had already done all that they could do in the matter, and to go more slowly was practically impossible. The *Clan Galbraith* was, before she heard those whistles, during the time she heard them, and up to the time she heard them, going practically as slow as possible—practically stopping, that is to say, dead stopping; and, under those circumstances, I think it follows that the *Lord Bangor* was alone to blame.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the defendants, *Thomas Cooper* and *Co.*, agents for *Randall* and *Cay*, Cardiff.

Tuesday, Nov. 5.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J.)

THE GLENOCHIL. (a)

ON APPEAL FROM THE COUNTY COURT OF LANCASHIRE, HOLDEN AT LIVERPOOL.

Carriage of goods—Bill of lading—Exemption of shipowner from liability—Fault or error in the navigation or management of the ship—"Management"—Act of Congress, Feb. 13, 1893 (*The Harter Act*).

Goods were shipped under a bill of lading, which, by incorporating the Harter Act, exempted the shipowners from liability for "damage or loss resulting from fault or errors in navigation, or in the management of the vessel." Soon after the arrival of the vessel at the port of discharge, one of the water ballast tanks was filled in order to stiffen the ship, but owing to an injury which had occurred to a sounding pipe on the voyage, and which, but for the negligence of those on board, could have been ascertained, water was let into the cargo space and damaged the goods.

Held, that the act which resulted in the damage to the cargo was an error in the management of the vessel within the words of the bill of lading, as it was necessarily done in the proper handling of the vessel for the safety of the ship herself, and only indirectly affected the cargo, and there was nothing to limit the word "management" to the period when the vessel was actually at sea.

THIS was an appeal by the defendants in an action for balance of freight from a decision of the judge of the Liverpool County Court, directing judgment to be entered for the plaintiffs for the amount claimed, and dismissing the defendants' counter-claim.

The plaintiffs were the owners of the steamship *Glenochil*, and sought to recover the sum of 129*l.* 10*s.* 8*d.*, as balance of freight upon 1640 bags of cotton-seed oil-cake, carried in that vessel under certain bills of lading from New Orleans to London. The defendants, the indorsees and holders of the bills of lading, admitted the plaintiffs' claim, but counter-claimed for the sum of 121*l.* 18*s.* 1*d.* for damage caused to the oil-cake while in the plaintiffs' ship, and paid into court the sum of 7*l.* 12*s.* 7*d.*, the difference.

The bills of lading under which the cotton-seed was carried provided that the shipment should be subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved the 13th Feb. 1893, and known as "The Harter Act."

By this Act it is provided:

Sect. 1. That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any clause, covenant, or agreement, whereby it, he, or they, shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise, or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void, and of no effect.

Sect. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement, whereby the obligations of the owner or owners of the said vessel to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants, to carefully handle and stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

Sect. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The *Glenochil* sailed from New Orleans in every way properly equipped and seaworthy, and, after meeting with exceptionally heavy weather, arrived in Millwall Dock and commenced discharging. Before the whole of the defendants' oil-cake had been delivered out of No. 2 hold, it became necessary to fill some of the water-ballast tanks in order to stiffen the ship. The engineer turned on the cock for the water to run into the tank under No. 2 hold, and left the water running for a considerable time, the effect of which was that, owing to the pressure, water was driven up the sounding pipe with considerable force. On the 23rd Feb. the bottom tier of defendants' bags of oil-cake in No. 2 hold were found to be damaged by water to the amount of the counter-claim. On the 25th Feb., after the cargo was discharged, it was discovered that the water-ballast sounding-pipe and casing were cracked across and broken about four inches above the tank top on the port side, and were out of the perpendicular. The break was caused by the straining of the vessel during the heavy weather on the voyage. This fact could have been ascertained had the sounding-rod been used prior to admitting the water into No. 2 tank, and the learned County Court judge found it was negligence on the part of the ship not so to have ascertained it. He held that the exception in sect. 3 of the Harter Act embodied in the bill of lading covered the damages done to the cargo, though caused by the negligence of the ship. The damage was damage which resulted from an act done by one of the officers of the ship in the management of the vessel in order to give her stability for the purpose of discharging her cargo carried under a contract contained in the bill of lading. The learned judge was further of opinion that, as sect. 3 of the Harter Act did not confine the exception as to "management" of the vessel to the period while the ship was being navigated, it extended the operation of the exception in the bill of lading to the period whilst the cargo was on board, and still undelivered.

The defendants appealed.

Joseph Walton, Q.C. and *Horridge*, for the defendant, in support of the appeal.—The first two sections of the Harter Act are intended to be imperative, and the exceptions in sect. 3 are not exceptions to those sections. The negligence was neglect in the care of cargo, not negligence in the management of the ship; management of the ship means management of the ship *quâ* ship, or in the way of navigation. This is borne out by the dicta of Kay, L.J. and Smith, L.J. in

Dobell v. *Steamship Rossmore Company*, 73 L. T. Rep. 74; (1895) 2 Q. B. 408;
The Ferro, 68 L. T. Rep. 418; 7 Asp. Mar. Law Cas. 309; (1893) P. 38.

The vessel had arrived at her port of discharge, and the terms "navigation" and "management" apply only to the time when she is actually at sea:

The Accomac, 63 L. T. Rep. 737; 6 Asp. Mar. Law Cas. 579; 15 P. Div. 208;
The Southgate, (1893) P. Div. 329.

Pickford, Q.C. and *Maurice Hill* for the plaintiffs.—The damage resulted from an act done in the management of the ship for her safety. The exception under the contract must last whilst the obligation lasts:

The Carron Park, 73 L. T. Rep. 356; 6 Asp. Mar. Law Cas. 543; 15 P. Div. 203.

The Accomac (*ubi sup.*) dealt with navigation and not with management, and it is difficult to reconcile the dictum of Lord Esher, M.R. in that case with that in

Carmichael v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association*, 57 L. T. Rep. 550; 6 Asp. Mar. Law Cas. 184; 19 Q. B. Div. 242.

What Kay, L.J. dealt with in *Dobell* v. *Steamship Rossmore Company* (*ubi sup.*) was whether something done before the voyage was within the exception, and the question of how long the voyage continued was not raised in the case. They also referred to

Laurie v. *Douglas*, 15 M. & W. 746.

Horridge in reply.

THE PRESIDENT.—I think the learned judge in the court below has stated the question at issue with perfect accuracy, and has, indeed, done more than that, because I think he has decided the question in the correct way, and for reasons which occur to me to be extremely well and extremely concisely expressed, and with which I entirely agree. The bill of lading in this case incorporates, by words added to it, part of what is known as the Harter Act, the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th Feb. 1893. The question is whether the exemptions in that Act apply to the present case so as to give rise to an exemption from what the learned judge has found, and rightly found, to be negligence. The learned judge has so stated it, and we are compelled to take his judgment entirely, for we have no evidence before us as to what that negligence was. It is sufficient for us to say that it was negligence consisting in a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening no doubt arising because part of her cargo had been taken out of her. In that operation of stiffening there was a mismanagement of a pipe, and the result was that water was let in and damaged the cargo—water which was intended to act merely as ballast. It is not at first sight, I think, very easy to understand the meaning of the Harter Act, and to reconcile clause 1 and clause 3, but I think the correct explanation has been given to us by the learned counsel who appears for the respondent. No doubt the object of clause 1 is in terms to prevent clauses being inserted which would exempt from want of proper care in regard to the cargo. It is obvious, of course, that those words cannot be taken in their largest sense, because in a certain sense any mismanagement of the ship, in navigation or otherwise, is want of care as regards the cargo, secondarily though not primarily. But it is clear what was intended by the words of sect. 3, the words which exempt from liability for damage or loss resulting from faults and errors of navigation, or in the management of the vessel: and the way in which those two provisions may be reconciled is, I think, that the first prevents exemptions in the case of direct want of care in respect of the cargo, and in the second the exemption is, though in a certain sense there may be want of care in respect of the cargo, primarily from liability for a fault arising in the navigation or in the management of the vessel, and not of

the cargo. Now, then, is this a fault in the management of the vessel within the meaning of the bill of lading? It is not necessary to deal with it as a question of navigation. It is sufficient to deal with it as a question of management. It is said, however, that the two things are one and the same, and that management and navigation mean the same thing, because the management is only in the navigation, and no doubt upon that a most formidable argument arises, for it is put upon a dictum, though only a dictum, of Kay, L.J. It is, of course, a just observation that Kay, L.J. did express a view that, contrasting the various clauses of the bill of lading, the expression "faults or errors in navigation or in the management of the vessel" applies rather to errors or faults in navigation, or the sailing, than to a matter of this kind. But when one considers what the circumstances were, viz., that the fault or error was antecedent to the commencement of the voyage—and was a fault connected with the construction almost of the ship, or, at any rate, the seaworthy condition of the ship—one sees, I think, that what the Lord Justice really had in his mind was not a contrast between the management of the vessel while sailing and while lying in harbour, but rather a contrast between the state of the ship, as a matter of seaworthiness, and mismanagement of the ship during the voyage. That, I think, is not an unreasonable meaning to put upon the Lord Justice's words, and it seems to me almost clear that management was entitled to go somewhat beyond—not much beyond—navigation, just to take in this very class of things which do not affect the sailing or movement of the vessel, but do affect the vessel herself. This court had before it very much the same sort of question in the case of *The Ferro*, and I adhere to what I said then, that stowage is an altogether different matter from the management of the vessel, because it is connected with the stowage alone, and the management of the vessel is something else. It may be that the illustration I gave in that case was not a very happy one, but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo. Then the other argument which was pressed upon us was that the terms "management" and "navigation" under the provisions of the Harter Act apply only to the period of navigation itself, and that is said to end when the vessel comes into dock. For that the authority of *The Accomac* (*ubi sup.*) is relied on. It is quite true that in that case, where the words were "navigation in the ordinary course of the voyage," it was held that the navigation ceased when the vessel got into dock. But I do not see that there is anything in this case to limit the period during which those words are to apply. I do not say whether navigation in the strict sense of the term is limited to the period that the vessel is sailing, that is to say, in motion, but I confess I see no reason whatever for limiting the word "management" to the period of the vessel being actually at sea. I think it is not necessary to refer to any of the cases which appear, perhaps, somewhat to limit the meaning attached to the decision in *The Accomac* (*ubi sup.*). I do not think it is necessary to refer to the case of *The Carron Park* (*ubi sup.*), where the voyage was held by Lord Hannen to not consist merely of the time the vessel was proceeding, nor to the dictum of my learned brother in the case of *The Southgate* (*ubi sup.*), because, taking the words of *The Accomac* (*ubi sup.*) as they stand, and putting the common limitation upon them, it does not seem to me that they go far enough to place the limitation suggested on the period of management. It appears to me, therefore, the judgment of the learned judge was correct. I think that here there has been a failure in the management of the vessel, but from the effects of that failure of management of the vessel there is, by the words of the charter-party, an exemption.

BARNES, J.—In this case the plaintiffs' action appears to have been brought against the cargo owner for balance of freight, and there appears to have been a counter-claim for damage to cargo. The real question in the case was whether or not the shipowners were liable for the damage to the cargo which had been injured, and that question turns upon the construction of the bill of lading under which the goods were carried, which provided that the dangers of the seas should be excepted, but also that the shipment was made subject to all the terms and provisions of, and all exemptions from liability contained in, the Act of Congress of the United States, approved on the 13th Feb. 1893, which is known as the Harter Act. In the 3rd section of that Act there is found a provision that "neither the vessel, her owner or owners, agents, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel." There are other exemptions, but that is the one upon which the question arises in this case. Now, on the arrival of the vessel at the port of discharge it appeared that in order to complete the discharge it became necessary to fill one of the water-ballast tanks, in order to stiffen the ship, and the ballast tank was accordingly filled up, but owing to an injury incurred in the course of the voyage the ballast tank, when filled, admitted, from a broken sounding-pipe, water into the cargo space, and the learned County Court judge found that in the circumstances of the case there was negligence in not having sounded that breakage before filling up the water-ballast tank. He states in his judgment that he thinks this was damage which resulted from an act done by one of the officers of the ship in the management of the vessel, in order to give her stability for the purpose of discharging her cargo, carried under the bill of lading. And then he states what seems to me to be the right conclusion of law to come to in this case, viz., that "sect. 3 of the Harter Act does not confine the exception as to the 'management' of the vessel to the period while the ship is being navigated, and therefore in my opinion extends the operation of the exception in the bill of lading to the period while the cargo is on board and still undelivered." The contest before us has been as to whether or not the word "management" in the section referred to, which by incorporation of the section into the bill of lading is to be read as part of the contract made by the bill of lading—whether the word "management" in that section covers the loss in question in this case. Mr. Pickford has not so much put the case upon the word "navigation," because of the expressions in the judgment of the court below in the case of *The Accomac*. I do not think it necessary to say anything about

that case further than this, that the words in that case are not the same, and that the expression "management of the ship" does not occur in it. The argument having been upon the word "management," it is said that in the case of *The Ferro* (*ubi sup.*) there are expressions which show that the word "management" has no further signification than the word "navigation." That is certainly not the decision in the case of *The Ferro*. *The Ferro* was a case in which it was sought to exonerate the shipowner from improper stowage by the stevedore under the words "navigation or management of the ship," and we held in this court that negligent stowage by the stevedore was not within those words, and I see in the judgment which I myself delivered I stated that some things might be suggested to which the word "management" was applicable beyond those of navigation. Here we have a case in which there is an act of mismanagement which it might, perhaps, be said is not strictly navigation. Of course I don't decide that it is not or that it is; but it certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself. In the course of the argument, two principal points seem to me to have been taken. It is said that the word "management," having regard to the other sections of the Act, cannot mean management of the vessel which may affect the cargo by letting water into the ship. But I think if those sections are contrasted there is a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself, and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel—though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo—that must be a matter which falls within the words "management of the said vessel." Then it is said management could not extend to the time after the ship had arrived in the port of discharge, because it is said that the word "navigation" in the case of *The Accomac* did not have a similar extension. In that case the words were different, as I have said, and they spoke of it as "navigation of the ship in the ordinary course of the voyage." But it seems to me that all exemptions extend from the time the cargo was taken on board to the discharge, though the terms of the exemptions themselves may not necessarily cover the particular act. For instance, if the navigation is said to cease at the time of arrival, the word does limit the time, but there is nothing here to limit the time during which the word "management" extends, and it seems to me that it must extend, as the County Court judge has said, up to the time that the cargo is finally delivered. I agree with the learned County Court judge, and think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Rowcliffes, Rawle,* and *Co.*, agents for *Hill, Dickinson,* and *Co.*, Liverpool.

Solicitors for the defendants, *Wynne, Holme,* and *Wynne,* agents for *H. Forshaw* and *Hawkins.* Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Nov. 11.

(Before SMITH and RIGBY, L.JJ.)

THE SHOE MACHINERY COMPANY LIMITED *v.* CUTLAN. (*a*)

ORIGINAL MOTION.

Practice — Patent — Action for infringement — Alleged invalidity of patent on ground of anticipation—Appeal—Amendment of particulars of objection — Further evidence — Jurisdiction of Court of Appeal—Patents, &c., Act 1883 (46 & 47 *Vict. c.* 57), *s.* 29 — *Rules of Court, Order LVIII., r.* 4.

Under the combined operation of sect. 29 *of the Patents, &c., Act* 1883, *and rule* 4 *of Order LVIII. of the Rules of Court, the Court of Appeal has jurisdiction, pending an appeal by the defendants to an action brought to restrain the infringement of a patent, to grant an application by them for leave to amend their particulars of objection, and to adduce further evidence on the hearing of the appeal.*

Reasons for not exercising such jurisdiction discussed.

Pirrie *v.* The York Street Flax Spinning Company Limited (11 *R. P. C.* 429, 431) *and* Cropper *v.* Smith (51 *L. T. Rep.* 729; 26 *Ch. Div.* 700, 710) *applied.*

Cole *v.* Saqui and Lawrence (59 *L. T. Rep.* 877; 40 *Ch. Div.* 132) *distinguished.*

THE plaintiffs brought an action against the defendants, Frederick Cutlan and Owen Robinson and Co., alleging that they had infringed certain patents for inventions of "improvements in machinery for lasting the uppers of boots and shoes," which patents had been duly assigned to and were now vested in the plaintiffs. The plaintiffs claimed an injunction and damages.

The defendants denied the infringement and alleged that the patents were invalid on the grounds set forth in their particulars of objections, which contained (*inter alia*) the objection that the patents had been anticipated by the specifications of twelve prior patents mentioned in the schedule to the particulars of objections.

In May 1895 the action came on for trial before Romer, J., and on the 12th June 1895 his Lordship granted an injunction, overruling the defendants' objections and holding the patents valid.

The defendants shortly afterwards gave notice of appeal, and now applied to the Court of Appeal, by way of original motion, asking that, for the purpose of their appeal, they might be at liberty to amend their particulars of objections by adding further specified particulars of objections, which alleged anticipations of the plaintiffs' patents by seven specifications published in this country before the date of the plaintiffs' patents, the existence of which specifications was not known to the defendants or their advisers prior to or at the date of the judgment of Romer, J. The defendants also asked that they might be at liberty, upon the hearing of the appeal, to adduce

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

further oral evidence as to the alleged anticipations of the plaintiffs' patents and the matters appearing thereon; and that pending the appeal all proceedings under the judgment might be stayed.

Terrell, Q.C. and *Micklem* for the applicants.—What we desire to show is, that the plaintiffs' patents are invalid, because they have been anticipated by the specifications of seven other prior patents which were not included in the applicants' original particulars of objections. Under rule 4 of Order LVIII. the Court of Appeal has all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact. It has therefore jurisdiction to entertain the present application. Precisely the same order that is asked for here was made in

Pirrie v. *The York Street Flax Spinning Company Limited*, 11 R. P. C. 429, 431.

See also the observations of Bowen, L.J. in

Cropper v. *Smith*, 51 L. T. Rep. 729; 26 Ch. Div. 700, at p. 710.

We submit that the applicants have brought their case within that of *Pirrie* v. *The York Street Flax Spinning Company Limited* (*ubi sup.*). They have shown due diligence, and there has been no delay. The applicants are, of course, prepared to make such compensation to the plaintiffs for the indulgence asked for by means of the payment of costs as the court thinks proper to order. [SMITH, L.J.—There are two questions here. First, whether the court has jurisdiction to make the order; secondly, whether on the merits of the case it ought to do so.] As regards the first question we submit that it can do so within the language of rule 4 of Order LVIII., if that rule is to be read according to its natural meaning. Then, under sect. 29 of the Patents, &c., Act 1883, the defendant to an action for infringement of a patent is entitled to amend his particulars of objections from time to time "by leave of the court or a judge." As regards the merits we submit that this is a case in which the jurisdiction of the court ought to be exercised.

Moulton, Q.C. and *W. N. Lawson* for the respondents.—We submit that there is no jurisdiction in this court to allow the amendment of the particulars of objections. Sect. 29 of the Patents, &c., Act 1883 places a limitation on the amendment of particulars, because sub-sect. 5 of that section says that "by leave of the court or a judge" particulars may be amended. The meaning of that sub-section is, that the court or a judge may at the trial give liberty to amend the particulars. But that is a jurisdiction in which the Court of Appeal is not pointed to; the section is only intended to apply to courts of first instance. It has been held that in sub-sect. 6 of the same section the Court of Appeal is not the court pointed to but the High Court, whether constituted by a judge of first instance or being a divisional court:

Cole v. *Saqui and Lawrence*, 59 L. T. Rep. 877; 40 Ch. Div. 132.

[RIGBY, L.J.—All you can say is that the section does not make it necessary for the Court of Appeal to allow the amendment instead of a court of first instance.] By sect. 117 of the Patents, &c., Act 1883, "court" means "Her Majesty's High Court." Therefore sect. 29 must be read as if it said the High Court and no other court. Rule 4 of Order LVIII. means that this court has such jurisdiction as is intended to give effect to the rehearing. Beyond that there is no jurisdiction, and it could never have been intended by that rule to virtually repeal the above-mentioned sections of the Patents, &c., Act 1883. Costs are not a solatium for all amendments when they are amendments in substance. The applicants will not be left without remedy if their present application is refused, for there is no estoppel created by a judgment against the defendant to a patent action affirming the validity of the plaintiff's patent. In spite of the judgment in the court below it is open to the defendants still to petition, with the consent of the Attorney-General, for the revocation of the plaintiffs' patent:

Re Deeley's Patent, 72 L. T. Rep. 702; (1895) 1 Ch. 687.

The case of *Pirrie* v. *The York Street Flax Spinning Company Limited* (*ubi sup.*) is not an authority on the question whether this court has jurisdiction to allow the amendment of particulars of objections. All that was really decided there was the question of the merits of the case.

Terrell, Q.C. in reply.—The rules of the Supreme Court apply to a patent action just as much as to any other action:

Re Haddan's Patent, 51 L. T. Rep. 190.

Therefore rule 4 of Order LVIII. empowers this court to accede to the present application.

SMITH, L.J.—This is an application by the defendants to a patent action, under Order LVIII., r. 4, to be allowed to make an amendment of their particulars of objections, and to adduce further evidence. I understand by the affidavits that the defendants desire to introduce certain new particulars of objections. The action was brought by the plaintiffs against the defendants for infringement of the plaintiffs' patents, and the trial occupied Romer, J. for five days. The defendants had delivered particulars of objections. Three patents were in dispute, and the particulars of objections amounted to twelve in number. The case was tried out, and the learned judge gave judgment in which he found that apart from patent C, the defendants had infringed patents A and B; that both were good patents; and he granted an injunction against the defendants. The defendants being cast by Romer, J. appeal to this court and say that the judgment was incorrect, and they make their present application for the purpose of adding to the anticipations alleged before Romer, J. by adding seven further anticipations to them. They ask this court to overhaul Romer, J.'s judgment on the old anticipations, and to go on to form a new judgment on the whole of the anticipations, both old and new. Speaking for myself, I should be very loth to grant such an application as this, for it appears to me that if a person who has infringed a patent is entitled to come to this court in this way this court would be inundated with similar applications, and would not only have to hear appeals, but would be turned into a court of first instance, and have to hear a part of the case that was not heard in the court below. In opposition to the present application it is first of all said that we have no jurisdiction under Order

LVIII., r. 4, to make the order asked for. I am of opinion that in law we have that power. It is pointed out that sect. 29, sub-sect. 5, of the Patents, Designs, and Trade Marks Act 1883 has enacted that the amendment of particulars of objections shall only be granted by leave of "the court or a judge." It is then said that this court has decided, in *Cole* v. *Saqui and Lawrence* (59 L. T. Rep. 877; 40 Ch. Div. 132), that the Court of Appeal is not "the court or a judge," and *ergo* that this court has no power to give leave to amend particulars. In my opinion that argument is not well founded. In the case of *Cole* v. *Saqui and Lawrence* (*ubi sup.*) there was an application under sect. 29 of the Patents, &c., Act of 1883, and it was expressly held that, although the Court of Appeal was not the judge pointed at, yet that the Court of Appeal ought to give the judgment which the court of first instance ought to have given, and the certificate that the particulars of objections had been proved was granted as if this court had been "the court or a judge." But we have now the express words of Order LVIII., r. 4, which says that "the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact." In my judgment patent actions and any other actions, as regards this power of amendment and further evidence, stand in the same position. There is no such distinction at all as Mr. Moulton invited us to draw between patent actions and other actions. If authority were wanted as to there being jurisdiction to grant this application, I think the case of *Cropper* v. *Smith* (51 L. T. Rep. 729; 26 Ch. Div. 700) is a strong decision that there is this power in the Court of Appeal to grant leave to amend. Both Cotton and Fry, L.JJ. based their judgments upon the supposition that the applicant in that case had deliberately refused to come to this court and ask for leave to amend, and they said that if the application had been made there would have been jurisdiction to grant it. Bowen, L.J., with whose observations as to amendment I entirely concur, thought that, although the applicant had not asked for leave to amend, it ought notwithstanding to be allowed. That was a very different amendment from the one before us. One of the defendants had delivered particulars of objections and the other had not. The one who had delivered particulars succeeded, and the other who had not delivered particulars did not succeed. The defendant, who failed, came to this court, not for the purpose of asking leave to amend, but insisting upon it that his plea of non-infringement covered the question of want of novelty. On a subsequent appeal to the House of Lords, the House of Lords held (10 App. Cas. 249) that the defendant who failed ought to have the benefit of his co-defendant's particulars. It is true that no leave to amend was given, but that was because the whole thing had been fought out, and the only question that remained was whether he ought to have this benefit. I have not the slightest doubt that, although this is a patent action, there is jurisdiction in this court under Order LVIII., r. 4, to give leave to amend. Then there is a second question, viz., whether on the merits it would be wise to give leave. I have to balance what would happen if leave were granted against what would happen if leave were withheld. If leave were granted this would happen: When the appeal came to this court the appellant, who had been cast before Romer, J., would appear, and we should not only have to consider the twelve anticipations which were before the learned judge, but we should have to consider seven new ones. Nothing could be more inconvenient than that. Our time is fully occupied now without having to act as a court of first instance, although that of itself might be no answer to the application. I do not understand, and there is no satisfactory explanation, how the applicants came to miss these new specifications. But no irremediable damage will be done to the applicants if we refuse their application. This court held in *Re Deeley's Patent* (72 L. T. Rep. 702; (1895) 1 Ch. 687) that on a petition for revocation of a patent there was no estoppel by reason that the petitioner had been a party to a former litigation. The petitioner comes as one of the public and not as an individual, and, although judgment may have been given on the point and he may be the very person against whom judgment was given, there is no estoppel against him, because he appears as one of the public. Therefore a judgment given against him as an individual is no estoppel to him on a petition for revocation of the patent. Here the applicants by their own blunder or that of their agents failed to successfully impeach the plaintiffs' patents, but they can do that on a petition for revocation. It has been held in a recent case that a man has a right of action, although he has to obtain the fiat of the Attorney-General before commencing proceedings. The court there said that, where there was anything like a *primâ facie* case made out, no Attorney-General who had existed lately or would exist hereafter would refuse his fiat. If these specifications are produced and have the effect which the evidence says they will have, the applicants may be entitled to an order for revocation of the patents. But, of course, I express no opinion as to whether such a petition ought to be successful. No irreparable damage will be done to the applicants, and the motion must be refused with costs.

Rigby, L.J.—I am of the same opinion. As to our jurisdiction to entertain an application of this kind, and to make an order such as we are asked to make I entertain no doubt. Reading the words of Order LVIII., r. 4, I find no exception of patent cases, and it would be a very strange thing if we were to read by construction a thing of that sort into the order. Looking at it as a question of authority I can see plainly that each of the three judges of the Court of Appeal in *Cropper* v. *Smith* (51 L. T. Rep. 729; 26 Ch. Div. 700) thought that there was no doubt as to their jurisdiction. When the case was carried further into the House of Lords (10 App. Cas. 249) I find that Lord Selborne, whose opinion was concurred in by the other noble Lords, entertained no doubt upon it. What the majority of the Court of Appeal held in that case was that no amendment was necessary. They had the materials for deciding the case, and they did decide it in favour of the appellants. That was affirmed in the House of Lords. It was there held that the plaintiff having had an opportunity of dealing in the action with every case of anticipation which had been brought forward, the anticipation having been expressly relied on by the defen-

dants, the court ought not to close its eyes to the evidence before it, which while it was only the evidence of one defendant was necessarily the evidence of the other defendant also; and in effect that the latter was not shut out from the benefit of the evidence which had been given, and that he did not want to put forward these particulars of objections which had been disposed of in the court below. Then there is the Irish case, *Pirrie* v. *The York Street Flax Spinning Company Limited* (11 R. P. C. 429, 431). It may be said that we are not bound by that decision. But I think that the general scope of the judgment of Bowen, L.J. in *Cropper* v. *Smith* (*ubi sup.*) is to the same effect, and even if not bound by it I should agree with what is said in the Irish case that there is jurisdiction to make this order. But the jurisdiction must be exercised with care. Lord Selborne, in *Cropper* v. *Smith* (*ubi sup.*), whilst approving of the general principles of the judgment of Bowen, L.J., goes so far as to say that even in that case—which was a strong case by reason of the fact that all the objections had been considered in the court below—if he had thought that the order was right without amendment he doubted whether he should have advised their Lordships to reverse it for the purpose of allowing the amendment to be made. If it were a question of construing the rule only, and if it could be shown that we were bound in every case to act upon it, it would be different; but we have a discretion. Of course there must be consideration of the matter, because to allow particulars of objections to be amended without allowing additional evidence would be idle, and the words of the rule make the power to allow additional evidence discretionary. The question is how that discretion ought to be exercised. I rely to a considerable extent on that expression of Lord Selborne in *Cropper* v. *Smith* (*ubi sup.*), and I think it must be exercised with considerable caution. It does not follow at all that because particulars have been overlooked in the court below—not intentionally omitted, but have been merely overlooked—that therefore there should be an opportunity given to bring them forward with the necessary evidence in the Court of Appeal. The court has always been very cautious how it acted on Order LVIII., r. 4, and it ought to be so. Although I do not accede to what Mr. Moulton said as to jurisdiction, I agree that the exercise of this discretion should be very strictly guarded. As a rule there can be no doubt that all sorts of objections and particulars of objections are put forward, and as a rule there is sufficient evidence at the trial of every patent action for the alleged infringer to attack the patent and show that it has been anticipated. We ought to be cautious how we allow any new particulars to be brought forward unless they are some very special objections. Mr. Terrell tried to show us in five or six minutes by handing up the specifications that this was a clear case; but I am sorry to say that he did not advance the least in satisfying my mind. I could not say more about it than this, that what he said was plausible, but did not convince me in the least that it would be reasonable to make this order. I do not think we could be convinced in that way. We could only say that there was a matter to be considered. We cannot form an opinion in that short manner as to which party would succeed, nor would that be a right test. Here is a very complicated matter, a great many questions have to be tried, and the applicants ask for liberty to add seven other objections to their former objections, and to embark upon a very long trial upon issues which were not brought before the court below. That would lead to such great inconvenience, it would do so much to increase the difficulties of patent jurisdiction, that unless it can be shown that some damage will be done to the applicants, which can only be avoided by allowing them to amend, leave ought not to be given. If the case is so plain, or even if it is a case capable of being established by evidence, now those materials may be made use of on a petition for revocation of the patent, and that revocation would be a complete relief to the defendants from the consequences of the injunction, from which, but for their own mistake, they might have defended themselves in the court below. A case has not been made out for granting leave to amend in this way.

Application dismissed.

Solicitors for the applicants, *Sharpe, Parker, Pritchards,* and *Barham.*

Solicitors for the respondents. *J. H.* and *J. Y. Johnson,* agents for *Dennis* and *Faulkner,* Northampton.

Monday, Nov. 18.

(Before Lord Herschell, Smith and Rigby, L.JJ.)

Re The Taltal Chile Nitrate Company Limited. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company — Winding-up — Manager in foreign country—Arrears of salary — Claim to prove for—Foreign or English currency—Fall in rate of exchange.

By an agreement entered into in England between the manager of a company carrying on business in Chile and the company it was provided that he should be paid an annual salary, at the rate of 1000*l. sterling, by monthly payments, "at such place or places and in such manner as he may direct." The manager, while the company was carrying on business, drew bills upon them from time to time for the monthly payments of his salary payable in Chile in Chilian dollars, in an amount of dollars that would at those dates, at the then rate of exchange, be equivalent to the amount of his sterling claim. These drafts were not paid by the company; and on the company subsequently going into liquidation the manager claimed to prove in the liquidation for the amounts of the unpaid instalments calculated in pounds sterling, the rate of exchange having fallen since the dates when the bills were drawn.*

Held, that, the company not having paid the manager in the manner in which he "directed" by drawing the bills, his position was that of a person whose salary, at the rate of 1000*l. per annum, was unpaid; and that he was entitled to prove for his unpaid salary at the sterling rate.*

Decision of Williams, J. affirmed.

This was an appeal by the liquidator of the above-named company (now being wound-up)

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

against a decision of Williams, J., the question being as to the amount for which the late manager of the company in Chile was entitled to prove in the liquidation in respect of unpaid salary.

The learned judge decided that the proof must be allowed in pounds sterling.

The facts of the case sufficiently appear from the head-note and the judgment of Lord Herschell.

J. Eldon Bankes, for the appellant, stated the facts of the case, and contended that the manager had, by drawing the bills in dollars, "directed," within the meaning of the agreement, that the instalments should be paid in dollars; and that he could only be allowed to prove for the amount of dollars valued at the present rate of exchange. The rate of exchange having fallen considerably since the times when the bills were drawn, the result would be that, if the proof was admitted only for the amount of dollars at the present rate of exchange, the company would be liable for several hundred pounds less than if the proof was admitted for the amount in pounds sterling.

C. T. Mitchell, for the respondent, was not called upon to argue.

Lord Herschell.—I think that the judgment of the learned judge in the court below must be affirmed. The only question is as to the amount for which the manager of the company is entitled to prove in respect of his unpaid salary. The contract between him and the company was as follows: [His Lordship read the material clause of the agreement and continued:] The agreement was made in England, and the salary was expressed in English currency. The salary was to be payable by monthly payments. The manager "directed" that the payments due at certain dates should be made in Chilian currency, which would at those dates at the then rate of exchange be equivalent to the amount of his sterling claim. If the manager had been paid those Chilian dollars he could not have refused them. The company, however, did not pay him, and Chilian dollars having since become depreciated in value the contention of the liquidator is, that the manager is entitled to be paid only the sterling value of so many Chilian dollars at the present rate of exchange. It seems to me that that contention is quite untenable. The agreement by the company was to pay the manager so much sterling. If he had refused to take the payment a different question might have arisen. But the company did not pay him in the manner in which he directed. Therefore, he is in the position of a person whose salary at the rate of 1000*l.* per annum remains unpaid. What is he entitled to prove for? How is he precluded from being paid at the sterling rate because he said, "Pay me in Chilian dollars," and the company did not pay him? He is entitled to prove for the unpaid amount. How a direction given by him on which the company did not act can prevent him from saying that he is entitled to prove for his unpaid salary at the sterling rate I have great difficulty in seeing. I am not satisfied that, even if it were treated as a breach for not paying in Chilian dollars at a particular date, the manager would not be entitled to prove for the sterling value of those dollars at that date. It is, however, unnecessary to decide that point. It seems to me that, having regard to the clause in the agreement, there is nothing to preclude the manager, by reason of the direction he gave, from claiming as the learned judge in the court below has held. The appeal must accordingly be dismissed with costs.

Smith, L.J.—I also think that Williams, J. was right in this case. [His Lordship stated the facts of the case, and read and commented on the agreement, and continued:] The meaning of the manager's direction to the company was, "I will be paid a proportionate part of my salary in Chilian dollars if you pay me now, *in præsenti*, but not if you pay me five years hence or ten years hence." The company did not accept that direction; they did not pay him at all. It appears to me that, the direction not having been acted upon, the manager is entitled to claim to prove for his unpaid salary at the sterling rate. I agree therefore that the appeal must be dismissed with costs.

Rigby, L.J. delivered judgment to the like effect.

Appeal dismissed.

Solicitors for the appellant, *Courtenay, Croome, Son*, and *Finch*.

Solicitors for the respondent, *Snell, Son*, and *Greenip*.

Nov. 19 *and* 21.

(Before Lord Herschell, Smith and Rigby, L.JJ.)

Simpson *v.* The Corporation of Godmanchester. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Easement—Validity—Opening river locks—Grant or licence by deed—Presumption of lost grant—Prescription.

For a long series of years the corporation of G. had exercised the uninterrupted right, in times of flood, of opening the gates of three locks on a certain river, which belonged to the plaintiff and his predecessors. This right was traceable to a deed of 1689, *by which the plaintiff's predecessor took from the corporation of G. a conveyance of the site of one of the locks, and by the same deed granted that, in case of default by the miller of G. mills, it should be lawful for the bailiffs of G., for the time being, for ever thereafter, upon every likelihood of flood, to open and keep open the gates of the sluices at the three locks in question, until the waters had fallen. The plaintiff was a purchaser for value of the three locks, and also owner of the navigation rights on this part of the river, and had no notice, actual or constructive, of the deed of* 1689. *He claimed to restrain by injunction the exercise of the right in question.*

The defendants were the owners of the manor of G., and of various specified pieces of land at G., and certain common allotments, and they claimed this right on behalf of themselves and their tenants, and those entitled to rights of common.

Held, that the right was a valid easement, and could be supported on the presumption of a lost grant, apart from the grant contained in the deed of 1689.

Philipps *v.* Halliday (64 *L. T. Rep.* 745; (1891) *App. Cas.* 228) *applied.*

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

Decision of Wright, J., sitting as an additional judge of the Chancery Division (ante, *p.* 90), *affirmed.*

APPEAL by the plaintiff from a decision of Wright, J., sitting as an additional judge of the Chancery Division (*ante*, p. 90).

E. R. Simpson for the appellant.—The covenant in the deed of 1689 is not binding on the plaintiff:

Austerberry v. *The Corporation of Oldham*, 53 L. T. Rep. 543; 29 Ch. Div. 750.

Nothing short of the grant of an easement would be binding on him. The right claimed by the defendants is not an easement. It is too indefinite and uncertain to constitute an easement; it is destructive of the servient tenement, and differs in several other important respects from all known easements. See the observations of Mellish, L.J., in

Leech v. *Schweder*, 30 L. T. Rep. 586; L. Rep. 9 Ch. App. 463.

No such right as that of going on to the land of another person to let down water has been held to be an easement. [Lord HERSCHELL.—Can you give a definition of an easement which would exclude such a right? See the definition given in Gale on Easements, chap. 1. RIGBY, L.J.—Have you looked at *Sampson* v *Hoddinott* (1 C. B. N. S. 590)?] The right claimed could not have been granted to the defendants *quâ* lords of the manor, because the manor being a manor of ancient demesne, and the tenure Borough English, the defendants are not the owners of the soil of the manor, and an easement could not have been granted to them in respect of a mere seignory. There can be no easement without a dominant tenement:

Rangeley v. *The Midland Railway Company*, 18 L. T. Rep. 69; L. Rep. 3 Ch. App. 306.

Neither could the alleged right have been granted to the defendants as trustees for the landowners in the borough, as suggested by Wright, J. Such a grant is outside the pleadings, and is moreover impossible, since an easement cannot be legally vested in anyone but the owner of the dominant tenement:

Gale on Easements, 4th edit., pp. 8 and 9: Bro. Abr. Graunt, pl. 130, cited in *Ackroyd* v. *Smith*. 10 C. B. 164, at p. 188.

[Lord HERSCHELL.—It does not follow that an easement could not be granted to trustees for the benefit of a number of persons. *Crackanthorpe*, Q.C. referred to *Goodman* v. *The Corporation of Saltash* (48 L. T. Rep. 239; 7 App. Cas. 633).] The principle of the *Saltash* case is inapplicable to easements. Moreover, that was a case between trustee and *cestui que trust*, not between the corporation and a third person as here. [Lord HERSCHELL.—Unless you can establish that the right is something that could not be granted, the law will presume a grant for the purpose of supporting ancient user.] A lost grant to the defendants cannot be presumed, because the user is accounted for by the deed of 1689, which is produced and relied upon by the defendants:

Attorney-General v. *Horner*, 14 Q. B. Div. 245; see per Lindley, L.J. at p. 266.

[SMITH, L.J.—That case was decided previously to *Philipps* v. *Halliday* (64 L. T. Rep. 745; (1891) App. Cas. 228), which went to the House of Lords.] *Philipps* v. *Halliday* is distinguishable, for there the respondent did not rely on the original invalid purchase. *Attorney-General* v. *Horner* (*ubi sup.*) likewise went to the House of Lords, when the judgment of the court below was affirmed: (see 54 L. T. Rep. 281; 11 App. Cas. 66.) A lost grant in respect of the alleged dominant tenements cannot be presumed because the user proved is a general user, and therefore not such as would support a grant in respect of any particular tenement. Before applying the presumption of lost grant it is the duty of the court to ascertain in respect of what tenements the user has been, and no grant can be presumed unless it will account for such user. The user must be connected with the right claimed:

Lord Rivers v. *Adams*, 39 L. T. Rep. 39; 3 Ex. Div. 361;
Blewitt v. *Tregonning*, 3 A. & E. 554;
Hammerton v. *Honey*, 24 W. R. 603.

The covenant in the deed of 1689 did not amount to the grant of an easement because the right does not purport to be granted to the defendants, *quâ* owners of the Godmanchester Mill, nor for the benefit of the mill. In any event the covenant could not operate to grant an easement over Houghton and Hemingford locks, because Henry Ashley only owned one moiety of those locks, and one tenant in common cannot create a valid easement over the entirety:

The Durham and Sunderland Railway Company v. *Wawn*, 3 Beav. 119;
Powell v. *Head*, 41 L. T. Rep. 70; 12 Ch. Div. 686;
Nyburg v. *Handelaar*, 67 L. T. Rep. 361; (1892) 2 Q. B. 202.

And the decree of 1696 had not the effect of perfecting the title of the defendants to the right purported to be given them by the deed of 1689 over those locks. A similar grant to the defendants by the owner of the other moiety of Houghton and Hemingford locks cannot be presumed without proof of user in respect of the mill, and there is no such proof. It is for the defendants to prove that they have enjoyed the right claimed as incident or appurtenant to some specified dominant tenement or tenements, and this, as Wright J. has found, they have failed to do. Of the alleged dominant tenements the defendants have only been in occupation of three, namely, the Court Hall, Wharf, and Fire Engine Station, and, even assuming that they are affected by the opening of the locks (which has not been proved), the court will not merely from those facts presume that the defendants have exercised the right as appurtenant to those tenements. Still less will it presume that the right has been exercised as appurtenant to the tenements of which the defendants have not been in occupation, since the defendants could not do any act affecting those tenements without the consent of the tenants. [SMITH, L.J. referred to *The Duke of Devonshire* v. *Pattinson* (20 Q. B. Div. 263).] The defendants have not proved that the exercise of the right claimed is beneficial to any of the alleged dominant tenements, and the plaintiff has proved that it is actually prejudicial to some of them. Moreover, the Godmanchester Mill and the other tenements being on different levels, the burden of the alleged easement would be greater with respect to those on a low level than it would be with

respect to those on a high level. It is, therefore, most important for the plaintiff to know whether all or some only, and which of the alleged tenements are dominant tenements, in order that he may be able to see whether the right is properly exercised. This he would not be able to do if the dominant tenement or tenements are left undefined.

Crackanthorpe, Q.C. (with him *T. T. Methold*) for the respondents.—[He was stopped by the Court.]

Lord Herschell.—I am of opinion that the judgment of the learned judge in the court below must be affirmed. So far back as living memory goes—and there is ground for inferring that it was for a period anterior to living memory—the corporation of Godmanchester have exercised the right, in time of flood, of raising certain sluices or locks which now belong to the plaintiff, who has recently become the owner of the navigation upon which those sluices or locks are situate. The plaintiff comes into court seeking to restrain the corporation from exercising the alleged right which, I repeat, they have exercised as far back as memory goes; and he asserts that they have no right to do that of which he complains. The law on this subject was laid down in the case of *Philipps* v. *Halliday* (64 L. T. Rep. 745; (1891) App. Cas. 228), in terms which were concurred in by the House of Lords. It was there held that it is a well-settled principle of English law, that where there has been long-continued possession and assertion of a right, the right should be presumed to have had a legal origin if such a legal origin was possible; and that the courts should presume that the acts were done and those circumstances existed which were necessary to the creation of a valid title. That is the law to be applied to the present case. Now, could the corporation have acquired the right to raise these sluice gates in any valid and lawful way? It seems to me that that is a question which obviously admits of only one answer. Mr. Simpson says that they could not, because it is not an easement, and it could not be granted to them as an easement, and that it is a right which the law cannot recognise as having a possible existence. I am quite unable to see why not. It appears to me to be an easement within the definition of easement with which Mr. Gale's work on Easements commences, and I think that it is a perfectly correct definition. Easements may be of various characters, and it is a fallacy to suppose that you must bring it within some particular class which has been recognised, such as the class relating to watercourses, or light, or air, or otherwise. If a right is granted by the owner of land to another person to enter and to do something on the grantor's land for the benefit of the land of that other person, that *primâ facie* is an easement. And I do not see any reason why there should not be a perfectly valid easement in this right to go upon the land of the owner of locks or sluices, and, in times of flood, raise those locks or sluices to let the water down for the benefit of the owner of the land who exercises the right. Therefore, as to its being a possible easement, there seems to be no difficulty. Then we will suppose that there is no evidence of how that easement came into existence. Still it has been exercised, and it can have had a legal origin if the corporation are now the owners or occupiers of land, and have been during the time that they have been exercising the right such owners and occupiers. That cannot be affected by the question whether these sluices were open or not. If they have been such owners or occupiers, then those lands may be regarded as the dominant tenements in respect to which that easement was granted by the owner of the servient tenement, and it would be presumed that the grant was made in respect of such tenements owned or occupied by the corporation as would be affected by the exercise of the right. It is said that the corporation in some cases have been the owners, and have not been the occupiers. To my mind that is quite immaterial. They are the occupiers of some of them, and have been throughout the occupiers of some of them. But if they had not been the occupiers I know of no difficulty in the owner of a tenement taking the grant of a right to do an act upon the land of another which is beneficial to that tenement, and exercising that right, though his tenants be all the time in occupation. I cannot see the difficulty which is supposed to exist by reason of the corporation being the owners, and not being the occupiers. They do it on behalf of the occupiers of the tenement. The tenement is benefited by the act done, whether the owner does it or the occupier does it. It is admitted that the owner might do it, if by contract between him and the occupier he was to do it. And what the owner of the servient tenement has to do with the question of the relative arrangements between the owner and the occupier in such a matter I am at a loss to see. Quite apart from any deed or grant, it appears to me that on the clearest principles of law this alleged right was capable of a legal origin, and therefore must be assumed to have had a legal origin. But I am not satisfied that the right may not be rested upon the grant or deed of 1689, coupled with a lost grant, which certainly there seems to me to be every reason for presuming in the present case. In 1689 one of the locks, viz., the Godmanchester lock, was conveyed by the corporation to Henry Ashley, a predecessor in title of the plaintiff. By that deed Ashley, immediately following the grant to him, for himself, his heirs, executors, administrators, and assigns, promised and granted to, and with the bailiffs, assistants, and commonalty of the borough of Godmanchester and their successors, that he, Ashley, his heirs and assigns, should and would from time to time, and at all times, repair and uphold the sluices, and moreover that it should and might be lawful to and for the miller of the Godmanchester Mills, for the time being, and in his default or omission for such person or persons, officer or officers, as should be thereupon appointed by the bailiffs of Godmanchester for the time being, for ever thereafter, upon every likelihood or appearance of a flood, to set open, and keep open, the gates of the sluices at the three locks in question, until the waters had fallen. That appears to me to be a grant to the corporation of Godmanchester, authorising them, they being the owners of the mills, and authorising their tenants in case they did not do it themselves as the owners of the mills, to set open these sluices. I will not repeat what I have said about that being in the nature of an easement. It appears to me upon the true construction of this indenture that it amounts to a grant.

That is the reasonable construction of the indenture, having regard to the nature of the right with which the parties were dealing. That, therefore, would be a grant of an easement in respect of the mill, because the language of the deed connects it with the subject-matter. The corporation have throughout been and still are the owners of this mill. There is no difficulty therefore in a grant to the owners of a mill that they or their tenants may open these sluices for the benefit of the mill. There is the dominant tenement, the servient tenement, and an easement. But it is said that at the time when this deed was made Ashley was only the owner of an undivided moiety of these two sluices other than Godmanchester, and that therefore he could not grant an easement to interfere with those sluices, being only the owner of an undivided moiety. It is not necessary to discuss that question. I will assume that the right could not be rested on this deed alone. But what took place? The owners of the other undivided moiety of these two sluices other than Godmanchester insist that this purchase of the Godmanchester sluice by Ashley, who was the owner of an undivided moiety of the other sluices, must be taken to have been made on their behalf, and held to enure for their benefit. There was litigation upon that, and it was ultimately so decided. Obviously they could not with any propriety take the benefit of this deed without submitting to its burdens, one of the burdens being that over these sluices, or in respect of these sluices, in which they had an undivided moiety, a certain easement was created. Whether that of itself would have been enough to complete the title to the easement, it is not necessary to inquire. It seems to me that, if a grant was necessary to complete the title, the grant ought to be presumed, seeing that the right has been exercised during this lengthened period. I am assuming now that it has been exercised apparently in conformity with this deed. I see no difficulty in presuming the existence of such a grant. It seems to me a presumption which ought to be made, if it be necessary to establish the title of the defendant, founded as it is upon its long-continued user. Therefore, if the user be not referable to the deed, there appears to me to be ample support. If the user be referable to the deed it appears to me to be equally well founded in point of law, so that whether it was exercised under the deed or not under the deed it is totally immaterial to inquire. Whether it was the one, or whether it was the other, in each case it has a legal foundation to rest upon, and a legal foundation to which effect ought to be given in accordance with well-established principles. For these reasons I think that the appeal must be dismissed with costs, both here and below.

SMITH, L.J.—I entirely agree, and on the same grounds as my learned brother has stated.

RIGBY, L.J.—I also agree, and I have nothing to add.

E. R. Simpson.—The right exercised by the defendants would be different whether the court decided it to be connected with Godmanchester mill alone, or with all the hereditaments. Unless the plaintiff knows which tenement the right is in respect of, he cannot see whether it is properly exercised. If exercisable for the benefit of the mill alone, the defendants would not have the right to open the locks for some considerable time after they would if it were exercisable for the benefit of all the hereditaments. The plaintiff cannot tell whether there will be an excess until he knows in respect of what the right is to be exercised.

Lord HERSCHELL.—We do not decide that question one way or the other. It does not arise in the present case. The plaintiff asserted that the defendants had no right to open these sluices. His claim was not founded upon any question of mere excess. Therefore we cannot determine that question now. All that we can say is that the action is ill-founded.

Appeal dismissed.

Solicitors for the appellant, *Batten, Proffitt,* and *Scott.*

Solicitors for the respondents, *Grubbe* and *Co.,* agents for *Hunnybun* and *Sons,* Huntingdon.

Thursday, Nov. 7.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

CAFFIN v. ALDRIDGE. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship — Charter-party — Construction — Cargo — Hire of entire capacity of ship—Liberty to call at other ports—Deviation.

By a charter-party, which stated that the vessel was of a dead weight capacity of 125 *tons, it was agreed that the defendant's ship should load at Rotherhithe for the plaintiff "a cargo or estimated quantity of* 470 *quarters of wheat in sacks, and (or) other lawful merchandise," and should deliver the same at Gosport on payment of freight at "one shilling per quarter of* 496*lb. delivered." The charter-party gave liberty to the ship to call at any ports, and also contained the usual exception of sea perils. At the rate mentioned,* 470 *quarters of wheat weigh about* 102 *tons. At intermediate ports on the voyage the vessel took in and afterwards discharged goods for another shipper. Afterwards, before arriving at Gosport, the vessel met with an accident arising from sea perils, whereby the plaintiff's wheat was damaged.*

Held (affirming the judgment of Lord Russell, C.J.), that, upon the true construction of the charter-party, the ship was entitled to call at intermediate ports to take in and discharge goods for shippers other than the plaintiff, and that consequently there had been no deviation, and the plaintiff therefore could not recover damages for the injury to his wheat.

THIS was an appeal from the judgment of Lord Russell, C.J., at the trial of the action without a jury.

The action was brought to recover damages for injuries caused to a cargo of wheat during its carriage on the defendant's ship.

By a charter-party, which was headed with the words "Dead weight capacity 125 tons," it was agreed between the defendant, the owner of the ship *Alice Little,* of the measurement of seventy-five tons or thereabouts, and the plaintiff, a corn-factor, that the ship should proceed to Rotherhithe, "and there load from the factors of the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

said affreighter a cargo or estimated quantity of 470 quarters of wheat in sacks and (or) other lawful merchandise . . . and being so loaded shall therewith proceed to Gosport (Royal Clarence Yard) . . . and there deliver the same . . . on being paid freight as follows: one shilling per quarter of 496lb. delivered; the ship has liberty to call at any ports in any order, to sail without pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life and property." The charter also contained the usual exception of sea perils.

The charter was on a printed form, according to which the ship was to load "a full and complete cargo," but the words "full and complete" were struck out, and the words "or estimated quantity of," &c., were added in writing after the word cargo.

At the rate mentioned in the charter 470 quarters of wheat are equal to about 102 tons.

The ship having loaded the wheat at Rotherhithe went to Millwall where she took on board from another shipper ten tons of wire torpedo netting for carriage to Portsmouth Dockyard. She then went to Portsmouth Dockyard, and there discharged the wire netting.

While crossing Portsmouth Harbour on her way to Gosport she met with an accident arising from sea perils, and water getting into the ship, the plaintiff's wheat was damaged.

At the trial of the action before Lord Russell, C.J. without a jury, judgment was given for the defendant.

The plaintiff appealed.

Scrutton for the plaintiff.—It is submitted that there was a deviation, and, as the loss occurred after the deviation had taken place, the defendant is clearly liable. There was a deviation because the defendant had no right to carry any cargo besides the plaintiff's wheat. Whether or not he was entitled to do so depends on the words of the charter-party. The plaintiff was to ship "a cargo" of wheat. The word "cargo" implies the entire load of the vessel, and there is nothing further in the charter-party to show that the word is not here used in that sense:

Borrowman v. *Drayton*, 35 L. T. Rep. 727; 2 Ex. Div. 15.

[Lord ESHER, M.R.—That was a decision on a contract of purchase and sale, not on a charter-party.] The words "full and complete" were struck out of the printed form because it was known that the plaintiff's wheat would not make use of the entire capacity of the ship, but that does not show that the plaintiff had not hired the entire capacity of the ship. The clause providing that the plaintiff might ship "other lawful merchandise" in addition to the wheat shows that the charter-party was intended to be a hiring of the entire capacity of the ship. The 470 quarters were intended by both parties to be considered a full and complete cargo, though in fact it might not fill the ship. No argument should be based on the clause giving liberty to the ship to call at other ports. That clause only means liberty to call for purposes of the voyage. A clause of this kind must be construed with reference to the voyage:

Glynn v. *Margetson and Co.*, 69 L. T. Rep. 1; (1893) A. C. 351.

The court must first look at the adventure contracted for in the earlier part of the contract, and as wheat is a very delicate cargo, very susceptible of damage, the court ought not to get out of the clause giving liberty to call at other ports a right for the shipowner to carry other cargo. I admit here that the ship did not call at any port not on her way from Rotherhithe to Gosport.

Raikes, Q.C. and *Butler Aspinall*, for the defendant, were not called upon.

Lord ESHER, M.R.—The construction put on this agreement by the Lord Chief Justice seems to me to be obviously right. It is very difficult to ask the court to construe a written document in a certain way because some other different written document was construed in a different way. The meaning of the words "cargo" or "ports" in this charter-party depends upon the way in which they are used in it. Lord Russell, C.J. shows in his judgment that the words in themselves are capable of different meanings. By this charter-party the shipowner agreed to carry in the vessel 470 quarters of wheat. That was not a full and complete cargo. It has been argued that it was. The words "full and complete" occur in the printed form of charter-party which was used in this case, and were deliberately struck out. The argument that has been addressed to us comes to this, that they ought to be put in again. I cannot agree with that contention. I agree with the judgment of the Lord Chief Justice and with the reasons he has given for it.

LOPES, L.J.—I am of the same opinion. It was never intended by this charter-party that the plaintiff should load a full and complete cargo. The words were erased from the printed form, and moreover the full capacity of the ship was clearly not made use of by the amount of wheat which the plaintiff put on board. There is another ground for our decision. The charter-party contains a clause giving "liberty to call at any ports in any order." What was that clause inserted for? It seems clear to my mind that, because the full capacity of the ship was not being made use of by the plaintiff, the shipowner was to have liberty to take in cargo at other ports on the voyage. The wire was taken in and discharged in the course of the voyage of the vessel to her destination, and therefore there was no deviation. I agree that the judgment of the Lord Chief Justice was right.

KAY, L.J.—The only question for our decision is the meaning of this particular charter-party. It is headed with the words "Dead weight capacity 125 tons." By it the defendant agreed to carry 470 quarters of wheat from Rotherhithe to Gosport. Now the words "full and complete cargo" do not occur in the agreement; I do not refer at all to the fact of their having been struck out of the printed form. The charter-party provides for the payment of "one shilling per quarter of 496lb." Then by a very simple sum in arithmetic we find that the weight of what has been agreed to be carried was about 102 tons. Therefore on the face of the document it seems to me, to say the least, very doubtful whether "cargo" is here used as meaning something which was to make use of the entire capacity of the ship. But the next clause to which I will refer shows most clearly that "cargo" cannot be used in that meaning. The

ship is to have "liberty to call at any ports in any order." What can that mean except that the shipowner is to be at liberty to carry other cargo so as to fill up the ship, and for that purpose may call at intermediate ports? As a matter of fact that is what the shipowner did. He took in and delivered a quantity of wire at intermediate ports. That was entirely within the power reserved to him by the charter-party. There was therefore clearly no deviation, and the plaintiff cannot recover. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *J. A.* and *H. E. Farnfield.*

Solicitors for the defendant, *Farlow* and *Jackson.*

Thursday, Nov. 7.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

Liles v. Terry and another.(a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Undue influence—Solicitor and client—Gift to solicitor's wife—Absence of independent advice.

The rule of law which invalidates a gift to a solicitor unless the donor has previously had competent and independent advice in the matter, is absolute, and no evidence is admissible to rebut the presumption of undue influence which arises from the relationship of the two parties.

The rule is equally applicable to a gift to a solicitor's wife, and the fact that she may be a relative of the donor is therefore immaterial.

This was an appeal from the judgment of Charles, J., at the trial of the action without a jury.

The action was brought to set aside a deed dated the 12th Oct. 1892, made between the plaintiff and the defendant Terry, whereby the plaintiff had assigned to him a lease of two houses upon the trusts therein mentioned.

The plaintiff was a lady, who, at the time of the execution of the deed, was seventy-seven years of age.

The defendant Terry was a solicitor.

By this deed the plaintiff assigned the lease to him upon trust to pay to herself the rents and profits for her life, and after her death to her elder sister for life, and after her death in consideration of the natural love and affection of the plaintiff towards her niece, the wife of the defendant Terry, upon trust for Mrs. Terry absolutely.

The plaintiff's elder sister died before the commencement of this action.

The plaintiff had no separate advice in the matter of the execution of this deed, which had been drawn by the defendant Terry.

Evidence was given at the trial of what led to the preparation of the deed by the defendant Terry, and also as to what occurred at its execution by the plaintiff. On the latter point it was somewhat contradictory.

Charles, J., at the trial of the action without a jury, refused to set the deed aside.

The plaintiff appealed.

C. L. Attenborough for the plaintiff.—The plaintiff does not allege that the defendant has been guilty of any fraud. The court is asked to set aside the deed simply on the ground that it is a voluntary conveyance to the wife of the plaintiff's solicitor, the plaintiff never having had any independent advice in the matter. First, it is a voluntary conveyance. The case of *Price* v. *Jenkins* (37 L. T. Rep. 51; 5 Ch. Div. 619) is a decision only on the meaning of 27 Eliz. c. 4, and has no application to the question of what is a voluntary conveyance or gift which when made to a solicitor, without the donor having independent advice, will be set aside. The rule of the court in such a case is absolute. No evidence may be adduced in order to evade it. There are numerous cases which shew this to be an old established rule, *e.g.*:

Gibson v. *Jeyes*, 6 Ves. 266;
Hatch v. *Hatch*, 9 Ves. 292;
Huguenin v. *Baseley*, 14 Ves. 273;
Rhodes v. *Bate*, 13 L. T. Rep. 778; Law Rep. 1 Ch. 252;
Morgan v. *Minett*, 36 L. T. Rep. 948; 6 Ch. Div. 638;
Alcard v. *Skinner*, 57 L. T. Rep. 61; 36 Ch. Div. 145:
Tyars v. *Alsop*, 61 L. T. Rep. 8.

There is no hardship in the rule because a solicitor, before receiving a gift, has merely to call in another solicitor in order to make it valid. The fact of the gift being to the solicitor's wife, and not to the solicitor himself, is immaterial:

Huguenin v. *Baseley* (*ubi sup.*);
Goddard v. *Carlisle*, 9 Price, 169.

As the rule of law is, it is submitted, an absolute one, the relationship of Mrs. Terry to the plaintiff is also immaterial.

Stephen Lynch for the defendants.—This is a gift to a solicitor's wife, it is true, but it is a gift to her separate use so that he will have no control over it. There is no case deciding that a gift to a relative is void if that relative happens to be a solicitor's wife. If the transaction is an honest and straightforward one, which in this case is not denied, and the solicitor gave to the donor the same advice which an independent solicitor would have given, then the gift will be valid. Lord Brougham, C. so laid down the law:

Hunter v. *Atkins*, 3 Myl. & K. 113.

The law, as laid down by Turner, L.J. in *Rhodes* v. *Bate* (*ubi sup.*), does not extend to relatives. *Gibson* v. *Jeyes* (*ubi sup.*) was not a case of a gift but of a sale by an attorney to his client.

Lord Esher, M.R.—The question raised in this case is whether, by virtue of a definite rule laid down by courts of equity, the court is not bound to set aside a certain deed of conveyance which has been executed by the plaintiff. As regards the facts in the case, I take them in truth to be, as I think Charles, J. found, that when the plaintiff executed this deed she intended that what she did should have the effect of assigning the property in it to the wife of the solicitor; and she further intended to pass the property in such a way that she should never be able to revoke what she had done; and that the solicitor explained to her fully and fairly at the time the difference between a will and a deed. Not only did she, in my opinion, know perfectly well the effect of what she was doing, but I think that no influence was used over her to make her execute

(a) Reported by E. Manley Smith, Esq., Barrister-at-Law.

the deed. The deed moreover did not, and could not, benefit the solicitor himself, it was simply in favour of his wife, who was the plaintiff's niece, and whom the plaintiff wished to benefit. But even though these may be the facts of the case, nevertheless by a rule in equity the deed must be set aside because Mr. Terry was a solicitor, and he himself drew the deed and was with her when she signed it, and no other solicitor gave any independent advice in the matter to the plaintiff. The rule of equity upon which I give my decision has been laid down by judges of very great authority, and the presumption which arises against the defendant out of his relations towards the plaintiff is one of law which cannot be refuted by any evidence of fact whatever. That is the effect of the rule which has been laid down by Lord Eldon and by Turner, L.J. and they intended it to have that effect. I submit to that rule, though it seems to me an unfortunate one because it may work terrible injustice. But the court is bound by authority, and until that rule be altered or set aside by some higher authority, it must stand as the law. Upon the ground only of that rule of law I think that this appeal must be allowed and the deed set aside.

LOPES, L.J.—I agree that the appeal must be allowed. I am sorry to differ from the Master of the Rolls as to his comments upon any case that comes before the court, but in the present instance I feel compelled to differ from him to some extent. The rule which we must apply here is a hard and fast one, but I do not consider it to be an unfortunate one. It is founded upon public policy, and, though perhaps there may be some hard cases under it, it is, in my opinion, highly beneficial on the whole. I should therefore regret to see it altered. I think that the authorities establish this, that a gift to a solicitor made by a client who has had no independent advice, while the relationship of client and solicitor exists between them, or while there is any influence over the client arising from that relationship, is invalid. Before such a gift can be considered valid, the relationship of client and solicitor must be wholly at an end. When a case has been shown to be within that rule, no evidence is of any avail to make the gift valid. If a client wishes to make a gift to his solicitor, what the solicitor must do in order to make the gift a valid one is to obtain competent and independent advice for the donor. Some judgments of Lord Eldon have been cited which are strong authorities in support of this rule, but there is also a very valuable judgment of Turner, L.J. in *Rhodes* v. *Bate* (*ubi sup.*), which enables us to say whether this rule exists as a hard and fast one. He says: "I take it to be a well-established principle of this court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." That to my mind clearly establishes the existence of the rule I have alluded to. Now as to the facts of this case, I must say that I have not come to the same conclusion as the Master of the Rolls. I do not recognise any substantial distinction between a gift to a solicitor and a gift to a solicitor's wife, even though she may be a relative of the donor. Though the gift be to his wife, it is clear that he may benefit largely by it. She might perhaps immediately after receiving the gift hand it on to her husband. But it is unnecessary to say more as to the facts, because I base my decision upon the inflexible rule of equity which applies to cases of this kind.

KAY, L.J.—I agree with the result of the judgment of the Master of the Rolls, though I differ entirely from his comments upon the case. It is a rule of public policy which forbids a person under the influence of another from conferring benefits on that person; that is to say, a gift from the one to the other cannot be accepted unless the donor has received good professional advice before the gift is complete. Lord Erskine, L.C. in *Wright* v. *Proud* (13 Ves. 136) used these words: "So, independent of all fraud, an attorney shall not take a gift from his client, while the relation subsists; though the transaction may be, not only free from fraud, but the most moral in its nature." In *Hatch* v. *Hatch* (9 Ves. 292) Lord Eldon said: "This case proves the wisdom of the court in saying, it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty." There is a slight difference between those two judgments, for in the one it is said that an attorney cannot take a gift from his client, while in the other it is said to be almost impossible. But the explanation is given by the judgment of Turner, L.J. in *Rhodes* v. *Bate* (*ubi sup.*) where he says that if the gift should be one of a very trifling nature the court will take no notice of the relationship between the donor and donee. Nevertheless the rule is a strict one that a gift from a client to his solicitor is bad unless the donor has previously had competent and independent advice. That seems to me to be a most wise rule and eminently calculated to produce justice between persons who are in a confidential relation to each other, not only between guardian and ward, but especially so between attorney and client, since a client must be to a certain extent under the influence of his attorney. An attorney receiving a gift would be in a position of great suspicion, and therefore before he accepts it he should advise his client to go and get the independent advice of another solicitor. That is no great hardship upon him. But if he does not do that, then he has allowed himself to come under the well-established rule against the validity of such gifts, and he cannot support the transaction. In the present case the gift was made not to the solicitor himself, but to his wife. But in *Goddard* v. *Carlisle and others* (9 Price, 169) Richards, C.B. said: "There is no difference in principle between a gift of this sort to a man's wife, and a gift immediately to himself, if the gift to the wife be effected by undue means on the part of the husband." Now the principle and basis of the rule is that, while confidential relations exist between a solicitor and client, it is impossible to rebut any inference of undue influence in the making of the gift. It applies as much in the case of a gift to the solicitor's wife as in the case of a gift to the solicitor himself. With regard to the facts of this case I do not take the same view of the evidence as the Master of the Rolls. It seems that some time before the execution of

this deed the plaintiff had expressed her intention of leaving these houses to her niece. That is to say she intended to make a will in her niece's favour. Now a will is a revocable instrument, and all that a promise to make a will in somebody's favour means is that the promisor has at that time an intention of making a will of that nature. There is no evidence here as to any instructions being given by the plaintiff for the drawing of the deed, but when she met the solicitor for the purpose of signing her will he put this deed also before her. She asked why there were two documents to sign. She says now that she did not understand that the deed was irrevocable. [His Lordship referred to the evidence, and stated that in his opinion it did not support the allegation that the plaintiff when signing the deed understood the difference between a deed and a will.] However, I do not base my judgment upon that, because even if the plaintiff knew the difference between a deed and a will, under the long established rule in equity which I have mentioned, this deed must be declared void. I agree that the deed must be set aside, and this appeal will therefore be allowed.

Appeal allowed.

Solicitor for the plaintiff, *John Attenborough.*
Solicitors for the defendants, *Wilson* and *Son.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Nov. 5.

(Before NORTH, J.).

Re PITCAIRN; BRANDRETH *v.* COLVIN. (*a*)

Will — Administration — Reversionary interest — Tenant for life and remainderman — Conversion — Rule in Howe *v.* Earl of Dartmouth (7 *Ves.* 137).

P., by his will dated 3rd Nov. 1876, *gave all his property to trustees upon trust, after payment of his debts, funeral and testamentary expenses, and the expenses of executing the trust, to pay the income to his mother or permit her to receive the same during her life, and after her death to pay certain large legacies and pay the residue to a charity. There was no express direction to sell or convert. The will contained powers for the trustees to manage the estate, and if and when they thought fit to sell. The greater part of the testator's estate consisted of reversionary interests under settlements of personal estate of which his mother was tenant for life. The testator died on the 3rd Feb.* 1880. *His mother died on the 17th Oct.* 1894. *The reversionary interests fell into possession on her death. This was a summons taken out by her executors asking for the determination of the questions whether the reversion ought to have been sold at the testator's death, and whether the executors of the tenant for life were entitled to any payment out of the trust fund in respect of the income which she would have received if the reversions had been sold.*

Held, that the rule in Howe *v.* Earl of Dartmouth *only applies where the testator has expressed no intention either way as to the time for the realisation of his estate; that in this case the discretion given to the trustees to sell if and when they thought fit was inconsistent with an intention that it should be sold at the testator's death, and therefore the rule did not apply, and the questions must be answered in the negative.*

(*b*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

BY a trust disposition and settlement in the Scotch form dated the 3rd Nov. 1876, Cecil Colvin Pitcairn gave all and sundry his whole means and estate, heritable and movable, real and personal, wherever situated or addebted, presently belonging or which should belong or be addebted to him at the time of his death, to three trustees in trust for the uses and purposes thereinafter mentioned, viz.: (1) "From the produce of his means and estate to pay all his just and lawful debts and funeral expenses, and the expenses of executing the trusts;" (2) to pay over to the testator's mother in the event of her surviving him, during all the days of her life after his decease, the whole interest, dividends, and other annual produce and profits of the trust estate for her alimentary use, or otherwise to permit and empower his said mother to receive the same interests, dividends, and other annual produce and profits.

The 3rd, 4th, 5th, and 6th clauses of the trust disposition directed the trustees as soon as convenient after the testator's death, if his mother predeceased him or after her death if she survived him, to pay certain legacies amounting to 29,000*l.* and to provide for an annuity of 50*l.* The 7th clause directed that the trustees should pay and deliver all such other legacies, gifts, or provisions as should be contained in any codicil; and that if it should happen that after payment of his debts the expenses of the trust and certain legacies therein declared to be preferable the proceeds of his estate should on realisation prove insufficient for the full payment of the other legacies, such legacies should abate rateably; and lastly, with regard to the residue and remainder, if any, of his said means and estate after implementing the purposes aforesaid he directed his trustees to pay, assign, and convey the same to the Bishops of Edinburgh and St. Andrews to be applied by them for the benefit of the Scottish Episcopal Church or of such charitable institutions in connection therewith as they might think proper. And the testator thereby conferred upon his trustees the following powers and privileges, viz.: Power to his trustees to enter into the possession and management of his said estate and effects, and to call, sue for, uplift, receive, and discharge the rents and duties, interest, dividends, and annual profits arising from the same.

Then followed powers to appoint factors, and for any one of the trustees who might be so appointed to charge for his services, and the instrument proceeded:

> And with full power also to my trustees to grant a tack or tacks for any length of time they may deem expedient of the heritable property belonging to the trust estate, and likewise, if and when they shall consider it expedient, with full power to sell and dispose of all or any part of my said estate and effects hereby conveyed, and that either by public roup or private bargain, and at such price as they shall think proper, and to enter into contracts and do and execute all acts and deeds necessary for carrying out the said sales.

The trustees were given full power to invest

the trust funds in the securities therein mentioned.

The testator died on the 3rd Feb. 1880 domiciled in England, and the said trust disposition was proved as a will in England on the 21st April 1880 by two of the trustees therein named.

The testator's mother survived him and died on the 12th Oct. 1894.

At the time of the testator's death his estate consisted of personal estate of the value of 13,000*l.* or thereabouts, and of certain reversionary interests expectant on the death of his mother in trust funds, of which she was tenant for life under the settlement made on her marriage and various wills. These trust funds amounted to about 30,000*l.*

During the life of the testator's mother the trustees of his will paid to her the income of the property to which he was entitled in possession, but they did not sell any of the reversions.

This was a summons taken out by one of the mother's executors against the trustees of the testator's will asking for the determination of the questions:—Whether the mother was entitled on the death of the testator to have so much of his estate as consisted of the said reversionary interests (which fell into possession upon but not before her own death) sold, and the income of the proceeds paid to her for her life. And whether her executors were entitled to a payment out of the estate of the testator in respect of such income.

Everitt, Q.C. and *Howard Wright* for the summons.—The question is whether the tenant for life had a right to have this reversion sold at the testator's death. The general rule laid down in *Howe* v. *The Earl of Dartmouth* (7 Ves. 137) is unquestionable, and it must always be applied unless the will contains a clear expression of a contrary intention. That is clearly laid down in many cases, of which *Morgan* v. *Morgan* (14 Beav. 82) is a good instance. It shows that the burden is on the respondents to point out words in the will excluding the rule; and that the mere absence of a direction to convert is not enough. There is no clear expression of a contrary intention in this will. *Re Chesterfield's Trusts* (49 L. T. Rep. 261; 24 Ch. Div. 643) shows the way in which the relief must be worked out. It has been suggested that the fact that the testator's mother was herself the tenant for life of the reversionary interest makes a difference, but that was the case in

Johnson v. *Routh*, 30 L. T. Rep. O. S. 111; 27 L. J. 305, Ch.;
Pickup v. *Atkinson*, 4 Hare, 624;
Harrington v. *Atherton*, 11 L. T. Rep. 291; 2 De G. J. & Sm. 352.

Haldane, Q.C. and *R. Campbell* for the trustees of the will.—There can be no dispute about the general rule. The only question is whether, looking at the whole will and all the circumstances, the rule is excluded. The rule is one of intention not of law, and if on looking at the whole scheme of the will the court finds that the testator could not have intended the property to be converted it will not apply the rule. The general scheme of this will is to pay debts out of the testator's general estate; to pay the income of that estate as well as the settled funds to his mother for life, then when the settled funds are set free by her death to apply the general estate and the settled funds together in paying legacies. No conversion is directed until the mother's death. Nothing can be more unlikely, looking at that scheme, than that the testator intended the settled funds, of which his mother was tenant for life, to be sold at once. In the three cases quoted, *Johnson* v. *Routh*, *Pickup* v. *Atkinson*, and *Harrington* v. *Atherton* (*ubi sup.*) there was an express direction to convert the property. There is no case where in the absence of such a direction the rule has been applied to a case where the person to whom the testator's estate was given for life was also the tenant for life of the fund in which he had a reversionary interest. The cases show that the rule is very elastic, and the court has seized upon very slight indications to avoid applying it. In *Alcock* v. *Sloper* (2 M. & K. 699) the perfectly general word "dividends" was taken hold of to prove that long annuities were intended to be enjoyed in specie; and it was held that a direction to sell after the death of the testator's wife was inconsistent with selling before. In *Collins* v. *Collins* (2 M. & K. 703) and *Pickering* v. *Pickering* (4 M. & C. 289) the court held itself entitled to look at the whole will, and not bound to find expressions which were logically inconsistent with conversion. *Hinves* v. *Hinves* (3 Hare, 609) shows that the inclination of the court is against the application of the rule; and in *Daniel* v. *Warren* (2 Y. & C. C. C. 290) a direction to sell after the wife's death was held to be conclusive against an earlier conversion. *Burton* v. *Mount* (2 De G. & Sm. 383; 11 L. T. Rep. O. S. 492) is also in our favour; and in *Sewell's Estate* (23 L. T. Rep. 835; L. Rep. 11 Eq. 80) the Master of the Rolls held that a discretionary trust for sale prevented the rule being applied. In this will the power given to the trustees to sell when they think fit is inconsistent with an intention that the property should all be sold at the testator's death in any case.

Everitt, Q.C. in reply.—Slight indications of intention such as the word rents have been held sufficient to show that a tenant for life was meant to enjoy leaseholds or other wasting property in specie. But when, as here, there is no wasting property it is difficult to see how such words should show an intention not to have reversions sold. The rule must apply unless there is something to negative the idea of conversion. In *Re Sewell* (*ubi sup.*) there was a very special trust. *Wilkinson* v. *Duncan* (29 L. T. Rep. O. S. 35; 23 Beav. 469) and *Re Llewellyn's Trust* (29 Beav. 171) are clear authorities that the rule will be applied, although trustees have a discretion as to the time of sale.

NORTH, J.—The point in this case is a short one, and interesting, and not free from difficulty. The facts are very shortly these: Property was settled on a lady for life with remainder in the events which have happened to her son absolutely. The son by his will, to put it shortly, gave his mother a life interest with remainders over to other persons. The son died in 1880, the mother in 1894. The settled fund amounted to something like 30,000*l.* The testator left besides something between 10,000*l.* and 15,000*l.* During the interval of fourteen years for which the mother survived her son, she was, of course, receiving the income of the settled fund, and as a matter of fact

what she did receive under her son's will was the income of his estate other than his settled reversion. She did not receive any income in respect of his reversionary interest under the settlement. She has recently died, and now her representatives say that, the reversion having fallen in, they are entitled to so much of the proceeds of keeping the reversion, that is so much of the settled fund as represents the income that she would have received if the reversion had been realised under the son's will, the proceeds invested and the income paid to her for life. The question simply is, whether her fund is entitled to have out of the settled estate something to represent the income of the reversion during the fourteen years which she survived her son. Now, the rule of the court is, I think, very clearly settled; and it will be sufficient if I refer, at first at any rate, to the well-known case of *Howe* v. *The Earl of Dartmouth* (7 Ves. 137). [His Lordship read the passage from Lord Eldon's judgment on p. 148 from the words, "It is given as personal estate" . . . to . . . "the interest of its present worth."] That is dealing shortly with the case in which there is a wasting security when the tenant for life enjoying it in specie would receive more than his share, or a reversionary interest when the tenant for life would receive less than his share even if he received anything at all. Then in the case of *Morgan* v. *Morgan* (*ubi sup.*) the Master of the Rolls says, on p. 81, "Now the rule of law as applicable to these cases is not, I think, open to doubt, although the application of the rule to particular cases may be and frequently is a matter of very considerable difficulty." Then he refers to the rule laid down in *Howe* v. *Lord Dartmouth*, and goes on: "The rule has been since affirmed as often as it has been referred to, and is unquestionably the law. But the testator may take the case of any particular bequest out of this rule; and the effect of the later cases has been to allow small indications of intention to prevent the application of the rule. The question here, as in similar cases, is one of construction, whether the testator has in this will expressed his intention that this rule shall not apply to this particular case. It has been urged by the petitioners that the burden of proof does not lie upon them more than on the respondents, and that being a question of construction it is for the court to look into the will and discover the testator's real meaning. In one sense this is certainly true; but still, in my opinion, the rule of law is, that, unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe* v. *Lord Dartmouth* is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the court which forbids that application, to point out the words in the will that exclude it, and if this cannot be done the rule must apply. The reported decisions on the subject are useful, as they form a guide to enable the court to ascertain what directions contained in a will are properly considered to be an expression by the testator of his intention that this rule is not to apply. In no case that I have been able to find has the mere absence of any direction to convert his property been construed to mean that it should be enjoyed in specie by the legatees in succession; and the contrary must have been decided, though not expressly so stated, in *Johnson* v. *Johnson* (2 Coll. C. C. 441). There are several cases in which the court held that the rule was excluded where the testator has fixed the period of conversion; as, for instance, where he has given the property to one for life, and after the death of that person has directed the property to be sold and divided;" and then, after referring to one or two cases I need not dwell upon, he says: "I think, therefore, that the absence of this direction," that is, a direction to convert, "cannot be treated as an expression of intention on the part of the testator that his property was never to be converted; it would, I think, be unreasonable if it was so held. By law the property must be converted; a testator may not unreasonably be supposed to be cognisant of that law, and to have given no direction on the subject because he may have supposed that it would be mere surplusage so to do." Then there are two cases laying down the general rule. One of these cases is *Hinves* v. *Hinves* (*ubi sup.*). I will not read the passage, but it refers to the rule of the court in the absence of any expression of intention. Then come these words, which seem to be very much in point, at 3 Hare, 611: "But if the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply. The rule is settled with sufficient clearness. The difficulty only arises in its application to particular cases, where the intention of the testator is expressed with more or less distinctness. Then in *Pickup* v. *Atkinson* (*ubi sup.*) the same learned judge puts it very shortly. He says (4 Hare, 628): "Cases calling for a decision on this question have arisen in each branch of the court within the last few years, and in each branch of the court the rule appears to have been stated in the same way. If the will manifests an intention that the general residue of the estate shall be enjoyed by different persons in succession, and there is nothing to qualify that simple intention, the court, in order to effectuate it, converts so much of the testator's estate as is of a perishable nature (under which head leasehold property falls) into investments of a permanent kind." And, of course, although he does not state the alternative, it converts reversionary property on similar principles. Then he says: "But if the intention of the testator appears to be, that the first taker shall enjoy the property in that state in which it exists at his death, the court is bound to give effect to that intention." I take it, therefore, that it is clear from those and numerous other cases that the question is what the testator intends, and his intention must be gathered from his will. He has a right to say what is to be done; and intention as expressed or to be deduced from the terms of his will must be followed. But if he has given no direction on the subject, then the court has a rule that it applies. Now, looking at the present will, the testator first of all devises and bequeaths to certain trustees all his real and personal estate, and then proceeds to declare the trusts. It is apparent that the will was prepared by someone who was more familiar with Scottish terms than English, but there is no difficulty in following it. The testator says: "First, my trustees shall from

the produce of my means and estate pay all my just and lawful debts and funeral expenses and the expenses of executing the trust." His means and estate, of course, denote everything of which he died possessed. It was said that this was to be done at once, and points to an immediate conversion. But the expenses of executing the trusts could not all be disposed of in the first instance, they would continue until the estate was wound-up. Then the next is this: [His Lordship read the second clause set out above and proceeded:] There is a reference there to an actual receipt of what is produced by the estate as it stood. The trustees may not only pay it over to the mother, but may allow her herself to receive the income that it produces, letting her do what they might do, and she, of course, would not as tenant for life have power to convert the estate. As far as that clause goes it looks rather against there being any direction that anything not producing income was to be converted in order that the proceeds might produce income, but I think it deserves very little weight. The 3rd, 4th, and 5th clauses direct the payment of legacies amounting together to 29,800*l.* Then, sixthly, there is a direction to set apart a sum sufficient to provide for an annuity of 50*l.* a year; and, seventhly: [His Lordship read the 7th clause above set out.] At that time the testator was plainly contemplating that besides the legacies he had mentioned there might be others given by a will or equivalent instrument which would have to be paid out of the estate. He is not, therefore, dealing with this sum of 29,800*l.*, as it was suggested he is, as a sum corresponding with the value of the reversion which would fall in on his mother's death, but a sum which he contemplated might be increased by other legacies being added to it. It is plain also that at this point he is contemplating a realisation of his estate. But, in my opinion, realisation there means the conversion of the investments, of which the estate then consisted, into money for the purpose of paying legacies and paying over the residue; and the use of the word does not throw any light on the question with which I have to deal, that is, whether this reversion ought to have been converted at the testator's death. Then there is a direction to pay, assign, and convey the property to certain persons upon charitable trusts, which I need not read. The direction is not to pay over certain moneys, but to pay, assign and convey the property. Mr. Everitt says that may apply to real estate which he might acquire subsequently to the date of his will. It certainly might apply to that, but the phrase "assign and convey" seems to me to point to something which is to be the result of no conversion taking place because it could not apply to handing over the proceeds of sale. Then there are some powers for executing the trusts. The testator says: "I hereby confer on my trustees the following powers and privileges, viz.: with power to my trustees to enter into the possession and management of my said estate and effects." He is dealing with a trust to be exercised and executed by the trustees during the continuance of the trust, and here he uses this phrase, "of my said estate and effects," which is the same phrase which he used in the beginning of the will with reference to what it was out of which debts and funeral expenses are to be paid. Then he goes on giving power to the trustees "to enter into the possession of and management of my said estate and effects, and to call, sue for, uplift, receive, and discharge the rents and annual profits arising from the same," and to make titles, and so on, and to employ factors, agents, or cashiers "for managing my said means and estate." That is referring to what is to take place during the continuance of the trust. Therefore they are to manage here what was clearly an unconverted estate, the same estate which was described at the beginning of the will. Then, further on, there is this power, "with full power to sell and dispose of all or any part of my said estate and effects hereby conveyed, and that either by public roup or private bargain, and at such price or prices as they may think proper." Then, further on, there is a direction as to the securities in which funds may be invested. That clause seems to be the clue to the meaning of the will here; and I think that this power given by the testator to the trustees to sell and dispose "if and when they think it may be expedient" means that they are to have the power of selling if they think fit, and that, if they have power to do it if they think fit, they necessarily have the power not to do it unless they think fit. It seems to me upon the authorities that there are several cases that show that, where a testator has intended that a conversion is to take place at some time or other than that at which the rule of the court would make conversion necessary, he has dealt with the question of conversion, and the rule of the court has no application. I read the passage in *Morgan* v. *Morgan* (*ubi sup.*) in which the Master of the Rolls pointed out that the rule was excluded where the testator has fixed the period of conversion. Now, in the present case he has not fixed it in that sense, but he has given the option of saying when the conversion is to take place to some other persons, which seems to me to be equally effective in negativing what is called the rule of the court which would require that conversion to take place immediately, or as soon as possible after the death of the testator. No doubt in the illustration given in *Morgan* v. *Morgan* (*ubi sup.*) a time is fixed as at the death of a particular person, but there are two or three cases where the same rule has been applied where a particular time is not fixed. One of them was *Alcock* v. *Sloper* (*ubi sup.*). [His Lordship read the words of the gift in that case, and proceeded.] In his judgment the Master of the Rolls says, after referring to *Howe* v. *The Earl of Dartmouth*: "It is with a view to this principle that the present will is to be examined. The testator gives the residuary estate to trustees 'upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof for her own sole and separate use during her life.' There is here no intimation of an intention that any part of the property should be immediately converted by the trustees, but the inference rather is that the trustees during the life of the wife were to be merely passive; and the term dividends has reference to the long annuities. After the death of his wife he directs his trustees to sell his freehold house in Oxford-street, and also his leasehold houses, by auction. The leasehold houses, like the long annuities, were a wasting property, and he has plainly expressed his intention that they should not be

sold during the life of his wife, and that is manifestly inconsistent with the general notion on his part that the wasting portion of his residuary estate was immediately to be converted into permanent property." Then he quotes the passage in the will directing that Mr. Abbott should be employed to convert the property and to distribute the same, and says: "The testator could not have meant that Mr. Abbott should convert the whole of his property after the death of his wife if he had intended that any part of it should be converted during her life. The widow is, therefore, entitled to enjoy during her life" what? not the income of the leasehold and freehold houses only, but the income of the other wasting property, viz. the long annuities. Then in *Burton* v. *Mount* (*ubi sup.*) there was a general gift of the testator's real and personal estate, upon trust to pay the income to his son for life, and after his death for his children, and the testator empowered his trustees, "notwithstanding the devise and bequest of his freehold and leasehold estates, at any time or times, or from time to time at their discretion, to make sale and dispose of the freehold and leasehold estates or any of them (except as therein mentioned) by public auction or private contract," and so on. Then Knight Bruce, V.C. came to the conclusion that, as there was this discretion given to the trustees as to the time at which they were to sell, it was inconsistent with the intention of the testator that the property should be sold under the rule of the court immediately, and he decided the point as well as to the leaseholds as to the long annuities in favour of the tenant for life. Again, the case of *Re Sewell* (*ubi sup.*) which was cited this morning seems to me to be exactly in point. These cases seem to me to show that, when the time of sale is fixed, either by reference to a given number of years after the testator's death or to the falling in of a life or anything of that kind, or when it is left to the discretion of somebody else to say when the sale is to take place, the testator has by his will provided for the sale, and therefore there is no rule of the court requiring the sale in a different way or under different circumstances to those indicated by the testator's will. I find here a direction that the trustees are to have full power, if and when they consider it expedient, to sell and dispose of all or any part of the estate and effects. It seems to me that that gives them a discretion, in the exercise of that power, to regulate the time of sale which is inconsistent with and negatives any intention that the court should realise the reversion in the way in which it would do if there had been no such direction. In my opinion, therefore, as the trustees did in fact allow the reversion to remain unsold, the estate of the tenant for life is not entitled to any part of the proceeds of this reversionary interest now that it has fallen into possession.

Solicitors: *Freshfields* and *Williams*; *Nicholl, Manisty*, and *Co.*

Aug. 6 *and* 10.

(Before STIRLING, J.)

FARNHAM *v.* MILWARD AND CO. (*a*)

Practice — Parties — Action by lunatic — Bankruptcy—Trustee in bankruptcy added as defendant—Stay of proceedings—Order XVI., r. 17; *Order XXV., r.* 4—*Lunacy Act* 1890 (53 *&* 54 *Vict. c.* 5), *ss.* 117, 120—*Bankruptcy Act* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 132.

An action had been commenced by a lunatic by his committee. The lunatic was subsequently adjudicated a bankrupt, and the trustee in bankruptcy, having declined to proceed with the action, was, on the application of the defendants, added as a defendant thereto.

On an application of the trustee in bankruptcy for a stay of proceedings:

Held, that the right of a lunatic to bring an action vested on his bankruptcy in his trustee; that the trustee having declined to proceed with the action could not be added as a defendant thereto against his will, and that the trustee was therefore entitled to have the action stayed as against him.

ADJOURNED SUMMONS.

On the 5th Aug. 1893 W. Farnham was found a lunatic by inquisition, and on the same date his wife, Catherine Farnham, was appointed his committee.

On the 7th Sept. 1893 an action was commenced by Catherine Farnham, suing in her own name and in that of W. Farnham, against Milward and Co., who had acted as W. Farnham's solicitors and confidential agents, for an account of all moneys received and paid by the defendants, Milward and Co., for or on his account, a receiver of all moneys come to their hands since the 6th June 1893, damages and costs.

On the 17th Nov. 1893 an account was ordered to be taken of all sums of money come to the hands of the defendants as the late solicitors of the plaintiff, W. Farnham, and of all sums paid or advanced by the defendants to or for the use of the plaintiffs.

On the 17th March 1894 a receiving order was made against the plaintiff, W. Farnham, and on the 19th May 1894 he was adjudicated a bankrupt. On the 26th May 1894 one Norris was appointed trustee in the bankruptcy.

On the 23rd April 1895, on the application of the defendants Milward and Co., Stirling, J., on the authority of *Re Whatman*; *Hoar* v. *Whatman* (W. N. 1889, p. 213), made an order in chambers giving liberty to amend the writ by adding Norris as a defendant in the action, and directing that the taking of the accounts should be proceeded with. The writ was accordingly amended on the 2nd May 1895.

This was a summons taken out by the defendant Norris on the 15th June 1895, asking that all proceedings in the action might be stayed as against him on the ground that it was vexatious.

Subsequently to the issue of this summons the defendant attended certain applications in chambers on the taking of the account.

R. J. Parker for the summons.—The sole right of action being now vested in the trustee, the bankrupt cannot continue the present action:

Jackson v. *North-Eastern Railway Company*, 36 L. T. Rep. 779; 5 Ch. Div. 844;

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

Warder v. *Saunders*, 47 L. T. Rep. 475; 10 Q. B. Div. 114;
Selig v. *Lion and Son*, 64 L. T. Rep. 796; (1891) 1 Q. B. 513;
Kellaway v. *Bury*, 66 L. T. Rep. 599;
Rochfort v. *Battersby*, 2 H. of L. Cas. 388.

On these authorities I submit the trustee was wrongly added as a party, and that the proceedings in the action ought to be stayed as against him.

Willis Bund for the defendants Milward and Co.—The trustee was properly added as a party to these proceedings. The defendants Milward and Co. are perfectly willing to account, but they ought not to be called upon to do so twice.

Hastings, Q.C. and *Church* for the plaintiffs.—The trustee not only has taken part in the proceedings in chambers, but he has asked for a statement of claim. It is now therefore too late for him to make the present application. The cases cited by the other side were not those of lunatic bankrupts, and do not therefore apply. The Lords Justices when this case was before them (*Re Farnham*, 73 L. T. Rep. 231; W. N. 1895, 127) expressed great doubt whether a lunatic could be made bankrupt. The trustee can only take subject to the lunacy jurisdiction of the judge in lunacy over the lunatic's property. This action therefore having been brought by the direction of the master in lunacy the court ought not to stay it before an application has first been made for that purpose to the lunacy authorities. They referred to the Lunacy Act 1890, ss. 116, 117, and 120.

R. J. Parker in reply.—No doubt where the delay in making the application has been considerable the court will refuse to act under Order XXV., r. 4:

Cross v. *Earl Howe*, 62 L. J. 342, Ch.:
Annual Practice 1895, p. 552.

But here the delay was very small. He also referred to

Re Plenderleith, 69 L. T. Rep. 325; (1893) 3 Ch. 332;
Bankruptcy Act 1883, s. 132;
Re James, 50 L. T. Rep. 471; 12 Q. B. Div. 332;
Re Lee, 48 L. T. Rep. 193; 23 Ch. Div. 216.

Cur. adv. vult.

Aug. 10.—STIRLING, J. stated the facts and continued:—On the accounts being proceeded with in chambers, an objection was raised by the defendants, Milward and Co., that they were liable to be sued both in this action and by the trustee in the bankruptcy, and they contended that the proceedings should not be continued without the trustee being made a party. He declined to prosecute the action; and then, the matter being before me in chambers, I was asked to allow the amendment of the writ by making Norris a defendant, and on the authority of *Re Whatman* (*ubi sup.*) I thought that I was justified in giving leave to make the amendment. Now I am perfectly satisfied that I was wrong in giving that leave. In truth, I misread the account of that case in the *Weekly Notes*. I think I ought to have inferred from the report there that the order made in that case did not authorise proceedings such as I was asked to permit in the present case; and having had during the argument the registrar's book produced to me I am satisfied that no such order was made. But for that authority, which I thought that in chambers I was bound to follow, I should not have allowed the amendment. On the 23rd April 1895, leave having been given, the trustee was added as a defendant; thereupon some correspondence took place between the solicitors of the plaintiff and the solicitors of Norris, which continued down to the 2nd May; and from that fact it is obvious to my mind that Norris's solicitors were groping about to discover on what ground he had been added as a defendant, and they pointed out that he should be sued as trustee in the bankruptcy, which had not at first been done, and that the writ ought to be amended by indicating the relief asked against him. The writ was finally amended on the 2nd May, and then the correspondence closes. Subsequently the trustee was present at some applications at chambers, and on one which was adjourned to myself; but ultimately on the 15th June he took out this summons, and the question is whether he is entitled to the order he asks for. It was admitted by counsel for the plaintiffs that in the case of a sane plaintiff the defendant would be entitled to the order, and there can be no doubt that that would be so; but two questions were raised. First it was said that the law as laid down by the Court of Appeal in *Jackson* v. *North-Eastern Railway Company* (*ubi sup.*) and other cases applicable to the case of a sane bankrupt was not applicable in the case of a lunatic; and, secondly, that by reason of the delay the trustee was precluded from the relief to which he would otherwise be entitled. Dealing with those objections, I must first consider the position of a lunatic where he sues in this court. By Order XVI., r. 17, of the Rules of the Supreme Court 1883, it is prescribed: "Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the principal Act have sued as plaintiffs, or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose." Therefore, the practice which is now followed in the case of a lunatic plaintiff is the same as formerly existed in the Court of Chancery. The basis of that procedure, so far as it permitted a lunatic to sue by a next friend, was clearly stated by James, L.J. in the well known case of *Beall* v. *Smith* (29 L. T. Rep. 625; L. Rep. 9 Ch. 85), and as it states a principle, I will read a few words from the judgment. He says (at p. 91 of L. Rep. 9 Ch.): "The law of the Court of Chancery undoubtedly is that in certain cases where there is a person of unsound mind, not found so by inquisition, and therefore incapable of invoking the protection of the court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend;" and further on he says: "it is to be borne in mind that unsoundness of mind gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants, whom it makes its wards. The Court of Chancery is not the curator either of the

person or the estate of a person *non compos mentis*, whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings. It can no more take upon itself the management or disposition of a lunatic's property than it can the management or disposition of the property of a person abroad, or confined to his bed by illness. The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind." That is a clear statement of the jurisdiction exercised by the court in a case where a lunatic is the plaintiff, and though the remarks were directed to a case where a lunatic is suing by a next friend, they are equally applicable to a case where he is suing by a committee. There is a difference in the practice in the two cases, because from an early period it has been held that where a lunatic sues by a committee the proper practice is that the committee should be added as a co-plaintiff. That was laid down in *Fuller* v. *Lance* (Ch. Cas., Part I., 18, 19) in the reign of Charles II. The reason for this distinction, I apprehend, is this, that a committee being instructed by law, under the authority of the Crown, with the care, management, and disposition of the lunatic's affairs, he is in a position to receive and give a good discharge for property recovered in an action brought by the lunatic, whereas a next friend, who simply intervenes and invokes the jurisdiction of the court, would not be in a position to do so; but otherwise the principles which govern the procedure in actions brought by lunatics are the same in each case. It follows that the lunatic having been adjudicated a bankrupt, and that adjudication being binding on me, the right of action which at the commencement of the proceedings was vested in him has now by law become vested in his trustee; and though the committee may sue in the name of the lunatic and in his own name, and enforce rights of action which are vested in the lunatic, I can find no authority, and on principle it seems to me to be wrong, that he should be permitted to enforce a right of action which by due process of law I assume to have become vested in someone else, and to have ceased to be the right of the lunatic. In substance, the committee has a right to protect the property and enforce the rights of the lunatic, but his functions cease when the property and rights are vested in someone else. In support of the plaintiff's view, the case of *Re Farnham* (*ubi sup.*), a case which arose in this lunacy was cited; and I have read and studied the judgments delivered by the Lords Justice in that case. The case was a remarkable one. Part of the property of the lunatic consisted of a considerable amount of plate which had been deposited in court in the lunacy prior to the application which I am now about to mention. Being in court, the trustee, Norris, sought to have it delivered up to himself, on the ground that the legal title to it was vested in him. The question was raised and left open, whether a lunatic could be adjudicated a bankrupt. The Lords Justices assumed for the purposes of their decision that the adjudication was valid, though they expressed some doubt on the subject. The way in which the case was dealt with is shown by the judgment of Lindley, L.J., who says: "Assuming that, Mr. Swinfen Eady says that everything follows in his favour, and that the court ought to direct this plate to be handed over to the trustee in bankruptcy. But it has been pointed out, and I think very properly, that, inasmuch as this lunatic was adjudicated a bankrupt some time after he was found a lunatic by inquisition, the trustee in bankruptcy must take subject to the powers of the judge in lunacy conferred by the Lunacy Act 1890. Sects. 117 and 120 of the Lunacy Act 1890 vest in, or confer upon the judge in lunacy various powers, among other powers to apply the estate of a lunatic in discharge of his debts. Although I believe it is perfectly well settled that a lunatic can be adjudicated a bankrupt under the direction of the committee acting under the order of the judge in lunacy, yet there is a question whether he can be validly adjudicated apart from that direction. Now, supposing that the trustee takes, subject to the statutory powers, the main point in Mr. Eady's argument is answered. And I think that Mr. Warrington was quite right in saying that, whatever may be true of the actual vesting of the property in the trustee, it does not follow that the trustee may take the property which is so vested in him, except subject always to the jurisdiction which has accrued before the bankruptcy to the judge in lunacy under the inquisition. I think that that is a good answer to his argument so far as it goes." The Lords Justices did not dispute that the property and the legal right to it was vested in the trustee in bankruptcy; but they laid it down that they had, as it were, a higher power and could direct the application of the property. How far that may apply here it is not for me to say; but I have read the sections of the Lunacy Act 1890, which were referred to in the judgments, and the judgments themselves, with great care, and it does not seem to me that they go to this, that the committee can bring an action to assert a right which is vested in the trustee in bankruptcy of a lunatic. I do not think it was intended that the decision should go so far as that; so it follows, to my mind, that the defendant Norris is, on principle, entitled to the order he asks for. It only remains for me to deal with the question of delay. It must be borne in mind that the amendment was sanctioned by the judge in person, and the proceedings in the action had been sanctioned by the master in lunacy. The question raised is one of some novelty, and I think that under the circumstances the trustee has not come too late to obtain relief, and he shall not be prejudiced, as far as obtaining relief goes, by his having attended the proceedings to settle the accounts. It may be that he would be precluded from raising the objection if it did not go to the root of the proceedings. The proceedings, however, are, in my opinion, entirely wrong, and can only be set right by making the trustee a co-plaintiff. He declines to allow that to be done; and I think that, under the circumstances, he is not too late, and his application should be acceded to, and the action stayed as against him; but, at the same time, I do not think that this is a case for giving any costs.

Solicitors: *Field, Roscoe*, and *Co.*, for *Deane* and *Hands*, Loughborough; *Spencer Whitehead*; *Prior, Chureh*, and *Adams*.

July 23 and Nov. 5.

(Before STIRLING, J.)

CARTER *v.* CARTER. (*a*)

Married woman—Declaration of trust by deed acknowledged—Copyholds—Effect of declaration upon—"Disposition"—Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 77.

A declaration of trust by a married woman of copyholds of which she is tenant on the rolls by deed acknowledged under the Fines and Recoveries Act binds the copyholds in the hands of her customary heir.

A married woman may create a trust of her non-separate copyholds by deed acknowledged under the Fines and Recoveries Act with the concurrence of her husband.

A declaration of trust is a "disposition" within sect. 77 of the Fines and Recoveries Act.

TRIAL OF ACTION.

By a post-nuptial indenture of settlement dated the 2nd Jan. 1878 and made between James Carter and Susannah Carter his wife of the one part, and J. L. Sayers and E. Sayers of the other part, after reciting that certain copyholds situate in West Tarring in the county of Sussex had been devised to the said Susannah Carter, and that she had been duly admitted tenant thereof, and that certain freeholds had been conveyed to her, Susannah Carter and her husband conveyed to J. L. Sayers and E. Sayers the said freehold hereditaments upon the trusts thereinafter declared. And James Carter covenanted with the said J. L. Sayers and E. Sayers that he would, when required so to do, at the cost of the said trust estate concur with Susannah Carter and all other necessary parties in surrendering into the hands of the lord of the manor of Tarring a certain piece of land within the manor to which Susannah Carter had been admitted as devisee under a certain will to the use of the trustees, their heirs, and assigns, to the intent that they, their heirs, or assigns should, when admitted thereto, hold the same upon the trusts and with and subject to the powers and provisions thereinafter declared concerning the same. And it was agreed and declared that in the meantime, and until the premises should be surrendered in pursuance of the covenant thereinbefore contained, Susannah Carter and her heirs should stand seised and hold the premises upon the aforesaid trusts, and with and subject to the aforesaid powers and provisions, or as near thereto as circumstances would admit. The trusts were for such person or persons, and for such purposes as Susannah Carter should, whether covert or sole, by deed or will appoint, and in default of or subject to such appointment, to pay the rents and income of the trust premises to Susannah Carter during her life for her separate use, and after her decease, to James Carter, if he should survive her, during his life, and after the decease of the survivor of them to sell the hereditaments and hold the residue of the monies to arise from such sale in trust for such of the children of James and Susannah Carter as should be living at the decease of the survivor of them, and if more than one in equal shares. The settlement was executed by all parties, and duly acknowledged by Susannah Carter.

Susannah Carter died on the 20th Nov. 1884 without having exercised the power of appointment given her by the settlement.

James Carter died on the 24th Oct. 1892.

The copyhold hereditaments were never surrendered to the use of the trustees, and Susannah Carter continued tenant on the rolls of the manor till her death.

At the death of James Carter there were five children of the marriage living, all of whom were females. There had been one son only, but he had died before Susannah Carter, leaving an only son Alfred James Carter, an infant of about seventeen years, who on the 8th May 1894 had been admitted tenant by his guardian as the customary heir of Susannah Carter.

This was an action brought by the daughters of James and Susannah Carter against the trustees of the settlement of 1884, and A. J. Carter for the execution of the trusts of the settlement; and for a declaration that the defendant A. J. Carter was a trustee of the copyholds for the plaintiffs, and the question raised was whether the defendant A. J. Carter was bound by the trusts of the settlement.

The steward of the manor had given evidence to the effect that there was no custom of the manor which required the lord of the manor to take notice of trusts; and consequently the deed of 1878 could not be entered on the court-rolls.

Robertson-Macdonald for the plaintiffs.—The declaration of trust in the settlement of 1878 is binding on the defendant Carter. In that settlement there was no covenant to surrender by the tenant on the court rolls, but the parties relied on the declaration of trust. Although that deed was voluntary, yet where a trust has been actually created the court will enforce it: (May on Voluntary Dispositions, 2nd edit. pp. 404: 439 *et seq.*) A declaration of trust of copyholds by a man or by a *feme sole* is good, and binds the copyholds in the hands of the customary heir:

Steele v. *Waller*, 3 L. T. Rep. 74; 28 Beav. 466.

A married woman can create a trust of freeholds by deed executed in accordance with sect. 77 of the Fines and Recoveries Act. This is shown by the practice of conveyancers. I rely on sect. 77 of the Act as enabling a married woman also to create a trust of her non-separate copyholds. That section applies to copyholds in every case, except where the married woman could have effected her object before the Act by a surrender, with the concurrence of her husband. In the present case the object of Mrs. Carter was to have the legal estate vested in herself as trustee during her life, and after the death of the survivor of herself and her husband to have the property sold. This object could not have been effected by a surrender. A lord of a manor is not compellable to accept a surrender declaring any trusts, unless there is a special custom requiring him to take notice of trusts, and there is evidence that in the manor of which these copyholds are held there is no such custom. A declaration of trust is a "disposition" within the meaning of sect. 77 of the Fines and Recoveries Act; the construction of that section is dealt with in *Crofts* v. *Middleton* (27 L. T. Rep. O. S. 114; 8 De G. M. & G. 192, at p. 212) and *Pride* v. *Bubb* (25 L. T. Rep. 890; L. Rep. 7 Ch. 64). The proviso at the end of the section was only intended to preserve the rights

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

of the lords of manors in respect of legal surrenders, and to prevent them being deprived of their fines. On the cases and on the general law. I submit that the defendant Carter is bound by the declaration of trust contained in the settlement of 1878.

W. D. Rawlins for the defendant Carter.—The object of Susannah Carter could have been effected by a surrender to the trustees, their admittance, and a declaration of trust by them either on the court rolls or not. [STIRLING, J.—If a married woman does not wish to surrender but to be herself a trustee, why may she not effect her object?] That is impossible. [STIRLING, J.—You have to come within sect. 77, and show it can be effected by a surrender.] A married woman cannot do it at all. She could not before the Fines and Recoveries Acts have effectually executed a declaration of trust so as to bind her heir. She could not before the Act have disposed of her equitable interest in copyholds. Sect. 90 of the Act provides for the surrender of equitable estates in copyholds. The Act, it is true, is an enabling Act, but the procedure thereby prescribed must be strictly followed:

Cahill v. *Cahill*, 49 L. T. Rep. 605; 8 App. Cas. 420, 428.

This is a voluntary settlement; the plaintiffs are not within the marriage consideration, and consequently the court will not interfere in their favour. A declaration of trust is not a "disposition" within sect. 77 of the Fines and Recoveries Act:

Green v. *Paterson*, 54 L. T. Rep. 738; 32 Ch. Div. 95.

That Act does not extend to any copyholds of which the married woman was legal owner. If a maried woman could have disposed of the property without using the machinery of the Act, then sect. 77 does not apply. [STIRLING, J.—The lord of the manor would not be bound by a declaration of trust.] Yes, if he permitted the declaration to be enrolled on the books of the manor: (Watkins on Copyholds, 4th edit., vol. 1, p. 272.) [STIRLING, J.—Supposing a simple declaration of trust were intended, could that be done? A declaration of trust is a "disposition" of copyholds within sect. 77 just as much as a declaration of trust as to freeholds.] It has never been decided that a married woman can make a valid declaration of trusts as to freeholds. *Crofts* v. *Middleton* (*ubi sup.*) was a case of contract. The defendant Carter, who is tenant on the court rolls, has the legal estate, and there has been nothing to take it from him. The case comes within the proviso to sect. 77 of the Fines and Recoveries Act.

B. B. Swan for the trustees.

Robertson-Macdonald in reply.—A married woman could before the Fines and Recoveries Act dispose of her equitable estate in copyholds by a common recovery (*Pullen* v. *Lord Middleton*, 9 Mod. 483); and can do so now not only under sect. 90, but also by an acknowledged deed: (Elton on Copyholds, 2nd edit., p. 93.) *Green* v. *Paterson* (*ubi sup.*) is distinguishable. That case only decided that a declaration of trust was not a disposition of lands within sects. 15 and 40 of the Fines and Recoveries Act sufficient to bar an estate tail.

Cur. adv. vult.

Nov. 5.—STIRLING, J. stated the facts and continued:—The deed of 1878 was purely voluntary. An effectual disposition of property may be made without consideration in two ways, as is well shown by Jessel, M.R. in *Richards* v. *Delbridge* (L. Rep. 18 Eq. 11). He states it thus: "A man may transfer his property, without valuable consideration, in one of two ways; he may either do such acts as amount in law to a conveyance or assignment of property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person." To my mind it is plain that the draftsman of this deed was aware of the law, and intended, so far as related to copyholds, to avail himself of the second mode of disposition referred to by the Master of the Rolls in that case. The question is, has he effectively done so? Mrs. Carter never divested herself of the legal ownership of the property; but she did by the deed of 1878 declare herself a trustee of it; and if she had been at that date a *feme sole*, I think that the trusts thereby declared would have been binding on her heir. She was, however, under coverture; and the question which I have to decide reduces itself to this, whether a married woman, tenant on the rolls of copyholds, can by deed acknowledged under the Fines and Recoveries Act effectually declare herself a trustee of those copyholds. The answer depends on sect. 77 of the Act. It is thereby provided that "after the 31st Dec. 1833 it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this Act"—it is material to bear in mind that exception for reasons which I will state presently—"by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be invested in, or limited, or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed." I stop there for a moment, and will consider the proviso to the section later. The requirements of the Act to a disposition by a married woman are that it should be by deed, that it should be concurred in by the husband, and acknowledged by the wife in the manner required by the Act. With all these requirements the deed of 1878 complies. The first question which arises on this enactment is, whether a declaration of trust is a disposition? The words "dispose" and "disposition" in the

Fines and Recoveries Act are not technical words, but ordinary English words of wide meaning, and, where not limited by the context, those words are sufficient to extend to all Acts by which a new interest (legal or equitable) in the property is effectually created. A declaration of trust on the part of a *feme sole*, whereby she effectually parts with the entire equitable interest in property of which she remains legal owner certainly appears to me to be a disposition in equity of that property. That is borne out by the decision of Lord Hatherley in *Pride* v. *Bubb* (*ubi sup.*). There the question arose on a separation deed whether the effect of it was to impose upon real estate of which a married woman was the owner the incident of its being for her separate use. There was a recital in the deed from which it appeared that such was the intention, but it nowhere contained any express conveyance of the legal estate by the married woman. Lord Hatherley said: "Now the object of this deed is clearly to place this lady, with reference to all her real property whatsoever and whensoever acquired, in exactly the same position as if she had no husband at all; in other words, to give her the whole of the property to her separate use. If that had been so limited by a deed made anterior to her marriage, nobody disputes that the case would come precisely within the doctrine laid down by Lord Westbury in *Taylor* v. *Meads* (12 L. T. Rep. 6; 34 L. J. 203, Ch.), that she would hold as a *feme sole* and be able to make a will, the husband being placed out of the way. And I apprehend that by a deed duly executed, in which her husband concurred, the whole of her property might be placed in that position without any actual conveyance or assignment, and simply by the agreement of the husband, who is the only person concerned in the matter. In this deed it is recited that for valuable consideration the husband had agreed with his wife to abandon all authority over her property, and to give her full power of disposition over it as if she were sole. Then he covenants, and she makes a declaration to the same effect; and as both present and future property was to be included, it is impossible to hold that this reversion expectant on her life estate is not to be considered as within the meaning of the deed. I am quite satisfied that the observations in *Crofts* v. *Middleton* (*ubi sup.*) with reference to the statute which enables the husband and wife to deal with her estate as they think fit, were intended to displace the notions which I had expressed as to the effect of a mere contract." It was said, however, that the contrary was decided in *Green* v. *Paterson* (*ubi sup.*), which was a decision binding upon me. That case, so far as it is material to the present, related to copyholds of which a married woman was tenant in tail; and tenancies in tail are expressly excluded from the operation of sect. 77 of the Fines and Recoveries Act, and depend on the prior sects. 15 and 40. It is quite true that sect. 15, by which a tenant in tail was empowered to dispose of the lands entailed, uses the word "dispose," which is used again in sect. 77; but sect. 40 limits the mode of disposition by enacting that every disposition of lands under the Act by a tenant in tail thereof should be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition of his estate, if his estate were an estate at law, in fee simple absolute; and no disposition by a tenant in tail resting only in contract should be of any force at law or in equity under the Act. The effect of that is that the mode of disposition to bar an estate tail is limited to such an instrument *inter vivos* as would be effectual to pass a legal estate in fee simple. A mere declaration of trust, of course, could not pass a legal estate; and consequently I entirely agree, if I may be allowed to say so, in the decision of the Court of Appeal in *Green* v. *Paterson* (*ubi sup.*) that a mere declaration of trust could not bar an estate tail. The language of Fry, L.J. might, no doubt, admit of a wider meaning, and that is what is relied upon. He says: "In the first place, the statute requires that the instrument to bar the estate tail shall be a disposition, and I find in this case nothing like a disposition. It is a mere declaration of trust by the lady." Those words taken literally would seem to indicate an opinion that a mere declaration of trust was not a sufficient disposition within the Fines and Recoveries Act; but I think that they ought to be read as applying only to the point then actually calling for decision, and not as intended to affect the construction of sect. 77, which was not then under consideration by the court, and all the more so as I observe that *Pride* v. *Bubb* (*ubi sup.*) was not cited to the court in argument. In sect. 77 I find nothing which requires the disposition to be made by such an assurance as is required by sect. 40. It is next contended that the transaction falls within the concluding proviso of sect. 77, which is this: "Provided always, that this Act shall not extend to lands held by copy of court-roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel." In my opinion, the object intended to be effected by the deed of 1878 was that Mrs. Carter should declare herself a trustee of the legal estate in the copyholds then vested in her, or, in other words, to effect a disposition of the equitable interest without disturbing the legal title. I fail to see how this object could be effected by a surrender of that estate into the hands of the lord of the manor; for the effect of such a surrender would be to alter the legal title, and consequently the present case does not seem to me to come within the proviso. In my opinion, therefore, the heir is bound by the trusts, and judgment must be given in favour of the plaintiffs. I declare that the heir is bound by the trusts of the deed, and that he is a trustee of the legal estate vested in him for the purposes of the deed, and I direct a proper assurance to be executed, with liberty to apply in chambers for a vesting order.

Solicitors: *H. Sowton*, for *J. C. Buckwell*, Brighton; *H. Fereday*; *H. F. Griffith*, for *Holmes* and *Bennett*, Worthing.

Oct. 31 *and Nov.* 1.

(Before KEKEWICH, J.)

EARL OF STRAFFORD *v.* MAPLES. (*a*)

Vendor and purchaser—Sale by limited owner—Rentcharge—Release of part of the hereditaments—Improvement of Land Act 1864 (27 *&* 28 *Vict. c.* 114), *ss.* 68, 69—*Settled Land Act* 1882 (44 *&* 45 *Vict. c.* 38), *s.* 5.

The tenant for life of real estate, which was subject to a charge under the Improvement of Land Act 1864, *agreed to sell a portion thereof free from incumbrances. The vendor and the incumbrancers undertook to execute a deed of exoneration of the charge, but the purchasers required the sanction of the Board of Agriculture as provided for by the Act of* 1864.

Held, that, under the provisions of the Act of 1864, *which provisions were not intended to be repealed by sect.* 5 *of the Settled Land Act* 1882, *the sanction of the Board must be obtained.*

ADJOURNED SUMMONS.

On the 4th June 1895 the Earl of Strafford, tenant for life of the Wrotham Park estate, in Middlesex, consisting of about 4533 acres, entered into an agreement with F. Maples and others for the sale to them of a part of the estate, consisting of about 34 acres, free from incumbrances, subject to a certain tenancy.

The Wrotham Park estate, and the fee simple thereof, had by an absolute order, dated the 11th Feb. 1886, under the hands and seals of the Land Commissioners, in pursuance of the Improvement of Land Act 1864 (27 & 28 Vict. c. 114), been charged with the payment to R. Arkwright and others of the yearly sum of 1265*l.*, payable half-yearly every year for the term of twenty-five years, being a proportionate repayment of the capital sum of 22,147*l.* with interest. No part of the rentcharge was ever apportioned to the premises agreed to be sold, nor had they been released from the charge.

On the 11th June the vendor submitted to the purchasers a draft deed of exoneration of the premises sold from the above charge, which deed the incumbrancers had covenanted to join the vendor in executing.

The purchasers took the objection that the rentcharge having been created under the Improvement of Land Act 1864, a release of any part of the hereditaments thereby charged must be effected in manner expressly provided by that Act, and in particular by sects. 68 and 69, which provide (sect. 68) that if at any time the owner of land charged under the Act is desirous of selling or disposing of such land, and in certain other events therein specified, the Inclosure Commissioners (now the Board of Agriculture) "may," with the consent of the landowner, and with due notice to the grantee of the charge and other parties as therein set out, either release from such charge any part of the land charged therewith, or apportion such charge so that a separate and distinct charge may become charged on the part which the landowner is desirous of selling or disposing of, and the part intended to be retained by him, or on any other separate parts of the land, "provided that no lands shall in consequence of any such apportionment or release become charged with any greater amount than that to which in the opinion of the commissioners they have been durably benefited by the improvements in respect of which such charge was created" (sect. 69), that every such apportionment or release is to be made by an order under the hands and seal of the commissioners, and registered as therein mentioned. The purchasers, therefore, contended that without the consent of the Board of Agriculture the proposed deed of exoneration would not be an effectual release of the property sold under the Act of 1864, or the Settled Land Act 1882, or otherwise.

The vendor declined to apply to the Board of Agriculture, and alleged that on the execution of the deed of exoneration the premises sold would be released from the charge without the sanction of the board by virtue of the provisions contained in sect. 5 of the Settled Land Act 1882, which provides that

> Where on a sale . . . there is an incumbrance affecting land sold . . . the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land whether already charged therewith or not, in exoneration of the part sold.

The purchasers refused to complete, whereupon the vendor took out this summons for a declaration that upon the execution of the deed of exoneration, without the consent of the Board of Agriculture being obtained, a good title had been shown to the premises in accordance with the terms of the contract of sale.

Bramwell Davis, Q.C. and *F. E. Farrer* for the vendor.—Sect. 68 of the Improvement of Land Act 1864 (*ubi sup.*) is permissive merely and not imperative. It enables the commissioners to release or apportion against the will of the incumbrancers; if their consent is obtained as here, application to the commissioners is unnecessary. In the state of the law at the time of the passing of the Act of 1864 (*vide* Lord St. Leonards Act, 22 & 23 Vict. c. 35, s. 10, and *Booth* v. *Smith*, 51 L. T. Rep. 742; 14 Q. B. Div. 318) it was necessary to provide some authority (the tenant for life having none) to enable the incumbrancers on a release of a part of the land charged to recover the whole amount out of the unreleased land. This is the object of sect. 68, as is shown by sect. 70 of the Act of 1864, which provides that every charge which is released shall be recoverable out of the lands which shall not by the order of release be released therefrom. Its object is not to prevent an incumbrancer releasing if he chooses by deed, and taking the consequences of that release. [They also referred to sects. 56, 60, and 65 of the Act of 1864.] The vendor and the incumbrancers are enabled by virtue of sect. 5 of the Settled Land Act 1882 to release the land by their proposed deed: (Key & Elphinstone's Conveyancing, vol. 2, edit. 4, p. 688, note *a*.) In the case of *Re Howard's Settled Estates* (67 L. T. Rep. 156; (1892) 2 Ch. 233, 236) a charge such as this was shifted under the powers conferred by the Settled Land Act 1882, s. 5.

Warrington, Q.C. and *Medd* for the purchasers.—This is a statutory charge created by the commissioners themselves, and subject to the statutory regulations of the Act of 1864. Sect. 15 of the Act provides that, if the commissioners shall think fit to entertain an application to sanction proposed improvements, they may cause the land to be inspected and examined by an assistant com-

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

missioner, or a surveyor, or engineer, who is to examine the proposals contained in the application and report as to whether in his opinion the proposed improvements will effect a permanent increase of the yearly value of the land exceeding the yearly amount proposed to be charged thereon, and that such other inquiries may be made as the commissioners may think fit; and sect. 25 provides that, if the commissioners find the proposed improvements, or any part thereof, with or without any alterations required by them, will effect such increase in yearly value, they shall sanction such improvements or such part thereof as they shall think expedient. The release or apportionment of charges so created are carefully hedged in with restrictions by the Act which must be observed. There is the provision in sect. 68, that no lands shall in consequence of release or apportionment be charged with any greater amount than that to which in the opinion of the commissioners they have been durably benefited. Without the sanction of the commissioners the successors of the incumbrancers would not have notice of the release, for it would not be registered under sect. 69. They would therefore not be bound. The restrictions placed by the Act of 1864 upon the powers of limited owners and incumbrancers have not been repealed by sect. 5 of the Settled Land Act 1882, which in sect. 30 specifically recognises the existence, and extends the powers of the Act of 1864. This charge cannot, therefore, be released without the sanction of the commissioners.

Bramwell Davis, Q.C. replied.

KEKEWICH.—The vendor in this case is tenant for life of a large estate of which he is minded to sell a portion. The whole of the estate is subject to a rentcharge created under the Land Improvement Act 1864. The vendor, being tenant for life, could sell the whole or any part of the land subject to the charge, but he wishes to sell this portion freed therefrom, and he has therefore obtained the consent of the present incumbrancers to its release from the charge. The incumbrancers are willing to join in executing a deed of release, which, if this were a case of an ordinary mortgage, would be effectual to release the property. But the question is whether the proposed deed will be effectual, as this is not a case of an ordinary mortgage, but a charge created under an Act of Parliament. There is nothing here turning on the difference between a mortgage for a lump sum and a mortgage by instalments. The question turns on the meaning of the Land Improvement Act 1864 and the effect produced on that Act by the Settled Land Act 1882. It is important to see what is the nature of this charge. It is a charge created under statutory powers which were in existence long before 1882, and when dealing with property by limited owners was, so to say, in its infancy, or, any rate, by no means fully developed. In order to allow limited owners to charge their estates for the purpose of improving settled land, by the Act of 1864 the commissioners, now the Board of Agriculture, are enabled to sanction charges upon settled land up to a certain extent, they being bound by sect. 15 of the Act to make inquiry as to whether the money to be charged thereon can be properly expended in improving the land so as to effect a permanent increase of the yearly value of the land exceeding the yearly amount proposed to be charged thereon, and by sect. 25, if satisfied that such will be the case, to sanction the proposed improvements. The land to be charged is the land on which the money is to be expended for improvements. That is the whole notion of the above provisions, and is the foundation of the commissioners' jurisdiction. Of course, on inquiries being made it may be found that the intended improvements will not be realised, but the commissioners are bound to go into the matter and see if, according to their judgment, the money to be raised will effect the intended improvements or not. But besides this the Legislature, thinking it might be found desirable to release a part of the property charged, or to apportion the charge between the various parts of the property charged, have enacted sect. 68 in which there is an enumeration of the events which might make an application to the commissioners necessary for those purposes. That section is intended to be exhaustive, at any rate it applies to this case, because it looks to the case of a limited owner being desirous to sell a part of his land, and in that event enacts that application is to be made to the commissioners in order to release from the charge any part of the land charged, or apportion such charge, so that a separate and distinct charge may become charged on the part which the landowner is desirous of selling, and the part intended to be retained by him or on any other separate parts of the land. Nothing could be wider than that section; the commissioners' jurisdiction seems unlimited, but their powers are hedged in with this proviso at the end of the section, "provided no lands shall in consequence of any such apportionment or release become charged with any greater amount than that to which, in the opinion of the commissioners, they have been durably benefited by the improvements in respect of which such charge was created." So where any application is made to the commissioners they must ascertain judicially what is the proper manner in which the property should be charged, and whether it would be durably benefited to the full extent intended. Here, of course, there is no question of dishonesty; but apart from that, if what is proposed can be done without resort to the commissioners at all, that proviso may become futile, because the incumbrancers and the tenant for life may, on such a supposition, properly agree to throw the whole of a charge upon a part of the property which is not durably benefited by the improvements effected through the charge, not only not to the extent of the greater amount thrown upon it, but even not at all. Therefore, if the argument of the vendor prevails, that proviso hedging in the powers of the commissioners will be repealed, and its intention will be defeated. Can that be? The answer to that is, that sect. 5 of the Settled Land Act 1882 has given large powers to tenants for life and other limited owners. That is a most useful section, but the question now is whether it was intended to override the provisions of the Land Improvement Act 1864. Now the Act of 1864 is recognised in sect. 30 of the settled Land Act 1882 as existing, and moreover some sections of the Act of 1864 are specifically repealed by the Act of 1882, viz., sect. 17, 18, and part of sect. 23. Therefore it would be a strong thing to say that any other part of the Act of 1864 not so repealed was repealed by implication. Of course that might

be the case if the provisions of the Act of 1882 were in distinct contradiction to those of the Act of 1864. One does not however decide that one Act repeals a former Act by implication hastily or without great consideration. Can it be said then that the terms of sect. 5 of the Settled Land Act 1882 impliedly repeal the provisions of sect. 68 of the Act of 1864? Sect. 5 provides: [His Lordship read the section above set out and continued:] That is to say, a tenant for life can do by virtue of that section what he could do if he were a tenant in fee without any statutory authority. Can there be any question as to whether this is an "incumbrance" or not? Certainly it is an incumbrance. Therefore, if the meaning of the section depended on that, the vendor's argument would be good. But is it right to consider that "the consent of the incumbrancers" means merely the execution of a deed by them? Is it not more reasonable to consider that the consent to be given is only such consent as the incumbrancers could give without the sanction of any other person? The incumbrancers in fact, in order to give the consent required by sect. 8, must in the fullest sense of the word be *sui juris*. But, according to the provisions of the Act of 1864, it seems to me that the incumbrancers here cannot be described as *sui juris*. How can they say that the land released is perfectly released, or that the remaining land is to be charged with the whole of the incumbrance? It might be so arranged that the whole of the charge would fall upon that part of the property which was not benefited thereby, and so the intention of the Act of 1864 would be defeated. The incumbrancers here are the persons who hold the rentcharge, but they are not "the incumbrancers" who are enabled to consent by sect. 5 of the Act of 1882, and the sanction of the commissioners must therefore be obtained. The proposed deed is therefore not sufficient to release this land, or, to put it more strongly, the tenant for life, and the incumbrancers have no power to throw the whole burden of this rentcharge upon that part of the land remaining unsold, which rentcharge the commissioners after due investigation have allowed to be placed upon the whole of the estate. It is said, however, that this has received *quasi*-judicial sanction from Stirling, J., in *Re Howard's Settled Estates* (*ubi sup.*), and that by deciding against the vendor's contention I should be disturbing a settled practice, and one recognised by conveyancers, and reference is made to a well-known work on conveyancing, Key & Elphinstone's Precedents. Now, with regard to the decision of Stirling, J., if he had by implication decided this point I should have followed him, but obviously it was not before him, and it was never argued. With regard to the practice of conveyancers, that always meets with respect from the court, and where there is evidence of it, it always receives due consideration. As to what is said in Key & Elphinstone (*ubi sup.*), it is only an opinion without reference to any discussion, and an opinion on the Act of 1882 which has certainly not yet been exhausted as regards judicial decisions. I think, therefore, I ought not to hesitate to act on my own opinion, and I shall hold that the purchasers' objection is good, and that the vendor must pay the costs of this application.

Solicitors: *Farrer* and *Co.*; *Valpy, Chaplin,* and *Peckham.*

Wednesday, Nov. 13.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re ANGLO-AUSTRIAN PRINTING AND PUBLISHING UNION LIMITED; BRABOURNE *v.* THE SAME. (*a*)

Company—Winding-up—Costs—Debentures covering present and future capital—Deficiency of assets—Petition—Moneys recovered by liquidator—Petitioner's costs — Companies (Winding-up) Act 1890 (53 *&* 54 *Vict. c.* 63), *s.* 10.

Where the debentures of a company are secured upon the whole capital of the company both present and future, but the assets are insufficient for the payment in full of the debenture-holders, a petitioner is not entitled to payment thereout of his costs of a petition to wind-up the company notwithstanding the fact that the assets to a large extent consist of moneys recovered by the liquidator in the winding-up from contributories and from the directors on a misfeasance summons under sect. 10 *of the Companies (Winding-up) Act* 1890.

ON the 2nd May 1891 an order was made for the compulsory winding-up of the Anglo-Austrian Printing and Publishing Union Limited, and the order directed (*inter alia*) that the costs of the petitioners should be taxed and paid out of the assets of the company. The official receiver was liquidator in the winding-up.

The company had issued debentures, which charged with the payment of the moneys thereby secured all its undertaking and property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

Prior to the winding-up, viz., on the 24th Feb. 1891 and the 19th March 1891 respectively, two actions had been commenced by debenture-holders to realise their securities. On the 4th May 1891 the official receiver was appointed receiver in both actions.

On the 28th June 1892 an order was made in the winding-up that the official receiver and liquidator should be at liberty to institute and prosecute misfeasance proceedings under sect. 10 of the Companies (Winding-up) Act 1890 against certain of the directors of the company, and that he should be indemnified against any costs to be incurred by him in such proceedings out of the assets of the company. As the result of these proceedings and of compromises, and of the payment of calls made on the contributories, the official receiver had received a sum which, after deducting the expenses of realisation, amounted to about 8780*l.*, which had been paid into court to the credit of the official receiver as the receiver in the debenture-holders' actions.

On the 11th Feb. 1895 judgment was given in the actions, and it was (*inter alia*) directed that an inquiry should be made whether there were any and what incumbrances other than the debentures affecting the property of the company, and whether there were any and what sums proper to be paid to any and what persons out of the property comprised in or charged by the debentures or any part of such property.

C. H. Robertson had acted as solicitor for the petitioners on the petition on which the winding-up order was made, and also for certain debenture-

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

holders and contributories appearing in support of the petition, and had assigned by way of mortgage the costs awarded under the winding-up order to one T. Mason.

This was a claim by Mason, which had been adjourned into court by the registrar, to have the costs so assigned to him paid out of the fund recovered by the official receiver.

It was stated that, unless the costs were paid out of the fund, there was small, if any, chance of their being recovered at all, inasmuch as all the assets were covered by the debentures.

Muir Mackenzie for the applicant.—As regards the funds obtained from the contributories in respect of the unpaid calls on their shares the only person who could make these calls was the official receiver and liquidator:

Fowler v. *Broad's Patent Night Light Company*, 68 L. T. Rep. 576; (1893) 1 Ch. 724.

To give him jurisdiction to do this it was necessary that there should be a winding-up order, and the applicant ought, therefore, to have his costs of the petition upon which such order was founded out of the fund so recovered. As to the moneys recovered on the misfeasance summons, I submit these were assets in the winding-up, and are subject to the payment of the costs of recovery. They are in the nature of damages, which do not come to the company during its existence as a going concern, but are produced by the winding-up only. The costs of the petition fasten on the assets because they are assets produced by an officer of the court, acting under the court's direction and the court's procedure. Before, therefore, they can be paid to the debenture-holders the costs of the petition must be paid.

Martelli, for the official receiver and liquidator, submitted to act as the court should direct.

Eustace Smith, for the debenture-holders, was not called upon.

WILLIAMS, J.—I have no doubt myself that the view taken by Mr. Mason, the mortgagee of the solicitor who acted for the petitioning creditor in the matter of the petition, is wrong. I am asked to say that, because certain misfeasance proceedings have been taken which resulted in an order that contribution should be made by certain persons to the assets of the company, and because the liquidator has realised certain money by proceedings which he has taken to enforce calls against shareholders, therefore, the debenture-holders are not to be allowed to enforce their rights against this fund, which is admittedly included in their security, without the costs of the petitioning creditor being first provided for. It is said that the case comes within the principle of salvage, because the particular proceedings which have been taken under sect. 10 could not have been taken unless there had been a winding-up order, and there could not have been a winding-up order unless there had first been a petition. That is true, but it does not seem to me that it brings these costs within any such doctrine as to salvage as is stated. If the application had been that there should be deducted from this fund, which was brought into existence in the manner stated, the costs of recovering it, for all I know I should have been prepared to make an order to that effect; but I am not asked here to do that. What I am asked to deduct are the costs of the petition, and I cannot make any such order. I wish to say this: It was not contended before me that the money which has been contributed to the assets, owing to the proceedings under sect. 10, is not covered by debentures such as those issued by this company. Upon that I can only say that, speaking for myself, I am very sorry that such should be the state of the law at the present moment. I cannot help thinking that when the question was first raised a different conclusion might have been arrived at, and it might very well have been held that such sums were outside the security. However, a contrary view has been taken and is now generally held, and I accept it. My hope now is that the Legislature may think fit to interfere. It seems to me to be an unwholesome state of things that the debenture-holders should have the control of money which has to be recovered by the officer of the court by proceedings for misfeasance. It continually happens in practice that the debenture-holders and promoters and officers of the company are intimately associated with each other, and then a winding-up comes and there is not sufficient money to pay the debenture-holders in full, and in all probability the debenture-holders have acquired their debentures under such circumstances that they only expect to receive a percentage of their investment, and frequently, if they do, they are not only satisfied, but justly so, as they are making a large profit. In this state of things a claim often arises against officers and promoters of the company in respect of what is a fraud not only on the company, but on the unsecured creditors, and the debenture-holders are so connected with the officers or promoters that they often step in when proceedings are threatened and say, "We do not think it is worth while to go to the expense of taking proceedings to recover anything from the officers or promoters; and, moreover, the estate is ours, and we do not assent to other persons enforcing the claim." I say this is an unwholesome state of things, and I hope the time will come when funds arising from proceedings for misfeasance will not be chargeable in favour of debenture-holders, but will be free from the debentures, and available for the benefit of the unsecured creditors. But that is not the present state of the law, and I am therefore bound to hold that the solicitor and his assignee are not entitled to have the costs of the petition paid out of this fund.

Solicitors: *Gush, Phillips, Walter*, and *Williams*; *H. A. Farman.*

Friday, Nov. 8.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

GREAT NORTHERN RAILWAY COMPANY *v.* COAL CO-OPERATIVE SOCIETY LIMITED. (*a*)

Bill of sale—Industrial and Provident society—Unregistered debentures—Winding-up of society—Validity of debentures as against liquidator—Bills of Sale Acts 1854 (17 & 18 *Vict. c.* 36), 1878 (41 & 42 *Vict. c.* 31), *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 17.

A society registered under the Industrial and Provident Societies Act 1862 *is not an "incorporated*

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

company" within the meaning of sect. 17 *of the Bills of Sale Act* 1882, *and therefore debentures issued by such a society are not by that section exempted from registration as bills of sale.*

FURTHER CONSIDERATION.

The Coal Co-operative Society Limited was established in 1872, and registered under the Industrial and Provident Societies Act 1862.

The society had issued debentures which were expressed to be a charge upon its freehold, copyhold, and leasehold hereditaments, and the goodwill of its business, and all its capital, stock, and goods and chattels and effects, and all its property both present and future.

These debentures had not been registered as bills of sale.

A debenture-holders' action had been commenced, and judgment therein had been given on the 10th May 1894.

On the 7th June 1894 the society was ordered to be wound-up.

This was the further consideration of the action, and a question was raised as to the validity of the debentures, so far as they constituted a charge on the property of the society other than the freehold, copyhold, and leasehold hereditaments, inasmuch as they had not been registered as bills of sale.

The Bills of Sale Act 1878, s. 17, provides that:

Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.

Buckley, Q.C. and *A. à B. Terrell* for the plaintiffs.—The Bills of Sale Act 1878 does not apply to a debenture of an incorporated society, but even if it did the effect of sect. 17 of the Bills of Sale Act 1882 is to render it unnecessary that such a debenture should be registered as a bill of sale:

Read v. *Joannon*, 63 L. T. Rep. 387; 25 Q. B. Div. 300.

The words "or other incorporated company" in sect. 17 are not to be construed as limited to companies *ejusdem generis* with mortgage or loan companies:

Re Standard Manufacturing Company, 64 L. T. Rep. 487; (1891) 1 Ch. 627.

We submit, therefore, that the present society is within the exemption contained in sect. 17. It is clearly a corporation: (Industrial and Provident Societies Act 1876, ss. 5, 7, 11.) The society, therefore, does not come within the Bills of Sale Acts, and consequently the debentures are valid as against the liquidator. They also referred to

Buckley on the Companies Acts, 6th edit., p. 169;
Bills of Sale Act 1882, ss. 4, 10, 12.

Levett, Q.C. and *E. C. Macnaghten* for the official receiver and liquidator.—The debentures are not protected by sect. 17 of the Act of 1882. All that that section does is to exclude from the operation of the Bills of Sale Acts, so far as the necessity for registration is concerned, those companies in which statutory provision is made for the registration of mortgages and charges:

Re Standard Manufacturing Company (*ubi sup.*).

That decision does not apply to the present case, for it cannot be contended that there is any such statutory provision in the case of this society. This society is not an "incorporated company" within sect. 17 of the Act of 1882. No doubt it is incorporated, but it is not a company. Throughout the Industrial and Provident Societies Act 1893 (which repealed and re-enacted the Act of 1876) a broad distinction is drawn between societies and companies: (see sects. 21, 38, 54, and 55.) It is clear, we submit, that these debentures are bills of sale, and are therefore invalid as against the liquidator as not being registered in conformity with the Act of 1878. They also referred to

Re Cunningham and Company Limited; Attenborough's case, 52 L. T. Rep. 214; 28 Ch. Div. 682;
Jenkinson v. *Brandley Mining Company*, 19 Q. B. Div. 568;
Re Stockton Iron Furnace Company, 40 L. T. Rep. 19; 10 Ch. Div. 335;
Buckley on the Companies Acts, 6th edit., pp. 272, 433;
Forged Transfer Act 1891, ss. 2, 3;
Companies Act 1862, s. 199;
Bills of Sale Act 1878, ss. 4, 8.

Buckley, Q.C. replied.

WILLIAMS, J.—The question raised in this case is as to the validity of certain debentures as against the liquidator of the Coal Co-operative Society Limited, which is in liquidation. As far as I can see the question that I have to decide is one which at present is not decided. There is no direct authority on the point. It is really, as far as I can see on the authorities, an open question, and I must decide it as best I can. Now the first Bills of Sale Act passed in 1854 was an Act passed with a specific object, which is stated in the preamble of the Act which is entitled "An Act for preventing frauds upon creditors by secret bills of sale of personal chattels" and begins with a recital: "Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances." Now the Act of 1854 being made to apply in favour of specified persons, and of those persons only—those persons being really execution creditors, and assignees in bankruptcy, and trustees under deeds for the benefit of creditors generally—was amended in 1878, but the Act of 1878 was passed, as far as I understand, for the same object and for the protection of the same classes of persons as the Act of 1854. Both Acts were passed to prevent the same mischief (*i.e.*, frauds on creditors) and for the protection of the same persons, *i.e.*, either individual creditors who had obtained judgment and issued execution, or creditors generally who had obtained execution in the shape of bankruptcy. There is nothing in the Act which indicates that there was any intention to afford any special protection to liquidators of companies in liquidation. Then one comes to the Act of 1882, which is an Act having a very much wider scope than either of the previous Acts. It is not only intended for the prevention of frauds upon creditors, but it is also intended for the protection of debtors and those who are in need against those who are apt to take advantage of their necessities to prey upon them and defraud them. So it is a natural consequence that one should find that the Act of 1882 does not only apply, as the Acts of 1854 and 1878 did, to a case where the grantor remained in possession of the pro-

perty, notwithstanding the bill of sale, but also applies in the case of bills of sale, grants, and charges which are given as security for debts or advances and to cases where the grantee may be in actual possession. Now that being the short history of the Acts, one finds in sect. 17 of the Act of 1882 the provision upon which so much has been said to-day. That section runs thus: "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company." That being the state of the legislation, those who have argued on behalf of the debenture-holders come and say, in the first place, the Bills of Sale Acts, whether you take the two earlier Acts or the later Act, have no application whatever to bills of sale and similar instruments issued by corporations. They say the two earlier Acts did not apply to corporations at all, and they further say that with regard to the Act of 1882 (which has to be construed with the Act of 1878—an Act still in force—the Act of 1854 having been repealed) that not only does the Act of 1882 itself not apply to bills of sale or debentures issued by companies but also that the Act of 1878, which has to be read with the Act of 1882 as one Act, can no longer apply if it did apply to debentures issued by corporations or incorporated companies, and it is claimed by those persons who hold these debentures that they are persons holding debentures issued by an incorporated company within the meaning of sect. 17. On the other hand it is argued on behalf of the liquidator, that the Act of 1854 and the Act of 1878 did apply, and the Act of 1878 does apply to debentures or bills of sale or charges issued by corporations or companies and that with regard to sect. 17 of the Act of 1882, whatever it can do in the case of an incorporated company, the present society is not an "incorporated company" within the section with the result that under the older Acts and under the later Act the companies remain liable to the provisions of the Bills of Sale Acts generally. That being so a good deal of light is thrown on these contentions by the decision of Bowen, L.J. in the recent case of *Re Standard Manufacturing Compang* (*ubi sup.*). In that case Bowen, L.J. undoubtedly puts it that the judgment of the court is based upon the ground that mortgages or charges of any incorporated company for the registration of which other provisions have been made by the Companies Clauses Act 1845, or the Companies Act 1862, are not within the Bills of Sale 1878. Now, if that is the whole of the decision of the Court of Appeal, I hold that the present society is not entitled to the benefit of that decision. It does not come within the scope of it at all. This society is not a company in which the registration of mortgages or charges is provided for by either of these two Acts, or indeed by any other Act. The result is that these debenture-holders are not entitled to say that they are exonerated from the provisions of the Bills of Sale Acts by reason of this decision of Bowen, L.J., because that decision is in terms applicable only to companies for the mortgages and charges of which provision is made for registration by the two Acts. That being so, I cannot myself hold that that decision is one that the debenture-holders can successfully rely on. I have therefore to look at sect. 17 and see whether these debentures come within that section irrespective of Bowen, L.J.'s decision. I hold that this society does not come within it. The ground I should like best to put it on is the simple one that sect. 17 excludes from the operation of the Act of 1882 "companies," and that this is not a company, it is a corporation which bears the name of "society." The word "company" has come to have a very well recognised meaning. There are various legal "companies," but this "society" does not come within the connotation of the word in any of its legal meanings. I think that alone would be sufficient ground for saying that the section is defined by the Legislature in favour of companies, and that if the Legislature had intended to include all sorts of corporations nothing would have been easier for the Legislature to do than to say so in plain terms. Though I think that a sufficient ground, I should like to add as a further ground that the absence of provisions for registration is a reason why the Legislature may very well have drawn the line between companies in respect of which there is such a provision made and corporations in respect of which there is no such provision. But it is my duty still to look at this decision of Bowen, L.J., and to see whether there is anything else in it which is either binding on me, or which I ought, in deference to Bowen, L.J., to follow. There is nothing that is binding on me. The question was distinctly raised in *Re Standard Manufacturing Company* (*ubi sup.*). Aye or no, were corporations generally bound by the Bills of Sale Acts, irrespective of the effect of sect. 17? Bowen, L.J. looks at the Bills of Sale Acts. He points out that bills of sale charges or debentures issued by "companies" do not, in his opinion, come within the mischief pointed at by these Acts. He goes on, and points out that much of the language of the Acts is not apt language to use if the statutes were intended to apply to corporations, but, at the same time, he takes the definition clause under the Acts of 1878 (sect. 4), which does not, for this purpose, materially differ from the definition clause under the Act of 1854, and says in terms that the words of that definition clause are wide enough to cover a bill of sale or debentures issued by a company. Having placed the matters *pro* and *con* he winds up by saying that he is not prepared to hold that no corporation can, in any circumstance, be within the Bills of Sale Act 1878. It seems to me that Bowen, L.J., deliberately and studiously leaves the question open. He goes on to say that "the view that debentures like the present are not within the Bills of Sale Act of 1878, was that adopted by Pollock, B. in the case of *John Welsted and Co.* v. *Swansea Bank* (5 Times L. Rep. 332), and by Lord Coleridge, C.J. and Wills, J. in the case of *Read* v. *Joannon* (*ubi sup.*); see also *Edmonds* v. *Blaina Furnaces Company* (57 L. T. Rep. 139; 36 Ch. Div. 215), *Levy* v. *Abercorris Slate and Slab Company* (58 L. T. Rep. 218; 37 Ch. Div. 260)." He then says: "We agree with this view"—*i.e.*, the view adopted in those cases—" and we think that this appeal should, therefore, be allowed, with costs both here and below." If he had stopped there I should have felt that that was such an affirmation of the view contained in those cases that it bound me. But he goes on to say, without

a fresh sentence, "on the ground that the mortgages or charges of any incorporated company, for the registration of which other provisions have been made by the Companies Clauses Act 1845, or the Companies Act 1862, are not within the Bills of Sale Act of 1878." That is to say, he does not exclude companies generally from these Acts, but only companies in which provisions are made for the registration of mortgages. It seems to me, therefore, that Bowen, L.J., deliberately leaves open the question whether the Bills of Sale Acts apply to other companies, *i.e.*, apply to companies in the case of which no provision is made for registration. Being then at large to deal with the question, I cannot help starting with the Act of 1854, and, remembering, with regard to that Act, that at the time when it was passed the Companies Act 1862 had not then passed (*i.e.*, the provisions for the registration of mortgages under the Act of 1862 were not in existence), and that whatever may have been the intention of the Legislature at the time of the passing of the Act of 1854 with regard to companies coming within the provisions of the Companies Clauses Act 1845, the Legislature cannot have had any intention with reference to companies under the Companies Act 1862. But with regard to those companies it seems to me impossible to reconcile the decision of Bowen, L.J. with *Deffell* v. *White* (15 L. T. Rep. 211; L. Rep. 2 C. P. 144) and *Shears* v. *Jacob* (14 L. T. Rep. 286; L. Rep. 1 C. P. 513), in which it was held in 1866 that the Bills of Sale Acts did apply to companies under the Companies Act 1862. I assume that the company in *Deffell* v. *White* (*ubi sup.*) was a company under the Companies Act 1862 from the date of the case (1866), In *Shears* v. *Jacob* (*ubi sup.*) the company is stated in terms to be a company "limited." With regard to the residue of the authority, there is some each way. There is a decision by Pearson, J. in *Re Cunningham and Company Limited*; *Attenborough's case* (*ubi sup.*), which is a positive decision that debentures issued by companies come within the Bills of Sale Acts, or at all events it is the expression of a very decided opinion. There should be added the case of *Ross* v. *Army and Navy Hotel Company* (55 L. T. Rep. 472; 34 Ch. Div. 43), where Kay, L.J. (then Kay, J.) and the Court of Appeal both said the Companies Act seemed to assume that companies under the Companies Act are within the Bills of Sale Acts. It is true they did not there avoid the security, but it was not at all on the ground that the Bills of Sale Acts had no application to such companies. On the other hand, there is, as I have said, the case of *Read* v. *Joannon* (*ubi sup.*), where Lord Coleridge expressly decides that corporations are outside the Bills of Sale Acts and the cases mentioned by Bowen, L.J., which, without at all expressly deciding, seem to me to assume that the Bills of Sale Acts have no application to corporations at all. I think it right to mention the point made by Mr. Levett that it is impossible to suppose that Bowen, L.J. meant to decide the case upon the ground that the Bills of Sale Acts have no application to companies at all, because, if he had intended to decide that, the elaborate grounds which he goes into for the decision would not have been necessary; he had only to say, "This point is concluded by *Read* v. *Joannon* (*ubi sup.*)." I have, therefore, first the decision of Bowen, L.J., which is a decision that companies in which provision is made for the registration of mortgages, are not within the Act of 1878. I have to say whether I will go one step further and say that no corporations are within the Bills of Sale Acts. I do not feel disposed to go that step further. What would most dispose me to go that step further is the fact that, though Bills of Sale Acts have been in force ever since 1854, there has not been (since the two cases I have mentioned) any decision avoiding debentures as coming within the Bills of Sale Acts down to 1882. The reason for that is that the question could not very often arise, because the Acts of 1854 and 1878 had no operation in favour of liquidators, and so far as execution creditors were concerned the question very rarely arose, because the moment an execution was put in you got a petition and a winding-up order, and in that way the raising of the question was avoided. Under those circumstances, I hold that this industrial society is not excluded from the operation of the Bills of Sale Acts; and I therefore decide against the validity of these debentures.

Solicitors: *W. Barrs*; *Bower, Cotton,* and *Bower.*

QUEEN'S BENCH DIVISION.

May 22, *June* 26, *July* 25, *and Nov.* 14.

(Before GRANTHAM and WRIGHT, JJ.)

THE HULL ROPE WORKS COMPANY LIMITED v. ADAMS. (a)

Mortgage of ship—Hire-and-purchase agreement—Attaching goods to ship—Ship's equipment—Disposition of goods—Factors Act 1889 (52 & 53 *Vict. c.* 45), *s.* 9.

A hire-and-purchase agreement, under which the hirer has no power to determine the agreement by returning the goods is an "agreement to buy" within sect. 9 *of the Factors Act* 1889 (52 & 53 *Vict. c.* 45). *And if the hirer in such case, being the mortgagor of a ship, attaches the goods to the ship in such a way as to make them part of the ship's equipment, then such act, at any rate if followed by the mortgagee taking possession, will constitute a "delivery" by the hirer under a "disposition" to the mortgagee within the same section.*

A. owned a fishing smack which he mortgaged to B. and Co. After the date of the mortgage A. entered into a hire-and-purchase agreement with C., under which C. gave A. possession of a trawling warp for the smack. This agreement, though it contained provisions enabling C. to determine it on certain contingencies, gave A. no power to do so by returning the goods to C. A. attached the trawling warp to the smack. Subsequently B. and Co. took possession of the smack and warp under the mortgage. C. thereupon forcibly retook possession of the warp. B. and Co. sued C. in the County Court for trespass. The judge held that the property in the warp had passed to B. and Co. under sect. 9 *of the Factors Act* 1889, *and gave them damages against C. C. appealed.*

Held, that the County Court judge was right.

Helby v. Matthews (72 *L. T. Rep.* 841; (1895) *A. C.* 471) *and* Lee *v.* Butler (69 *L. T. Rep.* 379; (1893) 2 *Q. B.* 318) *considered.*

(a) Reported by J. A. STRAHAN, Esq., Barrister-at-Law.

APPEAL of the defendant from the Suffolk County Court.

Batty was the owner of a fishing smack, called the *Maude Green*, registered at Lowestoft. On the 24th May 1893 Batty mortgaged the smack to one Knowles. On the 2nd Nov. 1894 Knowles transferred his mortgage to the plaintiffs.

On the 20th Oct. 1894 the defendant Adams supplied Batty with a trawl warp to be substituted for the one which was in use on the smack and was included in the mortgage of the smack. That trawl warp was supplied under a hire-and-purchase agreement, of which the following is the material part:

The owner and lessor (Adams) agrees to let to the lessee (Batty) and the lessee hereby agrees to hire and take from the owner and lessor one trawl warp . . . on the following conditions:

The lessee shall and will pay to the owner and lessor as and for rent for the said trawl warp the following sums, that is to say, four pounds per calendar month commencing on the 1st Nov. 1894, which said sums so agreed to be paid as aforesaid amount in the aggregate to the sum of fifteen pounds five shillings, and the lessee agrees to take all proper care of the said trawl warp, and not in any way to sell, assign, sublet, or otherwise part with, the possession of the said trawl warp, or assume the ownership thereof, so long as any of the said sums shall remain due, and will not in anyway alter the condition of the said trawl warp, or allow the same to be made without the consent of the owner or lessor in writing. And it is further mutually determined that, upon payment of all the several sums aforesaid being made to the lessor by the lessee, then this agreement shall be at an end, and the said trawl warp shall become the property of the lessee as purchaser thereof for the said sum of fifteen pounds five shillings, so to be paid as aforesaid, but until the said several sums shall have been fully paid, together with any expenses and costs, legal and otherwise connected therewith, the said trawl warp shall remain the sole and absolute property of the owner and lessor, it being hereby expressly declared and agreed that the said trawl warp is only let on hire to the lessee until all sums of money due under this agreement are paid, and in case of failure in payment of any of the above-mentioned sums, or in case the lessee, his exetors, administrators, or assigns shall during the continuance of this agreement be adjudged bankrupt, or file a petition in liquidation, or make a composition with, or any assignment for the benefit of his creditors or suffer his effects to be taken in execution, or give a bill of sale, or on any breach of any of the covenants and conditions herein contained the full balance of the said sum of fifteen pounds five shillings required for the purchase of the said trawl warp shall at the election of the owner and lessor, at once become payable to and be recoverable by him, who, however, instead of seeking to recover such balance, may, if he thinks fit, seize and resume possession of the said trawl warp wherever the same my be and sell the same.

Here follow provisions for applying the proceeds of the sale to the payment of expenses and of unpaid instalments, and handing the balance to the lessee or his representatives.

At the time the defendant entered into this agreement he knew that the smack was mortgaged to Knowles. He wrote to Knowles before concluding the agreement, and received a telegram in reply purporting to come from Knowles. There was no evidence that the plaintiffs knew of the agreement at the time the mortage was transferred to them.

On the 2nd March 1895 the plaintiffs took possession of the smack under their mortgage. The defendant thereupon demanded the return of the trawl warp supplied by him under the agreement with the mortgagor, Batty. The plaintiffs refused to comply, and on the 7th March the defendant, with some others, went on board the smack, and forcibly took possession of the trawl warp. The plaintiffs thereupon sued the defendant in the County Court for trespass.

It was contended for the plaintiffs that under sect. 9 of the Factors Act 1889 (52 & 53 Vict. c. 45) the trawl warp passed to them as mortgagees. For the defendant it was contended that that section did not apply, that the trawl warp was still the defendant's property, and that he was therefore justified in taking possession of it. The judge decided in favour of the plaintiffs awarding them 25*l.* damages, to be reduced to 10*l.* on the defendant returning the trawl warp.

The defendant appealed.

Sect. 9 of the Factors Act 1889 is as follows:

Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him. of the goods or documents of title, under any sale, pledge, or disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of titlewith the consent of the owner.

Scrutton for the appellant.—There is no agreement to buy within sect. 9. The House of Lords held that there are two kinds of hire and purchase agreements—those which must ripen into purchases, and those which may not. The former are within sect. 9 of the Factors Act 1889, the latter are not. This is one of the latter:

Helby v. *Matthews*, 72 L. T. Rep. 841; (1895) A. C. 471.

[WRIGHT, J.—In *Helby* v. *Matthews*, it was pointed out that there was a clause giving one party the right to determine the agreement. That was the basis of the decision. There is no such clause here.] In the second place there has been no disposition within sect. 9 of the Act. There was no delivery by the hirer to the mortgagee. The mortgagee took possession of the ship, and with it of the hired goods under power of law. The original mortgage was entered into before the hirer obtained possession of the goods, and accordingly it did not affect them:

Coltman v. *Chamberlain*, 25 Q. B. Div. 328;
Gough v. *Wood*, (1894) 1 Q. B. 713.

Poyser for the respondents.—Where under an agreement of hire and purchase, the hirer has no power to retain the goods, sect. 9 of the Factors Act applies. Here there is no such power:

Lee v. *Butler*, 69 L. T. Rep. 370; (1893) 2 Q. B. 318;
Helby v. *Matthews* (*ubi sup.*).

In the second place the rope having been attached to the ship, became part of her equipment. As such it was included under the previously existing mortgage:

Salmon v. *Wood*; *Ex parte Gould*, 2 Mor. Bank. Cas. 137.

And under sects. 31, 34, and 35, of the Merchant

Shipping Act 1894 (57 & 58 Vict. c. 60), the plaintiffs as mortgagees were owners, and had the power of disposition over the whole ship. To hold that the trawl warp was the property of defendant would be to make the ship consist of sixty-five shares contrary to sects. 5 and 9 of the same Act.

Scrutton in reply.—There is no express power in the agreement enabling the hirer to retain the goods, but there is nothing in it to prevent his returning them.

Cur. adv. vult.

Nov. 14.—GRANTHAM, J. read the judgment of the court:—We reserved judgment in this case to enable us to see if the judgment of the House of Lords in *Helby* v. *Matthews*—a case which had been argued, but on which judgment had not been given, or if given not reported—would affect this case. We have now seen that judgment, and are of opinion that this case is not governed by that decision, but is within the decision of the Court of Appeal in *Lee* v. *Butler*, which case is in fact approved by the House of Lords in *Helby* v. *Matthews*. The agreement in question is ill expressed, but it appears to us to contain an irrevocable promise by the hirer to pay 4*l.* a month until the full price of 15*l.* 5*s.* is paid, and when the 15*l.* 5*s.* has been paid, the rope thereupon becomes the property of the hirer. Various contingencies are named in which the owner may put an end to the arrangement for sale, but there is nothing corresponding to the provision on which the decision of the House of Lords in *Helby* v. *Matthews* appears to have turned, that "the hirer may terminate the hiring by delivering up to the owner the said instrument." We therefore think that in the present case the hirer had "agreed to buy" the rope within the meaning of sect. 9 of the Factors Act 1889 (52 & 53 Vict. c. 45), and we have already expressed our opinion that the addition of the rope to the equipment of the mortgaged ship was a sufficient delivery or transfer to the mortgagee under a "disposition" within the meaning of the Act, or at any rate became so when under and pursuant to the powers of the mortgage possession was taken by the plaintiffs.

Appeal dismised. Leave to appeal refused.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, agents for *Wiltshire* and *Son*, Great Yarmouth.

Solicitors for the defendant, *Dubois* and *Williams*, agents for *H. Chamberlin*, Great Yarmouth.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Oct. 28 *and* 29.

(Before WILLIAMS and KENNEDY, JJ.)

Re MORGAN; *Ex parte* TURNER. (*a*)

Bankruptcy—Protected transaction—Notice of act of bankruptcy—Bankruptcy Act 1883 (45 & 46 *Vict. c.* 52), *s.* 4, *sub-sect.* 1 (*h*); *s.* 49, *sub-sect.* 2.

Knowledge by a creditor that the debtor's solicitor has instructions to prepare a notice that the debtor intends to suspend payment of his debts is not notice to such creditor that the debtor has committed an act of bankruptcy, and an assignment of a debt taken by such creditor from the debtor, with such knowledge, is consequently valid.

THIS was an appeal from the County Court at Hereford, where his Honour Judge Lea had declared that an assignment by Morgan, the debtor, of a debt due to him from one Terry, to Turner the appellant, was void as against the trustee in the bankruptcy, having been taken by Turner with notice that Morgan had committed an act of bankruptcy.

On the 12th March 1895 Turner sold to Morgan seventy bullocks and received in payment a cheque, dated the 13th March, which was dishonoured upon presentation. Morgan re-sold the bullocks to Terry on the 13th March, and received from him a cheque, which, however, he did not cash, but ultimately returned to Terry. Terry was thus left indebted to Morgan for the price of the bullocks.

Upon the 14th March Morgan committed an act of bankruptcy by writing to the manager of his bank that he intended to suspend payment, and asking the manager to instruct Mr. Philpin, his solicitor, to prepare a notice calling a meeting of his creditors for the 19th March.

Upon the 15th March Turner had an interview with Philpin, who said to him, "Morgan has given me instructions to call his creditors together because he cannot pay his debts," but he did not acquaint Turner with the contents of the letter written by Morgan to the bank manager.

Turner wrote to Terry, on the 16th March, saying, "Morgan is compounding with his creditors," and upon the 20th March went to Morgan's house and compelled him to assign Terry's debt to him.

The petition was presented on the 1st April, receiving order made the 10th April, and a trustee was appointed, who moved the County Court upon the 21st May to declare the assignment void as against him. The court declared the assignment void, and Turner appealed.

Muir Mackenzie, for the appellant, stated the facts, and was stopped by the court.

Gwynne James for the respondent.—A debtor commits an act of bankruptcy when he gives notice to a creditor that he is about to suspend payment of his debts. Therefore, I contend that if Turner knows that Philpin has instructions from Morgan to call a meeting of his creditors, then he must know that Morgan has given notice that he is about to suspend payment of his debts.

Muir Mackenzie in reply.—Philpin had no right in the course of conversation with Turner to give him notice of an act of bankruptcy on the part of Morgan, nor was he Morgan's agent to commit an act of bankruptcy for him by telling Turner that he could not pay his debts.

WILLIAMS, J.—The case made before was that there had been an act of bankruptcy committed by the debtor, by his notice to the bank manager of his intention to suspend payment, within sect. 4, sub-sect. (*h*) of the Bankruptcy Act 1883, the bank manager being one of his creditors. That was the case in the County Court; but now, if one looks at the evidence of the two people who might have given notice of that act of bankruptcy to Turner, viz., the bank manager and Philpin, I think it plain that neither of them did in form give notice to Turner that the debtor had given this notice of

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

intention to suspend payment of his debts. First take the conversation between Turner and the bank manager; the affidavit of the bank manager does not suggest that he gave Turner any notice of the letter he had received from the debtor, and Turner in his evidence gave a point blank denial to the suggestion that he had received any such notice from the bank manager. Then take the conversation with Philpin, the same observations apply; his affidavit does not say that he told the appellant the contents or effect of that letter. It is impossible to say that Philpin in conversation gave any notice of this act of bankruptcy. It did, however, occur to me that the conversation between Turner and Philpin might constitute a notice of an act of bankruptcy, for it might be said that the very conversation was notice by the debtor, through his agent, that he had suspended, or was about to suspend, payment of his debts. Nevertheless, I have come to the conclusion that Philpin was not authorised by the debtor to give any such oral notice; he only had authority to issue a circular on a date which had not yet arrived, and the debtor might have withdrawn that authority at any time before the issue of the circular. Knowledge that a debtor intends to give notice of his intention to suspend payment is not notice of an act of bankruptcy, nor is knowledge that the debtor's solicitor has instructions to prepare a notice of intention to suspend payment notice that the debtor has committed an act of bankruptcy; and it does not amount to notice by the debtor to the appellant unless we hold that the instructions to the solicitor gave him authority to give oral notice before the circular was issued.

KENNEDY, J.—I concur. It seems to me on the evidence that it is quite clear that the appellant never knew of the contents or effect of the letter to the bank manager, and also that the solicitor had no authority to give oral notice of an act of bankruptcy on behalf of the debtor, but that his authority was limited to sending out the circulars.

Appeal allowed.

Solicitor for the appellant, *A. Hunt.*
Solicitor for the respondent, *H. P. Davies.*

Judicial Committee of the Privy Council.

July 25 and Nov. 16.

(Present: The Right Hons. Lords WATSON, MACNAGHTEN, MORRIS, and DAVEY, and Sir R. COUCH.)

CORPORATION OF TORONTO *v.* VIRGO. (a)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Corporation — Bye-law — Validity — Restraint of trade—Powers of regulating and governing.

A municipal power of regulation, or of making bye-laws for good government, without express words of prohibition, does not authorise a bye-law making it unlawful to carry on a lawful trade in a lawful manner.

And therefore, where a municipal council had power to make bye-laws for "regulating and governing" hawkers, &c.:

Held (affirming the judgment of the court below), that they had not power to prohibit hawkers from plying their trade at all in a substantial and important part of the city, no question of any apprehended nuisance being raised, and that a bye-law to that effect was ultra vires.

THIS was an appeal from a judgment of the Supreme Court of Canada (Gwynne, Sedgewick, and King, JJ.) Fournier and Taschereau, JJ. dissenting, who had reversed a judgment of the Court of Appeal for Ontario (Haggarty, C.J., Burton, Osler, and Maclennan, JJ.) affirming a decision of Galt, C.J. dismissing an application to quash a bye-law as being *ultra vires.*

The appellant corporation, professing to act in pursuance of their statutory powers for regulating and governing hawkers and pedlars, had passed a bye-law prohibiting such persons from carrying on their trades in eight specified streets of the city of Toronto. It was alleged, and was so found by the court, that these were the principal business streets of the town, and a motion was made to quash the bye-law on the ground that it was unreasonable and in restraint of trade, and went beyond powers of regulation, and amounted, in fact, to an absolute prohibition, and was *ultra vires.*

The sections of the Acts bearing on the case are set out in the judgment of their Lordships.

Blake, Q.C. (of the Canadian Bar), for the appellants, contended that power to pass such a bye-law was conferred by sect. 495, sub-sect. 3, of the Ontario Municipal Act (Rev. Stat. Ont. c. 184). It is not necessary that a nuisance should be caused or apprehended. [Lord WATSON referred to *Macbeth* v. *Ashley* (30 L. T. Rep. 310; L. Rep. 2 H. L. Sc. 352).] The statute gives the council unrestricted control over these matters, and, as they have exercised their discretion in good faith, the court will not interfere with it. In fact, in the courts below the opinion of three judges has prevailed over that of seven. See

Slattery v. *Naylor*, 59 L. T. Rep. 41; 13 App. Cas. 446.

H. Avory and *Du Vernet* (of the Canadian Bar), for the respondent, argued that the bye-law was unreasonable and *ultra vires*, and went beyond the powers of "regulating" conferred by the statute. It amounts to a prohibition and is in restraint of trade. See

Keep v. *Vestry of St. Mary's, Newington*, 70 L. T. Rep. 509; (1894) 2 Q. B. 524;
Dick v. *Badart*, 48 L. T. Rep. 391; 10 Q. B. Div. 387;
Calder Navigation Company v. *Pilling*, 14 M. & W. 76;
Chamberlain v. *Conway*, 53 J. P. 214.

Blake, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Nov. 16.—Their Lordships' judgment was delivered by

Lord DAVEY.—The question for decision in this appeal is whether a section of a bye-law was competently and validly made by the Corporation of Toronto. Sect. 12 of bye-law 2453 requires a licence to be taken out by "all hawkers, petty chapmen, or other persons carrying on petty trades, or who go from place to place, or to other men's houses, on foot or with any animal bearing

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

or drawing any goods, wares, or merchandise, for sale, or in or with any boat, vessel, or other craft, or otherwise carry goods, wares, or merchandise for sale, except that no such licence shall be required for hawking, peddling, or selling from any vehicle or other conveyance goods, wares, or merchandise to any retail dealer, or for hawking or peddling goods, wares, or merchandise, the growth, produce, or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licences, if the same are being hawked or peddled by the manufacturer or producer of such goods, wares, or merchandise, or by his *boná fide* servants or *employés*, having written authority in that behalf, and such servant or *employé* shall produce and exhibit his written authority when required to do so by any municipal or peace officer; nor from any pedlar of fish, farm, and garden produce, fruit and coal-oil, or other small articles that can be carried in the hand or in a small basket; nor from any tinker, cooper, glazier, harness-mender, or any person usually trading or mending kettles, tubs, household goods, or umbrellas, or going about and carrying with him proper materials for such mending." Sect. 2 *a* is the only part of the amending bye-law (2934) now complained of. It provides that "no person named and specified in sub-sect. 2 of this section (whether a licensee or not) shall (after the 1st July 1892, prosecute his calling or trade in any of the following streets and portions of streets in the city of Toronto." Then follows an enumeration of eight streets which comprise the busiest and most important thoroughfares of the city. The statutory power under which the corporation claims a right to make that bye-law is contained in the Municipal Act of Ontario, s. 495, which enacts that the council of any county, city, and town may pass bye-laws for "licensing, regulating, and governing hawkers or petty chapmen, and other persons carrying on petty trades, &c." Reference was also made to sect. 503 of the same Act, which empowers councils to pass bye-laws for establishing and regulating markets and preventing the sale by retail in the public streets of any meat, vegetables, grain, hay, fruit, and other articles. The real question is whether, under a power to pass bye-laws for "regulating and governing" hawkers, &c., the council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city, no question of any apprehended nuisance being raised. It was contended that the bye-law was *ultra vires* and in restraint of trade and unreasonable. No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise, both as to time and, to a certain extent, as to place, where such restrictions are in the opinion of the public authority, necessary to prevent a nuisance or for the maintenance of order. But their Lordships think that there is a marked distinction between the prohibition or prevention of a trade and the regulation or governance of it, and, indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated and governed. An examination of other sections of the Act shows that when the Legislature intended to give power to prevent or prohibit it did so by express words, and that the framers of the Act did not intend to include a power to prevent or prohibit in a power to regulate or govern. Through all the cases cited in illustration of the respondent's argument the general principle may be traced that a municipal power of regulation or of making bye-laws for good government, without express words of prohibition, does not authorise the making it unlawful to carry on a lawful trade in a lawful manner. It was argued that the bye-law did not amount to prohibition, because hawkers and chapmen might still carry on their business in certain streets of the city. Their Lordships cannot accede to that argument. The question is one of substance, and should be regarded from the point of view as well of the public as of the hawkers. The effect of the bye-law is practically to deprive the residents of the most important part of the city of the power of buying their goods from or of trading with the class of traders in question. And that observation receives additional force from the very wide definition given to "hawkers" in the Act. At the same time, the "hawkers," &c., are excluded from exercising their trade in that part of the city. There is no evidence, and it is scarcely conceivable that the trade could not be carried on without occasioning a nuisance. The appellants wisely disclaimed any intention on the part of the council to discriminate against hawkers and pedlars in favour of permanent shopkeepers. No other explanation of the object of the bye-law was offered. The question, therefore, is reduced to a bare question of power. Their Lordships, on the whole, have come to the conclusion that it was not the intention of the Act to give that power to the corporation. They therefore agree with the majority of the judges of the Supreme Court, and will humbly advise Her Majesty that the appeal be dismissed with costs.

Solicitors for the appellants, *Freshfields* and *Williams*.

Solicitors for the respondent, *Poole* and *Robinson*.

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 25 *and Nov.* 11.

(Before SMITH and RIGBY, L.JJ.)

CONSTANTINE AND CO. *v.* WARDEN AND SONS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice — Third-party procedure — Indemnity — Order XVI., r. 48.

An action was brought by shipowners against the defendants for not having unloaded the plaintiffs' ship at the port of discharge pursuant to the terms of the charter-party, which stipulated that the ship should be discharged at port of delivery "as customary." After the execution of the charter-party the defendants sold the cargo to D., who contracted that the cargo should be taken "from over the ship's side as fast as the captain can deliver," failing which it was to be resold at the defendants' discretion, D. being liable for "any loss, demurrage, or other

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

expenses arising therefrom." The ship arrived, and D. took delivery of the cargo.

Held, that leave ought not to be given to the defendants to issue a third-party notice under Order XVI., r. 48, against D., as the contract by D. as to loss and demurrage was not a contract to indemnify the defendants against their liability to the plaintiffs under the charter-party.

Decision of Day, J. reversed.

THE question in this case was, whether the defendants were entitled to leave to issue a third-party notice under Order XVI., r. 48, against the appellants.

The plaintiffs, who were shipowners, brought this action against the defendants for not having unloaded the plaintiffs' ship at the port of discharge pursuant to the terms of a charter-party dated the 15th June 1894, by which the defendants were bound, and which stipulated that the ship should be discharged at port of delivery "as customary."

On the 16th June 1894 the defendants sold to Messrs. Dobell and Co., the proposed third parties, 1500 to 2000 tons of bones at 4*l.* 10*s.* per ton, "to be shipped in one or two vessels, at sellers' option . . . during the months of August and (or) September and (or) October, from River Plate, to discharge at Birkenhead in the United Kingdom as per charter-party," and the contract contained the following provision: "The bones to be weighed in the usual manner and to be taken with all faults and defects from over the ship's side as fast as the captain can deliver, failing which to be resold at the sellers' discretion, and the buyer to be liable for any loss, demurrage, or other expenses arising therefrom."

There was also in the contract an arbitration clause in the event of any dispute arising on the contract.

The plaintiffs' ship, with the bones on board, arrived at Birkenhead in due course, when Messrs. Dobell and Co. took delivery thereof in fulfilment of their contract with the defendants.

The plaintiffs now sued the defendants for not having discharged the ship at port of delivery "as customary" according to the terms of the charter-party, alleging that the ship had been detained eleven days beyond the proper time, and the defendants sought to bring in Messrs. Dobell and Co. as third parties to indemnify them against this claim of the plaintiffs.

Day, J. at chambers held that the defendants were entitled to issue a third-party notice against Messrs. Dobell and Co., and from that decision Messrs. Dobell now appealed.

Bigham, Q.C. and *H. F. Boyd* for the appellants.—The liability undertaken by the appellants in the contract of the 16th June 1894, with reference to any loss, demurrage, or expenses, refers only to any failure on their part to perform that contract with the defendants. It is not a contract to indemnify the defendants against any claim the plaintiffs may have against them under the charter-party. Therefore Order XVI., r. 48, does not apply, and leave to issue the third-party notice should have been refused:

Speller and Co. v. *The Bristol Steam Navigation Company*, 50 L. T. Rep. 419; 13 Q. B. Div. 96.

The words of the contract of purchase "as per charter-party" refer only to the contemplated voyage.

Joseph Walton, Q.C. and *T. G. Carver* for the defendants.—There is in the purchase contract an express contract to indemnify the plaintiffs against any claim for demurrage. That contract shows that the goods are coming by ship, and the purchasers are to be "liable for any demurrage arising therefrom." As between the buyer and seller of the goods there can be no liability for demurrage; it must be between one of them and a third person. The appellants must be liable if the plaintiffs are, as they are bound by more stringent conditions than the plaiatiffs, and therefore they must have broken their contract if the plaintiffs have.

Bigham in reply.

Cur. adv. vult.

Nov. 11.—SMITH, L.J., after stating the facts, continued:—The case of *Speller and Co.* v. *The Bristol Steam Navigation Company* (*ubi sup.*) in this court has decided that a defendant is not entitled to issue a third-party notice under Order XVI., r. 48, unless he can show a contract by the third party, either express or implied, that the defendant shall be indemnified by him, which means a contract by the third party to indemnify the defendant against the causes of action upon which the plaintiff is suing. We have nothing in this case to do with contribution or with any implied contract, and the question is, do the defendants make out such an express contract by the third parties? In my judgment the first part of the contract of the 16th June 1894 between the defendants and Dobell and Co. down to the words as "per charter-party" deals with the contemplated voyage, and the clause commencing with "The bones to be weighed," and ending "arising therefrom," deals with the unloading of the ship at the termination of that voyage. It is argued for the defendants that in this document is to be found an express contract by Messrs. Dobell and Co. to indemnify the defendants against demurrage. They do not allege any implied contract. It is true that in it Messrs. Dobell and Co. contract to pay to the defendants any loss, demurrage, or expenses which may result from their not taking the bones from over ship's side as fast as the captain can deliver; but where is the contract that they will indemnify the defendants against the causes of action the plaintiffs may have under the charter-party of the 15th June 1894 against the defendants? I can find no such contract. Messrs. Dobell and Co. do not undertake to pay any demurrage the plaintiffs may recover against the defendants under the defendants' contract with the plaintiffs to unload as customary, but they undertake to pay any loss, demurrage, or expenses which may arise by reason of their (that is Messrs. Dobell and Co.) failing to perform their contract with the defendants, viz., in not taking delivery "over the ship's side as fast as the captain can deliver." But it is said that the result is the same as if there were a contract to indemnify, for unless the third parties have broken their contract with the defendants, the defendants cannot have broken their contract with the plaintiffs, because the greater obligation undertaken by Messrs. Dobell and Co. with the defendants must include the lesser obligation

undertaken by the defendants with the plaintiffs; and therefore it is said the third parties have, as regards demurrage, in substance undertaken to indemnify the defendants. But this argument, ingenious though it is, does not show any contract to indemnify, which must be proved to exist before Order XVI., r. 48, can be made available. If the defendants sued Messrs. Dobell and Co. for not indemnifying them they should be nonsuited, for the only cause of action they could establish against Dobell and Co. is a contract, not to indemnify but to pay any claim for damages the defendants may have against them for not unloading in accordance with their contract, *i.e.*, "from over ship's side as fast as the captain can deliver." It is true that the loss and demurrage expenses Messrs. Dobell and Co. might have to pay the defendants might be the same in amount as the damages the defendants might have to pay the plaintiffs, but, as was pointed out in *Speller and Co.* v. *The Bristol Steam Navigation Company* (*ubi sup.*), that does not suffice. I therefore am of opinion that the leave to issue a third-party notice should not have been granted. The point upon the arbitration clause does not arise. I think this appeal must be allowed with costs here and below.

Rigby, L.J.—I am of opinion that there is in this case no contract to indemnify. It is not suggested that there is an implied contract to indemnify, but that there is an express contract involved in the word "demurrage" contained in the contract for sale, which it is contended refers to demurrage contemplated by the charter-party. Now, first of all, though there was a charter-party in existence at the date of the contract for sale, it does not seem that the cargo carried under it was necessarily that which was to be delivered under the contract for sale. If it is not a necessary, it is certainly an unlikely construction, that the liability of the purchaser to the vendor is to depend upon any contract which the vendor may choose to enter into with a shipowner. Then is the construction necessary? Demurrage in the contract cannot, in my judgment, be treated as meaning demurrage in the strict sense, for in the contract there would not necessarily be any demurrage provided for in the strict sense. It must mean detention. The claim arises only on the default of the purchaser, and does not cover any damages for detention caused by the vendor, though he might be liable to the shipowner for such damages. Further, it cannot cover any damages for detention arising where neither purchaser nor vendor cause the detention. Yet under the charter-party there might be cases, as for instance a strike of workmen, where the charterer would be liable on his absolute contract with the shipowners. The measure of damages, or even the existence of damage under the two contracts of sale and chartering, need not coincide, though in certain events there may be damage for breach of each contract, and the measure of damage may be the same for each breach. This, of course, would not make the purchase contract a contract of indemnity. Further, the right of action against the purchaser arises immediately on his breach of contract. If it were a contract of indemnity the action would not arise until some payment indemnified against had been made. As there is no contract express or implied for indemnity, the third-party rules cannot properly be made applicable, and the appeal must be allowed.

Solicitors for the appellants, *Walker, Son,* and *Field,* agents for *Weightman, Pedder,* and *Co.,* Liverpool.

Solicitors for the defendants, *Field, Roscoe,* and *Co.,* agents for *Batesons, Warr,* and *Wimshurst,* Liverpool.

Nov. 11 *and* 20.

(Before Smith and Rigby, L.JJ.)

The Alcoy and Gandia Railway and Harbour Company Limited *v.* Greenhill.

Greenhill *v.* The Alcoy, &c. Company.

The Trustees, Executors, and Securities Insurance Corporation Limited *v.* The Alcoy, &c. Company. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Pleading—Counter-claim, who entitled to—Person named in defence as party to a counter-claim—Judicature Act 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-sect.* 3—*Order XIX., r.* 3; *Order XXI., rr.* 11, 14; *Order XXIII., r.* 4.

A person named in a defence as a party to a counter-claim thereby made is entitled to defend himself against such counter-claim, but not also to raise a counter-claim against the defendant and the plaintiff.

Street *v.* Gover (36 *L. T. Rep.* 766; 2 *Q. B. Div.* 498) *followed.*

Toke *v.* Andrews (8 *Q. B. Div.* 428) *distinguished.*

Decision of Stirling, J. affirmed.

The above-named company was in Aug. 1889 incorporated under the Companies Act 1862 for the purpose of acquiring certain concessions of the Spanish Government for the construction and working of a railway from Alcoy to Gandia in the kingdom of Spain, and of a harbour at the last-mentioned place, and of exercising the rights granted by those concessions.

In Aug. 1893 the company commenced an action against Thomas Arthur Greenhill and others concerning a contract which the defendants had entered into with the plaintiff company for the construction of the railway and harbour.

The defendants delivered a statement of defence, together with a counter-claim against the plaintiff company, and also against the Trustees, &c. Corporation in respect of a guarantee, the Corporation being named in the defence as parties to the counter-claim.

Subsequently the Trustees, &c. Corporation delivered a statement of defence to the counter-claim of the defendants, together with a counter-claim against the defendants, and also against the plaintiff company.

On the 22nd July 1895 the plaintiff company applied to Stirling, J., sitting at chambers, for an order that the counter-claim of the Trustees, &c. Corporation might be struck out on various grounds.

His Lordship made the order, as asked, on the authority of *Street* v. *Gover* (36 L. T. Rep. 766; 2 Q. B. Div. 498).

Rule 11 of Order XXI. of the Rules of 1883

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

(identical with rule 5 of Order XXII. of the Rules of 1875) provides as follows:

Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statment of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

Rule 14 of Order XXI. of the Rules of 1883 (identical with rule 8 of Order XXII. of the Rules of 1875) provides that:

Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

From that decision the Trustees, &c. Corporation, by leave, now appealed.

Macnaghten for the appellants.—The appellants desire to be allowed to counter-claim, although already brought in as third parties to a counter-claim. Stirling, J., in refusing to permit the counter-claim to be delivered, simply followed a direct authority on the point:

Street v. *Gover* (1877), 36 L. T. Rep. 766; 2 Q. B. Div. 498.

But I say that *Street* v. *Gover* (*ubi sup.*) was not rightly decided; and that, having regard to the Judicature Act 1873 and the Rules of Court, the order I now ask for can be made:

Toke v. *Andrews*, 8 Q. B. Div. 428;
Beddall v. *Maitland*, 44 L. T. Rep. 248; 17 Ch. Div. 174;
Judicature Act 1873, s. 24, sub-sect. 3;
Rules of Court 1883, Order XIX., r. 3; Order XXI., rr. 10, 14, 15; Order XXIII., r. 4.

Mulligan for the respondents, the plaintiff company.—It is clear from the decision of the Divisional Court in *Street* v. *Gover* (*ubi sup.*) that the appellants here cannot counter-claim against anyone, but can only reply to the original claim. That case was decided in 1877. Rule 8 of Order XXII. of the Rules of 1875 was left exactly as it was when the Rules of 1883 were passed: (see Order XXI., r. 14, of the Rules of 1883.) *Toke* v. *Andrews* (*ubi sup.*) is not an authority for the contention of the appellants, as it does not deal with the present point. Order XXI., r. 16, was passed to determine the difference arising between *Vavasseur* v. *Krupp* (15 Ch. Div. 474) and *Beddall* v. *Maitland* (*ubi sup.*). [Rigby, L.J.—*McGowan* v. *Middleton* (11 Q. B. Div. 464) overruled *Vavasseur* v. *Krupp* (*ubi sup.*).] The Rule Committee did not think proper to alter rule 8 of Order XXII., though *Street* v. *Gover* (*ubi sup.*) had been reported for some time. If the committee had considered that there was any reason for doubting that case they would probably have removed the doubt. It would be a strong thing to depart now from the practice which has been followed in both branches of the court since *Street* v. *Gover* (*ubi sup.*), and which I submit is founded on good sense. Another case on third-party procedure is

Eden v. *The Weardale, &c., Company*, 51 L. T. Rep. 726; 28 Ch. Div. 333.

R. J. Parker for the respondents, Greenhill and others.

Macnaghten replied.

Cur. adv. vult.

Nov. 20.—The following written judgments were delivered:—

Smith, L.J.—The question is whether a point of practice decided by Mellor and Lush, JJ. in the year 1877 in the case of *Street* v. *Gover* (36 L. T. Rep. 766; 2 Q. B. Div. 498) upon Order XXII., r. 8, in the Orders and Rules of 1875, which is identical with Order XXI., r. 14, in the Orders and Rules of 1883 now in force, is to be followed or not. Stirling, J. followed it, but gave leave to appeal. It is argued that the decision of Mellor and Lush, JJ. is wrong, and that the practice during the last eighteen years has been wrong, and that this court should now overrule the case of *Street* v. *Gover* (*ubi sup.*) decided in 1877 and alter the practice. I should be extremely loth to do anything of the kind. Unless fully convinced that the decision was wrong I most certainly should refuse to do so, more especially as since the decision the old Orders and Rules of 1875 upon which it was given have been replaced by the Orders and Rules of 1883. The Orders and Rules of 1883 have subsequently been often altered and amended, and yet the old Orders and Rules of 1875, with knowledge of the decision in *Street* v. *Gover* (*ubi sup.*) upon them, were re-established in 1883 and remain still untouched. This fact shows that no inconvenience has been felt in practice in adopting the construction of rule 14 of Order XXI. as laid down by Mellor and Lush, JJ. in the year 1877. The question is this: whether, when the defendant to an action brings in another person in order to counter-claim against him and the plaintiff—which he can do by virtue of sect. 24, sub-sect. 3, of the Judicature Act 1873, and Order XXI., r. 11—that person, under rule 14 of that order, is entitled not only to defend himself against such counter-claim of the defendant, but also to raise a counter-claim against the defendant and the plaintiff. Order XXI., r. 14, is as follows: [His Lordship read it and continued:] Mellor and Lush, JJ. held that the word "reply" in this rule did not embrace a counter-claim, and so the practice has been since 1877, as I have already remarked. I would point out the result if the person brought in by a defendant can counter-claim as is now suggested. He was no party to the plaintiff's action. The plaintiff wanted nothing out of him. All the plaintiff wanted was something out of the defendant. But it is said that the defendant who alleges that he wants something out of the plaintiff, and the person brought in in order that he the defendant may obtain relief for himself can thus bring in a person and put him upon the plaintiff, so that the plaintiff is driven to a contest with that person although the plaintiff has no claim whatever against him, and has never litigated, and does not desire to enter into litigation with him at all. It strikes me as odd that the rules should allow this, but it is said that they do, and it is said that Field. J., and Huddleston, B., in the case of *Toke* v. *Andrews* (8 Q. B. Div. 428), in the year 1882, in reality so held, and that their judgment is preferable to that of Mellor and Lush, JJ. In my opinion Field, J., and Huddleston, B., did not decide what it is now said that they did. In the

first place, they had not to decide upon the construction of Order XXII., r. 8. What they decided was, that where a plaintiff sued a defendant, and the defendant counter-claimed against the plaintiff, the plaintiff could counter-claim against the counter-claim of that defendant for a cause of action which accrued to the plaintiff after the issue of the writ. That is all those learned judges decided. It will be seen that this is a decision that an original plaintiff can counter-claim against the counter-claim of an original defendant and for a cause of action which accrued after the issue of the writ; but it is no decision that a person brought in by a defendant can counter-claim against an original plaintiff. It is true that Field, J. points out that Lush, J. had doubts as to whether he was placing the correct construction upon the word "reply" in Order XXII.; r. 8, but he and Mellor, J. did, nevertheless, expressly hold that the word "reply" did not include a counter-claim, and so it has remained until the present time. In my judgment, if this construction of the rule is to be altered, such alteration must be brought about by the Rule Committee by adding thereto the word "counter-claim" after the word "reply." But whether the Rule Committee would think right to do so I much doubt, seeing, as was pointed out by Mellor and Lush, JJ., that it would produce such a complexity as would render an action untriable. I should notice that this Order XXI., r. 14, applies to actions both in the Chancery and Common Law Divisions. If it would produce no complexity in the Chancery Division, as it is said it would not, well and good. But the same construction must be placed upon the rule whether it is being applied to a Chancery or to a common law action. And if, as I have no doubt in a common law action, the complexity pointed out would arise, I prefer the construction placed upon the rule by Mellor and Lush, JJ., and not that now contended for, viz., that the word "reply" as used in the rule embraces a counter-claim. In the case of *Eden* v. *The Weardale Iron Company* (51 L. T. Rep. 726; 28 Ch. Div. 333) in which a third party was brought in by a defendant under Order XVI., r. 48, in order that the defendant might obtain indemnity or contribution from him, it was argued that such third party could file a counter-claim against the original plaintiff. But this court held that he could not, and Bowen and Fry, L.JJ. pointed out the inconveniences which would arise if this were allowed; and similar inconveniences would, as it appears to me, arise in the present case if the application were allowed. For these reasons I am of opinion that the appeal must be dismissed, and with costs in any event.

RIGBY, L.J.—I am of the same opinion. Whether, if the case of *Street* v. *Gover* (*ubi sup.*) had come before me in the first instance, I should have been influenced by the reasons there given, and have arrived at the same conclusion, I very much doubt. But from the first I have been strongly impressed with the great inconvenience of attempting to interfere now with a decision on a rule as to procedure enunciated so long ago as 1877. My only hesitation has arisen from a doubt which I entertained for a short time as to whether *Toke* v. *Andrews* (*ubi sup.*) really had not in substance laid down a law not to be reconciled with *Street* v. *Gover* (*ubi sup.*). But after looking into that case, and the judgment of the Divisional Court as delivered by Field, J., I see that the learned judges did not intend to overrule, and they carefully avoided overruling, *Street* v. *Gover* (*ubi sup.*). Seeing that the learned judges may, like myself, have had some doubt about the original correctness of or necessity for the decision in *Street* v. *Gover* (*ubi sup.*), and seeing also that they would not act upon that doubt, I think that we likewise ought not to do so. My conclusion therefore, after consideration, is that I agree with what has been said by Smith, L.J. as to the inconvenience of attempting to interfere with that decision.

Appeal dismissed.

Solicitors for the appellants, *Slaughter* and *May*.

Solicitors for the respondents, *Ashurst, Morris, Crisp*, and *Co.*; *Batten, Proffitt.* and *Scott.*

Monday, Nov. 11.

(Before Lord ESHER, M.R., and KAY, L.J.)

THE SOUTH STAFFORDSHIRE TRAMWAYS COMPANY LIMITED v. EBBSMITH. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice — Evidence — Bankers' Books Evidence Act 1879 (42 & 43 *Vict. c.* 11), *s.* 7.

In an application under the Bankers' Books Evidence Act 1879 *for leave to inspect before trial bankers' books containing entries of the banking account of a person, a party to the action, he is entitled to rely upon the same privilege as to items which he swears are irrelevant to the matters in question, as existed in other applications for inspection before trial made previously to the passing of the Act.*

Semble, *that under that Act the court has jurisdiction to grant leave to inspect before trial bankers' books containing entries of the banking account of a person not a party to the action, if the applicant shows to the court that items in it would be evidence at the trial against a party to the action, but the court will not exercise its jurisdiction unless it be satisfied that there must be in the account items of that nature.*

Per Kay, L.J.: The person, not being a party to the action, of whose banking account inspection is sought should be served with notice and be heard in opposition to the application.

THIS was an appeal from an order made by Hawkins, J. at chambers reversing the decision of the master upon an application by the plaintiffs for inspection before trial of certain bankers books under the Bankers' Books Evidence Act 1879 (42 & 43 Vict. c. 11), s. 7.

The plaintiffs were a tramway company incorporated in 1883 which had taken over the rights and property of another company called the South Staffordshire and Birmingham District Steam Tramways Company Limited.

In their statement of claim they alleged that the defendant Ebbsmith was the promoter and solicitor of the latter company; that while he occupied that fiduciary position he formed a company called the Dickinson Tramway Appliances Company Limited, which company was a sham, being in fact Ebbsmith himself; that

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

certain patents were bought up for small sums by Ebbsmith and assigned by him to the Dickinson Company; and that Ebbsmith then procured the plaintiff company and their predecessors to purchase articles, the subject-matter of the patents, and licences to use the patents at exorbitant prices, and without any disclosure of his interest in the patents; and they claimed damages, an account of the defendant's profits, and a rescission of their contracts as to the patents.

By the Bankers' Books Evidence Act 1879 (42 & 43 Vict. c. 11) it is provided as follows:

Sect. 7. On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party. . . .

On the application of the plaintiffs, the master made an order that they should be at liberty to inspect, at the Metropolitan Bank Limited, the books of the Staffordshire Joint Stock Bank Limited, and their successors for the years 1885 to 1894, containing entries of the accounts of Ebbsmith and of the Dickinson Company.

This order was reversed by Hawkins, J., and liberty to inspect was entirely refused.

The plaintiffs appealed.

On behalf of the plaintiffs affidavits were filed with the view of showing that the Dickinson Company was really identical with the defendant. It appeared that out of the 1507 shares in the Dickinson Company the defendant had from its incorporation till 1889 held 1500, these shares were then transferred to George Rose, a clerk in his employ, who was one of the signatories of the memorandum of association, and subsequently they were all transferred to The Corporate Trust Limited, a company which had since gone into liquidation.

In an affidavit sworn by the secretary of the Dickinson Company he stated that there were no entries in the company's account showing payments by them to the defendant except those showing payment of dividends on the shares held by him.

Sir *Frank Lockwood*, Q.C. (*Scrutton* with him) for the plaintiffs.—The affidavits show the identity of the Dickinson Company with the defendant. Their banking account was really his, although it was not kept under his name. The court has jurisdiction to allow inspection of the banking account of a person not a party to the action:

Howard v. *Beall*, 60 L. T. Rep. 637; 23 Q. B. Div. 1.

G. Spencer Bower for the defendant.—The defendant has filed an affidavit in which he swears that "there are no entries in my banking accounts in respect of which inspection is now sought relating to the matters in question other than and except" three items which he mentions. The court is bound to accept that affidavit, and must refuse to allow inspection of any other items in his account. The Bankers' Books Evidence Act 1879 does not take away any privilege from a person against whom discovery is sought:

Parnell v. *Wood*, 66 L. T. Rep. 670; (1892) P. 137.

This is really an attempt by the plaintiffs to get evidence in support of their case by roving through the bankers' books. *Perry* v. *The Phosphor Bronze Company* (71 L. T. Rep. 854) is no authority against me; if considered it is rather in favour of the defendant here. He referred also to

Emmott v. *The Star Newspaper Company*, 67 L. T. Rep. 829; 62 L. J. 77, Q. B.

Loehnis for the Dickinson Company.—This company is not a party to the action. The court has no jurisdiction to make an order for the inspection of its banking account. *Howard* v. *Beall* (*ubi sup.*) should be overruled. Sect. 7 of the Act gives no power to the court except for the purpose of enforcing compliance with the previous sections; even if the court has jurisdiction to give inspection of this company's banking account, it ought not now to exercise that jurisdiction because the plaintiffs do not show that there is any item in this banking account which would at the trial be evidence against the defendant.

Sir *Frank Lockwood*, Q.C. replied.

Lord Esher, M.R.—This is an application by the plaintiffs for an order for leave, under the Bankers' Books Evidence Act 1879, to inspect before trial the banking accounts of the defendant and also of the Dickinson Tramway Appliances Company. The learned judge at chambers refused the application, and the plaintiff has appealed to this court. First, as to the banking account of the defendant. That the court has power to order inspection cannot be doubted; the question is, as to the rule of conduct by which the court should be guided in considering whether the application ought to be granted. Apart from the Act of Parliament which we are now dealing with, the court in granting inspection of documents has regulated its conduct by certain decisions and rules, and it has been a rule, when inspection of documents before trial was asked for, not to grant the application if the person against whom it was made put forward at the time in his affidavit an answer of a particular kind. If he did that, the court accepted the answer and acted upon it, leaving to him the risk of being subsequently found to have sworn a false affidavit. The present application is made under the Bankers' Books Evidence Act 1879, but I think that the court should exercise its jurisdiction under that Act in accordance with the rule of the court which I have mentioned in other cases of applications for inspection before trial. Now here the defendant has sworn in his affidavit that the items in his banking account which he has there given are the only items in it which are relevant to the issues in the action. In my opinion we must upon this summons accept that statement of his on oath, and we must act upon it. We therefore cannot now order inspection of his banking account before the trial of the action. We must leave the matter to the judge at the trial. Then there is the question as to the banking account of the Dickinson Tramway Appliances Company. I myself have no more doubt as to the power of the court to order inspection in this case than as to the power of the court in the defendant's case. It seems clear to me that we have power to order inspection, though the company is not a party to the action; and for the reasons given in the judgments of the Divisional Court in *Howard* v. *Beall* (*ubi sup.*). But the jurisdiction of the court should be

exercised with very great caution. The application is to inspect the banking account nominally of a person who is no party to the suit, and the court should therefore use great care in exercising its power. One rule of conduct which the court should observe in such a case as the present is this—I do not at all mean to say that the rule is exhaustive—if it be proved to the satisfaction of the court, so that the court is persuaded that the banking account said to be that of a third person is really and in truth an account of a person who is a party to the action, or if the court is persuaded that, though the banking account in question may not belong to a party to the action, yet that he is so much connected with it that items in it will be evidence against him at the trial, in such a case as that, the court would be justified, if there be no valid reason to the contrary, in making an order for inspection before trial. But, unless the court be convinced to that extent, the order ought not to be made. In the present case I think that the banking account kept in the name of the Dickinson Tramway Appliances Company was either an account of the defendant or else might contain items which would be relevant to the issues in the action. But that is not enough. I think that the person applying for the inspection of such a banking account should show to the court strong reasons for expecting to find in it some items which would be evidence at the trial against the other party. No item has been here fixed upon as one which would so benefit the plaintiffs, and I cannot imagine that any item that would be likely to be useful to the plaintiffs would be found in the account except those which the plaintiffs already have. Therefore, if we granted an order for inspection of this account, it would merely enable the plaintiffs to examine it for the purpose of trying to find out whether there were any items which might help them at the trial. Under these circumstances I think we ought not to overrule the decision of the learned judge, and we must refuse the plaintiffs' application. The appeal must be dismissed.

Kay, L.J.—I entirely agree with what the Master of the Rolls has said. The Bankers' Books Evidence Act 1879 for the first time gave power to the court to order inspection before trial of a banker's book when the banker was not a party to the action. No such order could have been made before that Act was passed. The rule as to inspection of documents has always been this, that the person against whom the application was made was always at liberty to seal up any parts which he had sworn were not relevant to the issues in the action. The applicant could not get behind an affidavit to that effect, and the rule of the court was to accept such an affidavit unless the applicant could show from some other document in the cause that the statement in the affidavit was inaccurate. The question is, whether that rule of the court has been altered in the case of an application under the Bankers' Books Evidence Act 1879. I agree with what was said by the court in *Parnell* v. *Wood* (*ubi sup.*), that the Act was never intended to do away with any privilege that a person may have in resisting inspection. It was only intended to enable the court to order inspection in certain cases where, before the passing of the Act, inspection could not be obtained at all. Now here the defendant in his affidavit gives certain items, and swears that they are the only items in his banking account which are relevant to the issues in the action. The court must accept that affidavit, and must therefore refuse the application for the inspection of his account. Then we come to the other part of the application, namely, for the inspection of the banking account of the Dickinson Tramway Appliances Company. That company is not a party to the action. It is sought to get over that fact by saying that, though the Dickinson Company is a corporation, yet, as the defendant at one time at least held practically all the shares in it, the company was really the defendant, and its banking account was his account just as if he had simply kept an account in some other name than his own. At present it seems unnecessary to give any decisive opinion on the point. But I see no reason for differing from the opinion of the court in *Howard* v. *Beall* (*ubi sup.*) that, under this Act of Parliament, the court has jurisdiction to order inspection of a banking account under such circumstances as that. But when a banking account is kept in the name of someone not a party to the action, the court will act with the greatest possible caution before granting inspection, with even greater caution than in an application to inspect the banking account of a party to the action. The third party whose account it is sought to inspect should certainly come before the court, and he should be heard in opposition to the application. In the present case notice has been served on the Dickinson Company, and they have appeared and argued against the granting of the application. Now a strong case of suspicion has certainly been made out by the plaintiffs, because at one time the defendant held nearly all the shares in the company. The evidence before us varies as to the date when his interest in the company came to an end. But it is not necessary to come to any conclusion on that point. The court must be satisfied, before granting the application, not merely that the Dickinson Company is identical with the defendant, but also that in the account in question there are items on which a finger could almost be laid which would at the trial be evidence against the defendant. I am not satisfied that there are any items of that kind in the banking account of the Dickinson Company. Therefore, we cannot allow inspection of their account at this stage of the action. In coming to this conclusion we are not in any way interfering with the power of the judge at the trial to order the books, or certified copies of their contents, to be then produced if he should think it necessary. All that we now decide is, that in the exercise of the discretion of the court we think that this is not a case in which we ought to order the inspection asked for.

Appeal dismissed.

Solicitors for the plaintiffs, *Munns* and *Longden.*

Solicitors for the defendant, *Walter Webb* and *Co.*

Solicitors for the Dickinson Company, *Walker, Son,* and *Field.*

Friday, Nov. 15.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

Re GALLARD; *Ex parte* GALLARD. (*a*)

APPEAL IN BANKRUPTCY.

Bankruptcy—Committee of inspection—Member employed as agent by solicitor of trustee—Sanction of the court—Profit costs—Bankruptcy Rules 1886, *r.* 317.

By rule 317 *of the Bankruptcy Rules* 1886 *no member of a committee of inspection of an estate shall, except under and with the sanction of the court, be entitled to derive any profit from any transaction arising out of the bankruptcy.*

A solicitor, a member of the committee of inspection of a bankrupt's estate, did work as agent of the solicitors of the trustee without having previously obtained the sanction of the court.

Held, that, after the work had been done, the court had no power to give its sanction and the solicitor was therefore not entitled to derive any profit from what he had done.

Held also, that the whole of a solicitor's bill of costs, except disbursements, is "profit," and therefore the court had no power to allow him anything in respect of office expenses.

Semble (*per Lord Esher, M.R.*), *that where a solicitor is appointed solicitor to a trustee in bankruptcy by a committee of inspection, one member of which is a clerk in his service, an immediate application to the court to set the retainer aside ought to be granted.*

THIS was an appeal from an order of Williams, J. in bankruptcy, varying the certificate of taxation of a solicitor's bill of costs in the bankruptcy.

In 1887 a receiving order was made against George Gallard, and in October of the same year a trustee was appointed by the creditors with a committee of inspection.

One of the members of the committee of inspection was a Mr. Williams, a solicitor, and a member of the firm of Cooper and Williams, at Brighton; another member was a Mr. Hunt, managing clerk to Messrs. Ashurst, Morris, Crisp, and Co.

The committee of inspection appointed Messrs. Ashurst, Morris, Crisp, and Co. solicitors to the trustee.

In the course of the bankruptcy it became necessary for Messrs. Ashurst, Morris, Crisp, and Co. to employ an agent at Brighton, and they accordingly arranged with Mr. Williams that he should act as their agent there on the usual agency terms.

No sanction of the court was obtained for this arrangement.

By the Bankruptcy Rules 1886, r. 317, it is provided as follows:

> No member of a committee of inspection of an estate shall, except under and with the sanction of the court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy.

Mr. Williams did the work and sent in to the trustee's solicitors an agency bill of costs for 139*l.*, which Messrs. Ashurst, Morris, Crisp, and Co. paid. The trustee claimed to be reimbursed out of the estate. In re-taxing the bill, which was ordered upon the application of a creditor, the master, acting upon rule 317, disallowed the whole sum except out-of-pocket expenses.

The trustee appealed.

Williams, J. held, that, in addition to being repaid for out-of-pocket expenses, the solicitor was entitled to 75*l.* in respect of the expense of keeping up an office and a staff of clerks, and that only 40*l.* could fairly be regarded as profit made out of the transaction. He therefore disallowed only 40*l.*

Miss H. Gallard, one of the creditors in the bankruptcy, appealed.

Cooper Willis, Q.C. and *Æneas Macintosh* for the creditor.

Herbert Reed, Q.C. and *Muir Mackenzie* for the trustee.

Lord ESHER, M.R.—Notwithstanding the great experience and knowledge of Williams, J., I think with all deference that we ought not to agree with his decision in this case. There are two points arising here. The sanction of the court is required, under rule 317 of the Bankruptcy Rules 1886, in order to entitle a member of a committee of inspection of a bankrupt's estate to derive any profit from any transaction arising out of the bankruptcy. That sanction was not obtained by Mr. Williams before he did the work in respect of which we are asked to disallow the profits claimed by him. The learned judge was of opinion that the sanction of the court could be given after the transactions had closed. It seems to me that, upon the true construction of rule 317, the learned judge was wrong in so holding. In my opinion, the sanction of the court must be obtained under that rule before a member of the committee of inspection of an estate has done any of the things in respect of which he claims any profit. Mr. Williams did not earn his profits "under and with the sanction of the court," and, since the court has no power to give its sanction subsequently, we must hold that he is not entitled to any profit for the work he has done in the bankruptcy. Now, I think that Messrs. Ashurst, Morris, Crisp, and Co. made a mistake in employing Mr. Williams as their agent. The learned judge said that he thought that they did not mean to do anything wrong, and I accept that. No blemish upon their honour arises from what they did, but they certainly made a mistake in employing as their agent a member of the committee of inspection without first obtaining the sanction of the court. It has been argued that the work which he did was very beneficial to the estate. I do not doubt it. But the question here is, whether he can be allowed to make any profit out of the matter, and whether he is entitled to be paid anything except in respect of disbursements. The learned judge agreed that Mr. Williams was not entitled to any profit, but he decided that the other charges in his bill of costs besides disbursements were not all profits. Mr. Williams has to keep up an office and a staff of clerks, and so the learned judge held that an allowance ought to be made for these office expenses, and that the only profit arising out of the work done was the amount of the bill of costs less these office expenses and disbursements. That is a very dangerous view to take. The profits of a solicitor are that which he claims to be paid, less his disbursements. I

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

cannot agree with the very lenient view taken by the learned judge. Everything in the bill must be taken off except in respect of disbursements, and this appeal must be allowed. There is another important question raised in this case. Messrs. Ashurst, Morris, Crisp, and Co., without any wrong intent, accepted a retainer from the committee of inspection of which one of their clerks was a member. That does not seem to me to be good practice. It was a mistake on their part. They should have immediately obtained the sanction of the court. Though it is not necessary for me to decide the point now, my view certainly is that, if a solicitor accepts a retainer from a committee of inspection when one of the members of the committee is in such close relations with him as their clerk was to Messrs. Ashurst, Morris, Crisp, and Co., an application made at once to the court that the retainer be set aside ought to be granted by the court in the exercise of its inherent powers.

LOPES, L.J.—I am of the same opinion. The true construction of rule 317 is an important matter. I understand it to mean that the sanction of the court must be obtained before, not after, the work is done in respect of which a profit is claimed. The sanction of the court is a condition precedent to the making of profits. In the present case Messrs. Ashurst, Morris, Crisp, and Co., without obtaining the sanction of the court, employed Mr. Williams as their agent at Brighton, he being a member of the committee of inspection. No doubt he was well acquainted with the details of the bankruptcy, and his employment was in some respects a proper one. But Messrs. Ashurst, Morris, Crisp, and Co. made a mistake in employing him while he was a member of the committee of inspection. He comes within the provisions of rule 317, and therefore he is not entitled to derive any profit from that which he did as agent for Messrs. Ashurst, Morris, Crisp, and Co. in this bankruptcy. Now, no question is raised as to his payment in respect of disbursements. The only question is as to a sum of about 115*l.* Williams, J. came to the conclusion that Mr. Williams was entitled to the whole of that sum except 40*l.*, which, he decided, represented the profit arising from the work done. The rest of that sum, about 75*l.*, the learned judge attributed to the expenses of the office and clerks, and he held that that sum was not profit. I cannot understand that decision. It seems to me that the outgoings of the office could not in any way be attributed to the expenses of the bankruptcy. All that the solicitor can claim to be paid is out-of-pocket expenses. Everything else in his bill is profit. The learned judge was wrong in deducting only 40*l.*; he should have deducted everything except disbursements. I therefore agree that the appeal must be allowed.

KAY, L.J.—The duties of the committee of inspection of a bankrupt's estate are obvious. They are to watch over the administration of the bankruptcy, and to control, to any extent they may think right, that which may be done by the trustee or the solicitor or anyone else who takes part in the administration. That being so, rule 317 was passed. I entirely agree with what has been said as to its construction. The words seem to me to be very clear. A member of the committee is not to derive any profit from any transaction "except under and with the sanction of the court." That means, he must have the sanction of the court at the time he is engaged in the transactions from which he hopes to derive profit. It cannot be said that the court can give its sanction afterwards. That would be contrary to both the letter and the spirit of the rule. The sanction must be obtained before any work is done by a member of a committee of inspection which would be profitable to him. That is my reading of the rule. In the present case Mr. Williams was a member of the committee of inspection, and never obtained the sanction of the court before acting as agent to Messrs. Ashurst, Morris, Crisp, and Co., who were solicitors for the trustee in bankruptcy. They arranged with him that he should act as their agent at Brighton on the usual agency terms, and they have paid him money for so acting. It is completely against the spirit of the rule that he should receive any profit for what he has done as agent for the trustee's solicitors. His duty, as a member of the committee, to keep down the expenses of the bankruptcy, conflicts with his own interest to incur expenses and make a profit. That is the very mischief that the rule was intended to get rid of. Then it is said that the learned judge has not allowed Mr. Williams any profit. He has, in fact, allowed him not only his disbursements, but a sum of about 75*l.*, which is said not to be profit. Mr. Williams has an office and clerks, and he asks that the cost of keeping up his office and clerks should be attributed to the expenses of the work he has done, and that only the balance of his bill should be treated as profit. It is the first time I have ever heard that suggestion made. If he were allowed to pay for the costs of keeping up an office and a staff of clerks out of that which he says is not profit, his interest would be in direct conflict with his duty as a member of the committee of inspection to keep down the expenses of the administration. I am of opinion that the 75*l.* which the learned judge allowed were profits arising from work done by Mr. Williams, and the learned judge had no power to allow anything in respect of office expenses. Rule 317 is imperative. As the 75*l.* were improperly allowed, we must now order that that amount be struck out of the bill.

Appeal allowed.

Solicitors for the trustee, *Ashurst, Morris, Crisp, and Co.*

Solicitor for the creditor, *J. C. Buckwell*, Brighton.

Thursday, Nov. 19.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

HILL *v.* SCOTT. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Carrier—Carriage by sea—Goods shipped without bill of lading—Insurance by carrier—Liability for damage to goods.

The plaintiff was in the habit of employing the defendant to carry wool from London to Bradford, the transit being partly by sea and partly by land. The wool was shipped without a bill of lading. When the wool came from Australia,

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

and was insured by the plaintiff for the transit from Australia to Bradford, the defendant charged the plaintiff a lower rate than he charged for wool coming merely from London, which was not insured by the plaintiff. In the present case of carriage of wool which had not been insured by the plaintiff, the defendant insured it. The wool was damaged by sea perils on the voyage from London. In an action to recover damages for injury to the wool:

Held, affirming the decision of Lord Russell, C.J. (ante, *p.* 210; (1895) 2 *Q. B.* 371), *that whether the defendant effected the insurance on behalf of himself, or on behalf of the plaintiff, no inference could be drawn from the course of dealing between the parties that it was a term in the contract of carriage that the defendant should be relieved from the ordinary liability of a carrier of goods, and that the defendant was therefore liable.*

THIS was an appeal from the judgment of Lord Russell, C.J., at the trial of the action in the Commercial Court without a jury.

The facts of the case are fully stated in the report of the case in the court below, *ante*, p. 210; (1895) 2 Q. B. 371.

The Lord Chief Justice, at the trial of the action without a jury, gave judgment for the plaintiff.

The defendant appealed.

Joseph Walton, Q.C. and *Hollams* for the defendant.

English Harrison, for the plaintiff, was not called upon.

Lord ESHER, M.R.—This is a case which has been tried according to the practice of the Commercial Court without pleadings. The argument put forward on behalf of the defendant in this court is, that the proper inference to be drawn from the course of business between himself and the plaintiff, with regard to the insurance of the wool carried by the defendant for the plaintiff, was that the defendant did not intend to take upon himself the ordinary risks of a carrier of goods, and that we ought to infer that this was part of the agreement between the plaintiff and the defendant. There seems to me to be nothing which should lead us to that conclusion. There is no evidence from which the court should infer the unusual and extraordinary contract that the defendant should not take upon himself the ordinary liabilities arising from his being a carrier of goods. That is the ground of the decision of the Lord Chief Justice. He held that the defendant made the insurance in the present case on his own behalf, and he declined to draw any inference such as the defendant desires. I have read his judgment, and I cannot say that the reasons given by him are wrong. In my opinion the defendant insured exclusively on his own behalf, and not on behalf of the plaintiff. Moreover, even if Lord Russell had come to the conclusion that the insurance was effected by the defendant on behalf of the plaintiff, that would not justify the court in inferring that the unusual term of the contract of carriage, which is suggested, was within the contemplation of both parties. If the defendant effected the insurance on behalf of the plaintiff, the only result would be that the plaintiff would be doubly protected against loss. He could sue the defendant as a carrier, or the underwriters, whichever he liked. I entirely agree both with the conclusion which the Lord Chief Justice has arrived at, and with the grounds he has given. The appeal must be dismissed.

LOPES, L.J.—I entirely agree. The plaintiff shipped goods for carriage by the defendant without any bill of lading. Then the defendant would be liable, as a common carrier, for the safe carriage of the goods subject only to certain well-known risks, none of which are material in this case. That is to say, he would be an insurer of the goods except in respect of those risks. He has entirely failed to prove any change from that position of liability as a common carrier. It was argued from the course of dealing between the parties that the insurance which the defendant effected was on behalf of the plaintiff, and it was said that the result of that was that there was a change in the liability of the defendant as a carrier. It is clear in my opinion that the insurance was effected by the defendant on his own behalf. But whether that be so or not, there is nothing in the facts to raise any inference that the parties had agreed to limit in any way the liability of the defendant as a common carrier.

KAY, L.J.—This is a case of a contract for the carriage of the plaintiff's goods by the defendant from London to Bradford, the transit being partly by sea and partly by land. Apart from any special contract, the defendant was in the position of a common carrier of goods. There was no written contract in any way limiting that liability of the defendant as a common carrier. Therefore, if the defendant wishes to show that his liability as a carrier was in any way limited, he must show that the inference which he wishes the court to draw from the course of business between himself and the plaintiff was in the contemplation of both parties to the contract of carriage. Assuming that the insurance effected by him was effected on behalf of the plaintiff, how can the inference be drawn from that fact that both parties intended that the defendant should be relieved from liability for the safe carriage of the goods covered by the insurance? It seems impossible to me to infer the limitation of his liability which the defendant seeks to introduce. I am not prepared to differ from the decision of Lord Russell as to the person on whose behalf the insurance was made, but the question seems to me to be quite immaterial.

Appeal dismissed.

Solicitors for the plaintiff, *Flower, Nussey*, and *Fellowes*, for *Killick, Hutton*, and *Vint*, Bradford.

Solicitors for the defendant, *Hollams, Son, Coward*, and *Hawksley*.

Tuesday, Oct. 29.

(Before Lord ESHER, M.R., KAY and RIGBY, L.JJ.)

MOWBRAY AND ANOTHER *v.* MERRYWEATHER. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Damages — Breach of warranty—Remoteness of damage.

The defendant supplied to the plaintiffs a chain,

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

to be used by them as stevedores in discharging a cargo, with a warranty that it would be reasonably fit for that purpose. In breach of his warranty the defendant supplied a defective chain, which broke whilst being used and injured a workman of the plaintiffs. By the exercise of reasonable care the plaintiffs could have discovered the defect. The workman having commenced an action against them under the Employers' Liability Act 1880, *the plaintiffs settled the action by paying* 125*l.*, *which was a reasonable and proper amount. They then sued the defendant to recover that sum as damages for breach of his warranty.*

Held (*affirming the judgment of Charles, J.*), *that the injury to the workman and the liability of the plaintiffs for such injury was a natural consequence of the defendant's breach of warranty, and that the plaintiffs were therefore entitled to recover from him the sum of* 125*l.*

THIS was an appeal by the defendant from the judgment of Charles, J. at the trial, without a jury, at Leeds.

The plaintiffs sued the defendant to recover the sum of 125*l.* as damages for breach of warranty.

The plaintiffs were stevedores at West Hartlepool, and the defendant was the owner of the steamship *Wenby*.

In August 1894 the plaintiffs undertook to discharge a cargo of deals from the *Wenby*, and, in accordance with the custom of the port, the defendant promised to provide all necessary and proper derricks, cranes, chains, winches, and other gearing reasonably fit for the purpose of discharging the cargo.

The defendant supplied a chain which was so defective that, while it was being used in discharging the cargo, it broke and injured a workman employed by the plaintiffs.

The injured workman thereupon commenced an action against the plaintiffs, claiming damages, under sects. 1 and 2 of the Employers' Liability Act 1880 (43 & 44 Vict., c. 42), upon the ground that there was a defect in the condition of the chain which the plaintiffs might have discovered by the exercise of reasonable care.

The plaintiffs did not defend the action, and paid the workman 125*l.* as compensation.

It was admitted by the defendant that there had been a breach by him of the implied warranty that the chain should be reasonably fit for the purpose for which it was supplied; and, by the plaintiffs, that they might, by the exercise of reasonable care, have discovered the defect in the chain. The defendant admitted that the settlement of the action by the workman against the plaintiffs was reasonable and proper.

At the trial, before Charles, J., without a jury, at Leeds, the learned judge gave judgment for the plaintiffs (72 L. T. Rep. 467; (1895) 1 Q. B. 857).

The defendant appealed.

Tindal Atkinson, Q.C. and *H. Gawan Taylor* for the appellant. — The compromise by the plaintiffs of the action which was brought against them by their workman was an admission by them of their liability for negligence. It was entirely owing to their negligence that they were obliged to pay the 125*l.* to their workman; if they had not been negligent, they would not have been liable to pay anything. The ground, therefore, of the plaintiffs' claim against the defendant is that, owing to their negligence, they became liable to their workman and had to pay 125*l.* The defendant may be liable in damages for his breach of warranty, but he cannot be liable to pay damages for a consequence which arose from the negligence of the plaintiffs. It could not have been in the contemplation of both parties, at the time of the contract, that the plaintiffs would be negligent. The defendant cannot be liable for damage which the plaintiffs have incurred through their own breach of duty to their workman. It may be true that the defendant would have been liable to the workman, if the workman had sued him, for the same amount, according to the decision in *Heaven* v. *Pender* (49 L. T. Rep. 357; 11 Q. B. Div. 503); yet this damage would not have resulted to the plaintiffs but for their own negligence. The defendant is liable to the plaintiffs only for the natural consequences of his breach of warranty, and damage arising from their own negligence is not such a natural consequence. Charles, J. relied upon the opinion of Martin, B. in *Burrows* v. *March Gas and Coke Company* (22 L. T. Rep. 24; 26 L. T. Rep. 318; L. Rep. 5 Ex. 67; 7 Id. 96). That was only a dictum of the learned Baron, and was not necessary to the decision in that case. In *Kiddle and Son* v. *Lovett* (16 Q. B. Div. 605) Denman, J., under very similar circumstances, held that the defendant was not liable. In *Ovington* v. *McVicar* (2 Macpherson, 3rd Series, 1066) the Scotch judges all expressed an opinion that the defendant would not be liable under circumstances such as those in this case. The decision in *Wrightup* v. *Chamberlain* (7 Scott, 598) is in favour of the defendant.

Robson, Q.C. and *Meynell*, for the respondents, were not called upon to argue.

Lord ESHER, M.R.—We have no doubt whatever about this case. This action was brought by the plaintiffs against the defendant for damages for breach of a warranty given by the defendant to the plaintiffs. It was admitted that the warranty had been given. It was an implied warranty, but that makes no difference; it was a warranty. The plaintiffs say that the defendant warranted that a chain would be sound and efficient for the work which it had to do, and for the purpose for which it was to be used, and that the defendant knew the purpose for which it was to be used. The defendant admits that there has been a breach of that warranty. That is sufficient to support the action. There was a contract, and a breach of that contract, and the plaintiffs are entitled to nominal damages at least. The plaintiffs say that, in this case, they have suffered more than nominal damage. They say that the defendant warranted this chain, which was to be used in their business as stevedores, knowing the way in which it would be used by their, the plaintiffs', workmen, and knowing that, if an inefficient chain were supplied, it would give way, and that the natural consequence would be that the workmen would be injured. Therefore, the almost certain result of a breach of such a warranty would be that the plaintiffs' workmen would be hurt and would be entitled to sue the plaintiffs for damages. The plaintiffs took the chain from the defendant with that warranty, and used it for the intended purpose by means of their workmen. The chain broke because of the

breach of that warranty. Then the natural and inevitable result of the breaking of the chain was that a workman was injured. The result to the plaintiffs was that the workman would sue them and recover damages if there had been any want of care on their part in allowing the chain to be used. The plaintiffs did not examine the chain before using it, because of the warranty given by the defendant upon which they had a right to rely. For that reason the plaintiffs were guilty of want of care. That was the natural result of the warranty which had been given by the defendant, and of the breach thereof. Now, what is the rule as to damages? There has been a contract of warranty, and a breach of that contract, and the plaintiffs sue in respect of that breach. In this case the result has been a peculiar kind of damage, and the question is whether that damage is too remote. What is the test of that? It is given by Charles, J. in his judgment, where he says: "The only question which I have to determine is whether the damage done to the workman, and which he could only recover from the plaintiffs by showing want of care in them, may nevertheless be regarded as the natural consequence of the defendant's breach of contract; or, in other words, a consequence which might reasonably be supposed to have been within the contemplation of the parties." If they had considered the matter with any care, they ought to have contemplated such a consequence. If, therefore, the parties in this case had so considered the matter, is it not reasonable to suppose that it would be within their contemplation that, if injury resulted to the plaintiff's workmen, the defendant would have to pay? I prefer the opinion of Martin, B., expressed in *Burrows* v. *March Gas and Coke Company* (*ubi sup.*), to that of the Scotch judges in *Ovington* v. *McVicar* (*ubi sup.*). I think that the view of Martin, B. was correct, and I adopt it. I am of opinion, therefore, that it is clear, in this case, that the damage for which the plaintiffs are suing is not too remote from the breach of warranty by the defendant. The plaintiffs owed no duty to the defendant, but to their own workmen only, and the defendant cannot rely upon the plaintiffs' negligence. I think that the judgment of Charles, J. was right, and that this appeal must be dismissed.

KAY, L.J.—This was an action brought to recover damages for a breach of warranty. The warranty, and the breach thereof, are not denied. The defendant supplied to the plaintiffs a chain to be used by them as stevedores in the work of unloading ships. The chain was defective; it broke while it was being used; and it injured a workman of the plaintiffs who was using it. The stevedores relied upon the defendant's warranty, and did not examine the chain before using it. The workman therefore had a remedy against two persons. He might have sued the present defendant, according to *Heaven* v. *Pender* (*ubi sup.*); or he might have sued his employers because the chain was defective and they were negligent in not discovering that fact. The workman commenced an action against the stevedores, and they compromised the action by paying 125*l.* It is admitted, and must be assumed, that 125*l.* was a proper sum to pay as compensation, and, if the action had been brought against the present defendant, the workman would have recovered the same amount. The stevedores then brought this action against the defendant. They say that there was a breach of his warranty that the chain would be efficient for the purpose for which it was supplied; and that the damages are not nominal, because, by reason of the defect in the chain and their want of care in not examining it, they have had to pay 125*l.* to their workman. The defence is that the plaintiffs would not have had to pay that money if they had not been negligent in not discovering the defect, and that they became liable to their workman, not solely on account of the defect in the chain, but also on account of their negligence in not discovering the defect. If the damages recovered from the plaintiffs by their workman were more than the workman could have recovered from the defendant if he had sued him, perhaps the measure of damages in this case would not be the same. In my opinion it is a most important fact, that the amount is the same. Suppose that this accident had not happened to a workman but to the plaintiffs themselves. Could they not have recovered against the defendant? It is clear that they could, and could have recovered the same damages. I do not lay down, or assent to, the proposition that the damages recovered against an employer are the measure of the damages recoverable against the defendant in cases of this kind. But here it is admitted that the amount would be the proper measure of damages if the action by the workman had been brought against the defendant, and it is, therefore, the proper measure in this action. The plaintiffs are not to be defeated in this action because they relied on the defendant's warranty. There was no negligence as between the plaintiffs and the defendant; there was no duty to examine the chain, for there was a warranty. I think that this was, within the well-known rule, a damage which fairly resulted from the defendant's breach of warranty, and one which must have been within the contemplation of both parties, viz., that if the chain was not efficient, injury might accrue to the plaintiffs' workmen. As to the cases which have been cited, they are all distinguishable except two. In *Wrightup* v. *Chamberlain* (*ubi sup.*) it was held that the costs of improperly defending an action were not recoverable. In this case such costs could not have been recovered if the plaintiffs had defended the action by their workman. In *Kiddle* v. *Lovett* (*ubi sup.*) the employer paid money to his workman when there had been no negligence; that was a gift, because there was no liability. In *Burrows* v. *March Gas and Coke Company* (*ubi sup.*) Martin, B. distinctly expressed an opinion that, in a case like this, the damages recovered by the workman were the proper measure of damages. The only other authority is *Ovington* v. *McVicar* (*ubi sup.*), in which the Scotch judges expressed a different opinion. I prefer the opinion of Martin, B. I think that the judgment of Charles J. was perfectly right, and I concur in the reasoning of that decision. This appeal, therefore, fails and must be dismissed.

RIGBY, L.J.—I am of the same opinion. This was an action for damages for breach of warranty. It is admitted that, under the circumstances, there was a warranty that reasonable care should be taken to supply plant fit and proper for the purpose for which it was supplied. It is clear

that no such care was taken. The plaintiffs were therefore entitled, as between themselves and the defendant, to rely upon the warranty as to the efficiency of the chain. It is true that, under the Employers' Liability Act 1880 (43 & 44 Vict. c. 42), the employers would be liable to their workmen if they were negligent. In an action by a workman against his employers it would be no answer to say that they had a warranty from the person who supplied the plant. Now, negligence is the absence of due diligence. The defendant is trying to set up the absence of due diligence on the part of the plaintiffs. That was an absence of due diligence towards their workmen and not towards the defendant. The defendant had warranted the efficiency of the chain. The question in this case is whether the damages claimed were reasonably within the contemplation of the parties when the warranty was given. That is clear, because the workman of the plaintiffs had a right to sue the defendant himself if he chose to do so. As to the authorities, I am not satisfied that, in *Ovington* v. *McVicar* (*ubi sup.*), the Scotch judges intended to lay down any different rule. If they did so, I do not agree with their view, but with the view of Martin, B., expressed in *Burrows* v. *March Gas and Coke Company* (*ubi sup.*). I think that the decision of Charles, J. was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *W. A. Crump* and *Son*, for *Turnbull* and *Tilly*, West Hartlepool.

Solicitors for the respondents, *Baker, Lees*, and *Postlethwaite*, for *Higson Simpson*, West Hartlepool.

Thursday, Nov. 14.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

The Red Sea. (*a*)

Marine insurance—Abandonment—Advances for disbursements—Prepayment of freight.

The plaintiffs insured the hull and machinery of the defendants' steamship. The vessel stranded, and was abandoned as a constructive total loss; her cargo was delivered. The gross freight was claimed by the insurers, but the defendants sought to deduct a sum advanced by the charterers to the master for disbursements at the port of loading, in accordance with the terms of the charter-party, which provided that the ship should pay "2½ per cent. commission, including insurance," and also a sum for working expenses incurred during the voyage.

Held (*affirming Bruce, J.*), *that, as regarded the advance by the charterers at the port of loading, the defendants were entitled to deduct it, since the words "including insurance" in the charter-party showed that the parties regarded it as subject to sea risk, and it was therefore equivalent to a prepayment of freight; but that the disbursement for working the ship could not be deducted, as it had not been incurred for freight alone.*

Appeal from a decision of Bruce, J.

This was an action brought by the underwriters on the steamship *Red Sea*, which formerly belonged to the defendants, the Sea Steamship Company, to recover a balance of freight.

The agreed facts were as follows:—

The defendants were owners of the steamship *Red Sea*, and on the 17th April 1894, by Ellis and Co. the managing owners of the vessel, they chartered her to H. Baars and Co., of Pensacola, to carry a cargo of timber from Pensacola to a direct safe port in the United Kingdom, as ordered on bills of lading, and there deliver it at such wharf or dock as consignees of cargo might direct on arrival for a freight of 5*l.* 2*s.* 6*d.* per St. Petersburg standard of 165 cubic feet. Twenty per cent. of the cargo was, however, to be taken at two-thirds of that rate.

A cargo of timber was duly shipped by H. Baars and Co. under a bill of lading dated the 19th May 1894 requiring the same to be delivered at the port of West Hartlepool unto order of shippers or their assigns paying freight and all other conditions as per charter-party. The bill of lading was duly indorsed to and the property in the cargo passed to R. Wade, Sons, and Co., of West Hartlepool.

The plaintiffs were insurers of the defendants in respect of the hull and machinery of the *Red Sea*, upon her voyage from Pensacola to West Hartlepool under certain policies. It was provided by the charter-party that sufficient cash for ship's ordinary disbursements at port of loading should be advanced the master by charterers or their agents at the exchange of 4 dollars 75 cents, ship paying 2½ per cent. commission, including insurance. Master to give his draft on owners or consignees as required and customary to cover same, which should be paid out of the first freight collected.

In accordance with these provisions H. Baars and Co. made disbursements for the ship at Pensacola amounting to 1677*l.* 19*s.* 10*d.*, and the master duly gave his note for the same. The said note was indorsed by the master of the *Red Sea* to Messrs. Price and Pierce of London, and by them it was for value indorsed to R. Wade, Sons, and Co., and they held it for value when the cargo arrived at West Hartlepool.

In the course of the voyage the ship necessarily put into Norfolk, Virginia, for coals to enable her to proceed on the voyage, and disbursements for coals and expenses were consequently incurred amounting to 339*l.* 4*s.* 9*d.*, for which the master on the 26th May 1894 gave his draft upon Ellis and Co. at thirty days date. The draft was paid by Ellis and Co. on or about the 28th June 1894.

The *Red Sea* being then in good and seaworthy condition arrived off West Hartlepool and endeavoured to cross the bar at the entrance to the harbour on the 16th June 1894, but in doing so she took the ground and remained stranded, having, as was afterwards discovered, holed her bottom badly.

Efforts were made to tow her off, but without success. A portion of her cargo was therefore put out of the ship into the water to lighten her, and on the 20th June, sufficient cargo having been discharged, the ship was towed off and taken into the harbour with the remainder of the cargo on board, and was berthed first in the basin or old harbour, where the other portion of the cargo was discharged, and afterwards in the Central Dock and in the Graving Dock, at which places

(*a*) Reported by Basil Crump, Esq., Barrister-at-Law.

the remaining cargo was discharged. The timber discharged from the vessel while stranded on the bar was formed into rafts and towed into the Central Dock at West Hartlepool.

On or about the 25th July R. Wade, Sons, and Co. paid to Ellis and Co., who acted on behalf of the defendants, 2227*l.* 19*s.* 5*d.* in respect of freight. The gross freight due under the bill of lading amounted to 4279*l.* 6*s.*, and R. Wade, Sons, and Co. claimed to deduct sums amounting to 2051*l.* 6*s.* 7*d.* Ellis and Co. allowed these deductions and accepted the balance in settlement of R. Wade, Sons, and Co.'s liability for freight without referring to the plaintiffs or showing them the account or deductions.

The plaintiffs also incurred and paid by their agents in respect of the ship and cargo at West Hartlepool, dock dues, 119*l.* 13*s.* 10*d.*; Custom House charges, 38*l.* 9*s.*; discharge of cargo in dock, 93*l.* 5*s.* 6*d.*; and some other items amounting in all to 255*l.* 15*s.* 4*d.*

Notice of the abandonment of the *Red Sea* was given by the defendants to the plaintiffs on the 19th June, but was rejected by the plaintiffs, and on the 20th June 1894, the defendants issued writs against the underwriters claiming payment of a total loss. Subsequently on or about the 30th Oct. 1894 it was agreed between the plaintiffs and the defendants that the plaintiffs should pay to the defendants ninety per cent. on the policies on hull, but that although only paying that amount, still the plaintiffs, with reference to the abandonment and constructive total loss and all questions arising thereon, should be in the same position as if they had paid a hundred per cent. The plaintiffs were, further, to keep the vessel and to pay the ship's proportion of the general average charges, dock dues and other expenses, except legal expenses. The vessel was, in fact, a constructive total loss in consequence of the stranding and of the damage thereby received on the 16th June. The agreement was arranged by letters dated the 29th and the 30th Oct. 1894 which passed between the solicitors to the parties.

The plaintiffs now contended that the defendants were bound to pay to them or to account to them for 4279*l.* 6*s.*, the gross bill of lading freight, less only the shipowners' proportion of any general average expenses incurred through the stranding of the vessel and the partial discharge of her cargo, and the other sums above referred to. The defendants contended that before paying over the balance of the freight it was subject to the further deductions of 1677*l.* 19*s.* 10*d.* and 339*l.* 4*s.* 9*d.* mentioned above.

The following were the material clauses of the charter-party:

11. Bills of lading to be signed as presented without prejudice to, if in accordance with, this charter, but any difference of freight to be settled on signing bills of lading, if under chartered rate, in cash less interest and insurance, if over chartered rate, by master's draft payable five days after arrival at port of discharge. In the absence of fraud, of clerical or obvious errors, the captain's signature to bills of lading to be accepted as binding upon owners; and in case of short delivery of cargo, owners or captain shall furnish an extended protest, if required, showing the cause of such short delivery.

13. Sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by charterers or their agents at the exchange of 4.75 dollars, ship paying 2½ per cent. commission, including insurance. Master to give his draft, on owners or consignees, as required and customary to cover same, which (together with draft for difference of freight, if any), shall be paid out of the first freight collected. In the absence of fraud, of clerical or obvious errors, the signing by the master of any such draft shall be conclusive evidence of and authority for the advance of such cash for disbursements, charges, and freight differences.

June 26.—Hearing of the question of law before Bruce, J.

J. A. Hamilton, for the plaintiffs, cited

Case v. *Davidson*, 5 M. & S. 79;
Manfield v. *Maitland*, 4 B. & A. 582;
Allison v. *Bristol Marine Insurance Company*, 34 L. T. Rep. 809; 3 Asp. Mar. Law Cas. 178; 1 App. Cas. 209;
Hickie v. *Rodocanachi*, 4 H. & N. 455.

Joseph Walton, Q.C. and *T. G. Carver*, for the defendants, referred to

Stewart v. *Greenock Marine Insurance Company*, 2 H. of L. Cas. 159; 1 Macq. 328;
Scottish Marine Insurance Company v. *Turner*, 1 Macq. 334;
Hicks v. *Shield*, 7 E. & B. 633;
Simpson v. *Thomson*, 38 L. T. Rep. 1; 3 Asp. Mar. Law Cas. 567; 3 App. Cas. 279;
Thompson v. *Rowcroft*, 4 East. 84;
Sharpe v. *Gladstone*, 7 East, 34;
Barclay v. *Stirling*, 5 M. & G. 6.

The following were also referred to:

Arnould's Marine Insurance, 6th edit., pp. 974-6;
Carver's Carriage of Goods by Sea, 2nd edit., p. 574, s. 564;
Benecke's Indemnity in Marine Insurance, pp. 392, 410.

July 5.—BRUCE, J. (after stating the facts) proceeded:—The question in dispute in this action arises in respect of two items which the defendants claim to deduct from the freight, viz., a sum of 1677*l.* 19*s.* 10*d.* paid at the port of loading in pursuance of a provision contained in the charter-party, and a sum of 339*l.* 4*s.* 9*d.* incurred for coals and other expenses at Norfolk, Virginia, necessary to enable the ship to proceed on her voyage. The plaintiffs are underwriters on hull and machinery, and they claim the freight as a benefit incident to the ship. No doubt, subject to a question hereafter to be considered, as to the sum of 339*l.* 4*s.* 9*d.*, they are entitled to whatever is the amount of freight payable on delivery of the cargo. The first question to be determined is what freight was, under the circumstances of this case, payable. In other words, was the sum of 1677*l.* 19*s.* 10*d.* paid at the port of loading a sum which is to be taken as a payment on account of freight; or was it a payment which could, in accordance with the terms of the charter-party, be deducted from freight? Clause 13, I think, contains words which show that the parties contemplated that the advances were of such a nature as to be insurable—that is, that they were in the nature of a prepayment of freight and subject to sea risk. It is true that the words "and cost of" are struck out, and the word "including" is substituted, but it does not seem to me that that affects the substance of the stipulation. The 2½ per cent. which it was stipulated the ship shall pay it is agreed shall cover the cost of insurance. But the amount to be paid for insurance is not material. The question is, was the advance of such a nature as to be capable of insurance? I

can give no meaning to the words in the charter-party unless I hold that the parties regarded the advance as subject to sea risk; and, if so, it must be regarded as a payment on account of freight, and cannot be treated as freight still due from the defendants. I think, therefore, that the defendants are right in their contention as to the sum of 1677*l.* 19*s.* 10*d.* As regards the sum of 339*l.* 4*s.* 9*d.*, the defendants contend that the right of the underwriters to the freight is subject to the expense of earning it, and that as the disbursements were necessary for the completion of the voyage, the underwriters can only claim the balance of freight after deducting the sum in question. But I think that the disbursements cannot be said to have been incurred for the freight alone. They were expenses incurred by the master acting on behalf of his owners for the general benefit of the adventure, long before the abandonment, and nothing that has occurred can, I think, have the effect of making the underwriters liable for a debt of this nature. It is said that if the owners of the ship had not paid the disbursements a claim in respect of the disbursements might have been enforced by the master, who would have had a maritime lien in respect of them. In answer to this argument I think it is enough to say that I am not satisfied that the master ever did make any disbursements. The owners have themselves paid the amount due in respect of these disbursements, and no circumstances have existed, that I can discern, to give rise to a maritime lien or any lien on the ship or freight. I hold, therefore, that as regards the sum of 1677*l.* 19*s.* 10*d.*, the defendants are right in their contention, and I pronounce against their claim to deduct the sum of 339*l.* 14*s.* 9*d.* from the freight.

The plaintiffs appealed. The appeal was heard on Nov. 14.

Lord Esher, M.R.—I am sure I should be the last person in the world to attempt to differ from Lord Ellenborough on any question of mercantile law, because I take him to have been the greatest mercantile judge before my time. I certainly shall not venture to say that I differ from a case which has been decided by Lord Ellenborough. That is this case of *Case* v. *Davidson* (*ubi sup.*). I think, with great deference to Mr. Hamilton, that he has misconstrued that case and all the cases which followed it. This is an action between underwriters of the ship and the shipowners, and the dispute arises after the ship has been a constructive total loss and the abandonment has been accepted by the underwriters. Now, what is the effect of that as between the underwriters and the shipowners, according to the case of *Case* v. *Davidson* and all the others? It seems to me that Lord Ellenborough pointed out distinctly in that case first of all that the ship is to be considered as having passed to the underwriters after the abandonment has been accepted, as from the time when the damage occurred to her which entitled him to abandon her. The ship has then passed to him, and he therefore is entitled to everything which that ship, then being his, can from that time earn; that is to say, that he can earn by her as being her owner. That is what he is entitled to, and that is what Lord Ellenborough has said. He is not entitled to anything that has been earned by the use of that ship before she was his ship. He is only entitled to what he earns by reason of her being his ship after. Now in the simple case, therefore, of the ship before the loss or damage having been chartered or having been filled with cargo on bills of lading, the freight to be payable on the arrival of the ship and delivery of the goods, by the law of England the ship has earned nothing at the time of the loss. She has earned nothing if she is lost before she arrives at the port of destination. By the law of England freight, unless it is prepaid freight, is only due and can only be sued for upon the arrival of the ship at the port of destination and the delivery of the goods to the consignees. Therefore, in that given case, at the time of the loss the ship has earned nothing. He who was her owner up to the time of the loss has earned nothing by the use of the ship. The ship has been used, but has not earned anything for him. But he who is owner when she arrives is entitled, as owner, to receive the freight; that is to say, he is entitled as owner by the delivery of the cargo at the port of destination to the freight for the use of the ship during the whole voyage. Therefore he obtains that freight by the use of the ship, and he obtains it in virtue of what the ship does when she arrives at her destination, and when she is his ship. That is the whole of the law of abandonment. Here, therefore, the ship was lost at a place a short distance from the port of destination. The underwriter, therefore, was entitled to receive all the freight which would be earned by the ship by delivery of the goods at the port of destination. But he was not entitled to any other freight, and if, therefore, there was freight prepaid, paid before the time when she became his ship, which the charterers could not have got back whether the ship was lost before delivery of the cargo or not, that freight is not earned by him by the use of the ship. It is earned by the man who got it, and who was paid it at the time—it was paid when he was the owner of the ship; that is, in this case, the shipowner. Now the shipowner here, according to the true construction of this charter-party, as between him and the charterer, was entitled to part of that freight by way of advance at the commencement of the voyage and before the ship started. That was to be treated, as between him and the charterer, as prepaid freight; that is freight paid and not to be got back again. To insure that freight is a perfectly well-known practice on the part of the person who would lose if the ship was lost. That is not the shipowner. That freight is safe in his pocket whatever happens to the ship, and he is entitled to keep it whatever happens. Therefore here, as between the shipowner and charterer, what the shipowner would be entitled to be paid if he were still the owner of the ship when she arrived at the port of destination and delivered her cargo, would be the charter-party freight coming due by reason of the arrival of the ship at that place and the delivery of the cargo. What was that? Not a freight he has already been paid, but so much of the freight as would become due to him by reason of the arrival of the ship and delivery of the cargo. That is, in other words, the difference between so much of the freight as he had already been paid and so much as would be due to him by reason of the arrival of the ship. So if the shipowner and

charterer had been there to settle the matter the shipowner would have been bound to say to the charterer, "You are bound to pay me the charter-party freight, less the amount you have already paid." That is to say, the difference between the prepaid freight and the charter-party freight. Here the shipowner chartered the whole ship to the charterer, and the captain, no doubt, was bound to sign bills of lading, and to sign them, if you please, in the name of the owner whose captain he was. But that bill of lading freight, although he would collect it from the consignees of the bill of lading—that is, from the bill of lading owners—he could not put it in his pocket. From them he would be entitled to receive it, but he would hold it as trustee for the charterer, because the charterer was the person who, as between the shipowner and the charterer, was to be entitled to the bill of lading freight. But what would happen? He would hold it as trustee for the charterer. But how much would he hold as trustee? Only that which was over and above what he was entitled to keep for his own charter freight. What he was entitled to receive for his own charter-party freight was the difference between what he had already been paid and the charter-party freight. If the bill of lading freight exceeded the charter-party freight, he would have been bound to hand over the difference to the charterer. But in this case there was no such circumstance, and therefore when the ship arrived, after the loss, the only thing to be received was the difference between the charter-party freight and the prepaid freight. If the shipowner had been there he would have received that sum; he would have paid himself any difference between the two, and would have had nothing over to pay the charterer. What he would have been entitled to receive, therefore, was that difference. But he could not receive that difference, because he did not earn that difference by the use of the ship. He had ceased to be the owner when the ship did earn that. Who did earn that? Why the underwriter. The underwriter earned that difference by reason of his being the owner of the ship when she arrived. But he earned nothing more by reason of being the owner of the ship. All this story about a thing which is called a draft, which is signed by the captain alone, which is not a negotiable bill, and which must, if it can bind his owners at all, merely bind them by way of pledging, as is said, the freight, has nothing whatever to do with it. It makes no difference as between the rights of shipowner and underwriter. This case is reduced to what I have said, and while certainly not venturing to differ from Lord Ellenborough, and certainly not attempting to contravene what has been said in some cases by Lord Blackburn, and in the case cited to us as having been said by myself in this court — without attempting to impugn that in the slightest degree, it seems to me that, in accordance with these cases, what I have said is the true view of looking at these cases, and shows that the judgment of Bruce, J. was right, and that the appeal should be dismissed.

Lopes, L.J.—The shipowner in this case abandoned the ship as and for a constructive total loss. On the abandonment the ship passed naturally to the underwriters, and the underwriters then and there were entitled to stand in the shoes of the shipowner. I mean by that the same shoes which he wore at the time of the abandonment. They were entitled to all that the ship afterwards earned, and entitled, therefore, to all unpaid freight, because that freight was not earned and did not become due until the arrival of the ship at her destination. Now, the underwriters are entitled to so much, but in my opinion they were not entitled to the freight which had been advanced before the abandonment. It is said that in so holding we are differing from certain cases decided by certain eminent judges. In my opinion we are not differing. I think we are deciding in accordance with these cases, although probably neither of them may directly raise the point with which we are now dealing. The first of those cases is the case of *Case* v. *Davidson* (*ubi sup.*). There is also the case of *Stewart* v. *Greenock Marine Insurance Company* (*ubi sup.*) and the valuable remarks of Lord Blackburn in the case of *Keith* v. *Burrows* (37 L. T. Rep. 291; Asp. 3 Mar. Law Cas. 481; 2 App. Cas. 631). I again say we are not deciding contrary to any of those cases, but in my opinion, in accordance with them. I think, therefore, this 1600*l.* was properly deducted. I am asked by my brother Kay to say that he entirely agrees with the judgment of the court.

Appeal dismissed.

Solicitors for the appellants, *Hill, Dickinson, and Co.*, Liverpool.

Solicitors for the respondents, *Batesons, Warr, and Wimshurst*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 3, 4, *and Oct.* 31.

(Before Stirling, J.)

Re Mason's Orphanage and the London and North-Western Railway Company. (*a*)

Charity—Power of trustees to sell charity lands without consent of Charity Commissioners — Deed of foundation — "Scheme legally established" — Charitable Trusts Amendment Act 1855 (18 *&* 19 *Vict. c.* 124), *s.* 29.

The trustees of a charity who derived their title to charity lands under a deed of foundation, dated the 29th July 1868, *and enrolled and perfected under* 9 *Geo.* 2, *c.* 36, *and amending Acts, contracted under the powers given to them by the deed of foundation to sell to a railway company some of the land conveyed to them by that deed. The company required that the consent of the Charity Commissioners to the sale should be obtained or the purchase money paid into court under the Lands Clauses Consolidation Act* 1845 (8 *&* 9 *Vict. c.* 18), *s.* 69.

The trustees declined to comply with either requirement, contending that the deed of foundation was a "scheme legally established" within the meaning of sect. 29 *of the Act of* 1855, *and the consent of the Charity Commissioners was therefore not required.*

Held, that the purchasers' objection was well founded.

(*a*) Reported by J. Sanderson, Esq., Barrister-at-Law.

VENDOR and purchaser summons.

By a deed of foundation of a charity dated the 29th July 1868, and duly enrolled and perfected in accordance with the provisions of statute 9 Geo. 2, c. 36, and the subsequent Acts amending the same, Sir Josiah Wilson conveyed certain freehold hereditaments to trustees for charitable purposes.

By clause 60 of the deed the trustees, or any five of them, were empowered by any deed or deeds to be executed as therein mentioned to dispose of or convey, either by way of absolute sale or in exchange for other hereditaments in England or Wales, all or any part of the hereditaments thereby assured, with an exception immaterial to the questions raised in the present case.

Acting under the powers thus conferred, the trustees for the time being entered into a contract for the sale to the London and North Western Railway Company of part of the hereditaments subject to the power. The purchasers raised the objection that sect. 29 of the Charitable Trusts Amendment Act 1855 precluded the trustees from exercising the power of sale without the consent of the Charity Commissioners, and insisted either that such consent should be obtained or that the purchase money must be paid into court in accordance with sect. 69 of the Lands Clauses Consolidation Act 1845.

The vendors answered that they were not bound to comply with either alternative.

The purchasers then took out the present summons under the Vendor and Purchaser Act 1874 to determine the question thus raised.

Sect. 29 of the Charitable Trusts Act 1855 provides that "it shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant otherwise than with the express authority of Parliament or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any such sale, mortgage, or charge of the charity estates," or any such leases as are specified in the section.

A. Underhill for the purchasers.—The consent of the Charity Commissioners to the sale is required by sect. 29 of the Charitable Trusts Amendment Act 1855. The vendors cannot bring themselves within the exceptions of that section. The deed of foundation is not a "scheme." Both in the Charitable Trusts Act 1853 and the amending Act of 1855 the word "scheme" occurs frequently, but neither Act mentions a "deed of foundation." The object and intention of the Legislature in passing these enactments was to secure the proper administration of the funds of charities by means of the control and supervision of some responsible authority. The intention of the Act will clearly be evaded if the exercise of the powers of sale given by the deed of foundation is to be entirely in the discretion and control of the trustees of that deed. We are therefore not bound to take a conveyance of the lands without the sanction of the Charity Commissioners to the sale first being obtained.

Graham Hastings, Q.C. and *Ingle Joyce* for the respondents.—As to the construction to be placed on the word "scheme" the observations of Lord Cairns in *Massy* v. *Rowen* (23 L. T. Rep. 142; L. Rep. 4 E. & I. App. 297, 298) as to the court not giving a technical meaning without very good reason are applicable. A technical meaning must not be given to the word "scheme." It must be understood according to the meaning which would be given to it in a dictionary. The use of the words "new scheme" in sect. 54 of the Charitable Trusts Act 1853 (to be construed as one with the Act of 1855) implies that such a deed as this constitutes a scheme. So does the judgment of Jessel, M.R. in *Re Campden Charities* (45 L. T. Rep. 152, 159; 18 Ch. Div. 310, 328). There a "scheme legally established" existed, and the court held that there must be a new one. It was not in the contemplation of the Legislature to take away the power of sale possessed by the trustees. [STIRLING, J.—If your argument is correct, the trustees could have granted a thirty years' lease, supposing that the founder had empowered them to do so.] They might if the founder had provided so by a scheme legally established. By the law previously to the legislation contained in the Charitable Trusts Acts the trustees could have sold the property. The cases on sales by trustees are collected in Tudor's Charitable Trusts, 3rd edit. pp. 250-257. The two most in point are

Attorney-General v. *Warren*, 2 Swanst. 291, 302;
Attorney-General v. *South Sea Company*, 4 Beav. 453.

[STIRLING, J.—The difficulty in this case could have been got over by obtaining the sanction of the Charity Commissioners. The Act authorises the commissioners to give their sanction.] The only question here is, whether this is a scheme legally established, and on this sects. 24, 26, and 42 of the Act of 1855, and sect. 12 of the Act of 1869 are most material. See also the judgment of North, J. in

The Governors of the Charity for the Relief of the Poor Widows and Children of Clergymen and Skinner, 67 L. T. Rep. 751, 752; (1893) 1 Ch. 178, 182.

It might be a very serious matter if it were held that the consent of the Charity Commissioners is necessary:

Governors of St. Thomas's Hospital v. *Charing Cross Railway Company*, 4 L. T. Rep. 13, 85; 1 J. & H. 400; 30 L. J. 395, Ch.

The statute was intended to apply to cases where there was no express power for the purpose. This has been acted on in conveyances during a number of years, and the point seems never to have come into the courts. [STIRLING, J.—The word scheme generally means a document given to the trustees by the court to supplement defects existing in their own instrument.] In Key & Elphinstone's Precedents of Conveyancing there is a precedent which shows that the sale is quite good without the consent of the Charity Commissioners.

Underhill in reply.—The argument for the vendors is based on a fallacy. [STIRLING, J.—Are the words "legally established" to be read in their popular meaning or strictly? Do any text-book writers deal with this?] Apparently not. [STIRLING, J.—Do you know of any case having arisen where an express power of sale existed and the money was paid into court?] I believe there has been such a case, but it is doubtful whether the money would be paid out without the consent of the Charity Commissioners.

Cur. adv. vult.

Oct. 31. — STIRLING, J. (after stating the facts):—The question thus raised comes before me upon a summons taken out by the purchasers under the Vendor and Purchaser Act 1874. Sect. 29 of the Charitable Trusts Act 1855 provides that "it shall not be lawful for the trustees, or persons acting in the administration of any charity, to make or grant otherwise than with the express authority of Parliament, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estates." The contention on the part of the trustees of the charity in the present case is, that the deed of 1868 under which they are acting constitutes "a scheme legally established" within the meaning of the Act, and consequently that the sanction of the Charity Commissioners is not required. Usually when a scheme is spoken of in connection with a charity what is meant is, not the instrument of foundation, but a document sanctioned by some authority containing directions for the administration of the charity. Previously to the passing of the Charitable Trusts Act 1853 such schemes were made by the Court of Chancery only. They were made mainly in three classes of cases: (1) When the directions contained in the instrument of foundation were ambiguous, imperfect, or otherwise insufficient; (2) where the directions, though originally precise and complete, had become under altered circumstances unsuitable to carry out the general intention of the founder; and (3) where a scheme sanctioned by the court itself had in like manner become unsuitable for that purpose. The Charitable Trusts Act 1853 authorised the making of schemes by other authorities than the Court of Chancery—as by Bankruptcy and County Courts (sect. 32 of the Act of 1853). In the Act of 1853 the word "scheme" occurs in sects. 8, 36, 42, and 54-60 (both inclusive); and in the Act of 1855 it occurs in sect. 39; and in all those places it is used to designate such an instrument as I have just been describing. *Primâ facie*, therefore, it may be expected to bear the same meaning in sect. 29. Against this two arguments are used. First, it is said that sects. 54-60 speak of new schemes, implying that the instrument which for the time being governed the administration of the charity was an *old scheme*; that such instrument might be that of foundation; and that consequently it is to be inferred that such instrument was regarded by the framers of the Act as a scheme. Where there is no old scheme the inference thus sought to be drawn appears to be far from conclusive. Secondly, reliance is placed on the language of sect. 24 of the Act of 1853, which provides that leases, sales, exchanges, and other transactions sanctioned by the commissioners are to have the like effect and validity as if they had been authorised or directed by the express terms of the trusts affecting the charity. It is said that this shows that sales authorised or directed by the express terms of the trust were valid. No doubt this was so in 1853, and would have continued to be so in the absence of any further enactment; but it seems to me that there would have been no inconsistency if the same Act of 1853 had by a subsequent section prescribed that leases, sales, and other transactions expressly authorised and directed should not be valid unless approved by the commissioners, and *à fortiori* there appears to be no inconsistency between the enactment in sect. 29 of the Act of 1855 and that in sect. 26 of the Act of 1853. Moreover, this remark may be made: if the intention was that every sale, mortgage, or lease authorised or directed by the express terms of the trust should be valid without the approval of the charity commissioners, why was not that language used in sect. 29 of the Act of 1855 as it is in sect. 26 of the Act of 1853? Again, the use of the words legally established in connection with the word scheme seems to point to the intervention of some duly constituted legal authority, and in this sense the word "establishment" is used in sect. 42 of the Act of 1853. As a mere matter of verbal construction, therefore I should come to the conclusion that the words "scheme legally established" do not include the instrument by which the charity was founded; but I further think that it would be unsatisfactory to dispose of the case without considering what object was intended by the Legislature to be attained by the enactment contained in sect. 29. That section prohibits three classes of transactions: (1) sales; (2) mortgages and charges; and (3) certain kinds of leases of charity estates; and it is desirable to see how the law stood with respect to such transactions prior to the passing of the first Act, viz., that of 1853. A sale, lease, or mortgage made in accordance with an express power was good. On this I may refer to the judgment of Lord Cranworth (then Vice-Chancellor) in *Attorney-General* v. *Hardy* (1 Sim. N. S. 338), where it was held that a trustee of a Wesleyan chapel under a deed which contained a power of raising money by mortgage might become himself a mortgagee, and, if he did so become, exercise all the rights of a mortgagee, although in opposition to the trusts. Even where no express power of sale existed, a sale might be made of the charity estate provided it were in accordance with a provident administration of the estate for the benefit of the charity, but the purchaser took subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances: (*Attorney-General* v. *Warren*, 2 Swanst. 291, see p. 302; *Re The Clergy Orphan Corporation*, 71 L. T. Rep. 450; (1894) 3 Ch. 145; see 71 L. T. Rep. 453; (1894) 3 Ch. 154.) The court, although it had power to sanction the alienation of charity lands, exercised this power with great caution: (see *Attorney-General* v. *Mayor of Newark*, 1 Hare 395.) As regards leases it was laid down that where power was given to trustees of a charity to make leases generally they might (both at law and in equity) either take fines or reserve rents as was most beneficial to the charity. Leases might be made for long terms provided it were for the benefit of the charity. See *Attorney-General* v. *South Sea Company*, 4 Beav. 453. But here again the onus of proving that the transaction was beneficial lay on the lessee (*Attorney-General* v. *Pilgrim*, 2 H. & Tw. 186), and it was laid down that *primâ facie* the terms of a husbandry lease ought not to exceed twenty one years nor that of a building lease ninety-nine years: (*Attorney-General* v. *Owen*, 10 Ves. 555; *Attorney-General* v. *Backhouse*, 17 Ves. 283, see p. 291.) Similar principles appear to have applied to leases in reversion (*Attorney-General* v. *Kerr*, 2 Beav. 420) where one of two such leases was upheld and the other set aside.

As regards leases for lives, however, they were held to be good, at all events if they were in accordance with the custom of the country or a long-continued practice (*Attorney-General* v. *Cross*, 3 Mer. 524; *Attorney-General* v. *Crook*, 1 Keen, 121); and in the former case so great a judge as Sir W. Grant, M.R. said (at p. 539), that he was not aware of any principle or authority on which it could be held that such a lease was on the face of it a breach of trust. This statement of the law appears to me to disclose two blots at least in charity administration. In the first place, it was obviously difficult in many cases for a trustee not acting under the direction of the court to satisfy himself that the transaction in which he was engaging might not be afterwards held to be a breach of trust. Secondly, many transactions held by the courts to be within the powers of trustees were, to say the least, of very doubtful expediency in the interest of the public. By sects. 21 and 24 of the Act of 1853 the legislature authorised the Charity Commissioners to sanction leases, mortgages, sales, and exchanges of charity lands, and thus enabled the trustees to obtain protection in a cheap mode and without putting the charity estate or themselves to the expense of proceedings in chancery. Thus the first of the two blots was removed; and the second was, in my opinion, intended to be wiped out by sect. 29 of the Act of 1855. I think the view of the Legislature was that alienation of charity estates by way of sale or mortgage, or by lease in reversion, or for lives, or longer terms, or in consideration of fines gave rise to abuses which the law as it stood prior to 1855 did not adequately prevent, and that such transactions ought not to take place, except by the direct authority of Parliament or with the sanction, direct or indirect, of the court or the Charity Commissioners, both being authorities familiar with charity administration, and likely to be vigilant in guarding against its abuses. But founders of charities and their legal advisers are not necessarily cognisant of what has been done in past times, and may unwittingly introduce into the instruments of foundation clauses which the experience of the courts or the Charity Commissioners would lead them to regard as highly objectionable. I do not suggest for a moment that the present vendors have done or intend to do anything which could possibly be treated as an abuse of their powers; but, if their contention be well founded, it follows that the founder of a charity might, by introducing approximate clauses into the founder's deed, effectually authorise his trustee to grant leases in reversion, or for lives or long terms or in consideration of fines, without the sanction of the Charity Commissioners. I do not think that this was intended by the Legislature. Sect. 29 of the Charitable Trusts Act 1855 prohibits (among other things) sales except under certain circumstances. It is for those who claim that their case falls within one of the excepted cases to make it out, and, upon a fair construction of the enactment, I think that the present vendors fail to do so. In my judgment, therefore, the objection raised by the purchaser is well founded, and there must be a declaration accordingly.

Solicitors: *C. H. Mason*; *Burton, Yeates*, and *Hart*, for *Johnson, Barclay, Johnson*, and *Rogers*, Birmingham.

Aug. 8, 9, *Oct.* 25, *and Nov.* 15.

(Before ROMER, J.)

HINDSON *v.* ASHBY. (a)

Riparian owner—Accretion—Owner of several fishery—Bed of river—Trespass—Adverse possession—Statute of Limitations.

A riparian owner on a non-tidal river is entitled to accretions to his land by reason of the gradual and almost insensible receding of the water, in a case where the actual river-bed belongs to a separate owner.

In determining whether or no any particular piece of land forms part of the bed of a river, at any particular spot at any particular time, no hard and fast rule can be laid down, but regard must be had to all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, its growth, and its uses.

THIS was an action by the Rev. John Hutchinson Hindson and others, who were the trustees of the church and bridge lands trusts at Wraysbury, Buckinghamshire, to restrain an alleged trespass upon their lands by the defendant John Ashby, who was the owner of adjoining lands on the same bank of the river Thames. The plaintiff's lands ran down to the Thames, and were described in their title deeds as bounded by that river. The defendant was possessor of the right of fishing in the Thames at this part of the river from bank to bank, and was also admitted for the purposes of the action to be owner of the soil of the bed of the river, and of certain eyots which had arisen therein. About the year 1866 the defendant's predecessor in title had caused a small ditch, of some seven inches in depth, to be made about five feet below the top of the plaintiffs' bank and along the plaintiffs' frontage. This ditch had been cleaned out at intervals, and the soil thrown on the river side. A row of trees had also been planted by the defendant or his predecessor between the ditch and the river, and had been occasionally trimmed on his behalf. The ditch was not noticed from the plaintiffs' bank until the year 1893. Shortly after the ditch was filled up, and a concrete pathway substituted by the defendant to enable his tenants to pass along the frontage of the plaintiffs' land to one of the eyots in the river.

The main question in the action was whether this concrete path was made on the bed of the river which belonged to the defendant, or whether this land had become the property of the plaintiffs by the right of accretion. It was admitted that the land in question had formerly been part of the bed of the river, and that for some months in the year it was under water. The river had however gradually receded, leaving this land dry for some months in the year.

The writ in the action was issued on the 5th Nov. 1894, and the plaintiffs claimed an injunction to restrain the trespass on the land, of which they claimed to be owners in possession.

The defendant denied the title of the plaintiffs, and claimed possession of the land in question as part of the bed of the river. He also claimed an adverse title by virtue of the Statute of Limitations.

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

Moulton, Q.C., *A. à B. Terrell*, and *F. Baden Fuller* for the plaintiffs.—The plaintiffs are riparian proprietors, and this land has always been described as bounded on this side by the river Thames. They are therefore entitled to all gradual accretions to their land. This concrete path cuts them off from the river to which they are entitled to go, and they are entitled to have the river flowing by unaltered and unchanged. Admitting, for the purposes of this action, that the defendant is owner of the soil of the bed of the river, that does not take away the right of accretion possessed by the plaintiffs as riparian proprietors. The real question is whether this path now forms part of the bed of the river or not; and, as to that, the fact that the defendant has made this path on dry land is conclusive evidence that it is not; his user of it is entirely a dry user. It is part of the bank, and not part of the bed of the river. The bed of the river is that which is always covered by water in an average year.

Bucknill, Q.C. and *Stuart Moore* for the defendant.—This is not an accretion at all, but part of the bed of the river which belongs to the defendant. But if it is not bed of the river, then the defendant is still entitled to it by adverse possession for much more than the requisite statutory period. The defendant is entitled to a several fishery, and the owner of such a fishery is, *primâ facie*, the owner of the soil of the river so far as the fishery extends. That is established by the cases of

Duke of Somerset v. *Fogwell*, 5 B. & C. 875;
Holford v. *Bailey*, 8 Q. B. 1000; 13 Q. B. 426;
Marshall v. *The Ulleswater Steam Navigation Company*, 8 L. T. Rep. 416; 3 B. & S. 732:
Attorney-General v. *Emerson*, 65 L. T. Rep. 564; (1891) A. C. 649.
Partheriche v. *Mason*, 2 Chitty, 658.

The defendant has exercised many acts of ownership over the land in question, as well as over the rest of the bed of the river. The cutting of the ditch and planting of trees are sufficient. As to what is the line which marks the bed of the river as between the owner of the bed and the riparian proprietor, it is either the middle line between high water mark and low water mark in an average year (*Scratton* v. *Brown*, 4 B. & C. 485), or else the highest point to which the river reaches in an average year. The banks which keep in the river are part of the river bed: (Gould on Waters, 2nd ed., p. 109, where the case of *Howard* v. *Ingersoll*, 13 Howard's Rep. U.S., p. 381, is also referred to.) The exclusive right of fishing has been held to extend over the whole bed of a river, notwithstanding the gradual encroachments on to the land of a riparian owner:

Foster v. *Wright*, 4 C. P. Div. 438.

They also referred to the case of

Attorney-General v. *Chambers*, 4 De G. & J. 55.

Moulton, Q.C. in reply.—The two parts of the defendant's case are mutually destructive. If this land was bed of the river, then he could not be in adverse possession of it, and acquire a title by the statute. If it was not bed of the river then he was a trespasser, and it was not until 1893 that we had notice of his claim to it, and the action was brought forthwith.

Nov. 19.—ROMER, J.—The substantial question I have to decide is, whether the plaintiffs are entitled to the piece of land on the margin of the Thames, the subject-matter of the action, or whether the defendant is entitled to the land. At one time the defendant insisted upon a subsidiary point, viz., that in any case the plaintiffs could not succeed in this action, being one based on trespass, because it was alleged by the defendant that the plaintiffs were not in possession at the time of action brought. But this subsidiary point was waived by the defendant before me, and both parties desired me to decide the substantial question between them mentioned above. The plaintiffs' case is shortly this:—They admit for the purposes of this action that the defendant is entitled to the bed of the river in the immediate neighbourhood of the land in dispute, and that at one time the bed of the river included this land. But they say that by a gradual process the river has receded, and that this land was added by insensible degrees to the adjacent land, and ultimately ceased to be part of the bed of the river and became part of the land of the plaintiffs as the riparian owners at that part of the river. They say that this was the condition of matters when the defendant did that which gave immediate rise to this action, namely, put down the concrete path to afford his tenants of a neighbouring eyot a convenient path and access to that eyot, and they further say that this condition has continued to the present time. Now, if the plaintiffs establish this, then, subject to any special defence the defendant may raise, they would be entitled to judgment in this case. For it is clearly settled that in the ordinary case where two different persons own the opposite banks of a non-tidal river, and each is entitled to the bed of the river adjacent to him up to the centre, then, if the river, not by sudden action or by leaps, but by a gradual and almost insensible process, changes its bed and adds land to one side, or takes land away from it, then the centre of the new bed becomes the boundary of the two properties, and each owner is entitled to enjoy the gain, or has to bear the loss occasioned to his land by the shifting of the river: (see *Foster* v. *Wright*, 4 C. P. Div. 438, where all the earlier authorities are mentioned and examined.) And I can see no distinction in principle between the ordinary case I have referred to and the somewhat unusual case before me where the river bed belongs to a separate owner, and not to the riparian owners. I therefore proceed to consider the defences raised by the defendant. The main defence is that the land in dispute has never ceased to be, and is still part of, the bed of the river. Now, in considering this question, there has been considerable discussion as to how the bed of the river is to be ascertained. Of course, if a river preserves a tolerably even flow, and does not fluctuate in volume much, except on extraordinary occasions, there is no difficulty in determining its bed. But when the river is one like the Thames, that is to say, one which, apart from extraordinary floods or droughts, changes considerably in volume in the course of each year, being, as a rule much higher in some months of the year than in others, then the question as to how its bed is to be determined is not so easy. Various suggestions have been made in the case before me by the opposing sides. It has been suggested (*inter alia*) (1) that any land which is covered by the river in the course of its flow at any time

during an average or ordinary year is of necessity to be considered part of the bed of the river; (2) that no land is to be considered as part of the bed which is not always covered by the river throughout any ordinary or average year; and (3) that by some sort of analogy to the method of fixing the margin of the bed of the ocean on the seashore, the margin of the bed of the river is to be ascertained by taking a line midway between the margin of the bed covered by the average highest flow and of that covered by the average lowest flow of the river. But, in my opinion, none of these suggestions are well founded. I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been or is subject, the nature of the land, its growths and its uses. I know of no authority in English law which has expressly decided this, but on principle I think it ought to be so decided. In the United States the question has been judicially considered, and a view expressed in accordance substantially with that formed by me. I find that in the case of *Howard* v. *Ingersoll*, before the Supreme Court of the United States, which is reported in 13 Howard's Reports, p. 381, Curtis, J., at p. 427, expresses himself as follows with reference to the question, and though, of course, his decision in nowise binds our courts, yet I cite his judgment because I think that, in substance, it is in accordance with the English law on the point. He says: "That the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between its highest and least flow. Something must depend also upon the rapidity of the stream and other circumstances. But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation appropriate to such land in the particular locality, grows, wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water." On this footing I have now to decide the question of fact as to the piece of land now in dispute, and on the evidence as a whole I find that at the date when the defendant made the concrete path, and thenceforth to the present, the land formed no part of the bed of the river; and, further, I find that it ceased to be part of the bed of the river, and became an accretion to the adjacent land belonging to the plaintiffs, not by leaps or bounds, but by a gradual and almost insensible process. I need not here refer in detail to the evidence which has led me to the above conclusions. I will only say that it appears to me impossible for the defendant to successfully contend, looking at the present condition of the land, and his own act in putting down the concrete path, and his attempted user of it as a way for his tenants, that this land still forms part of the bed of the river. It is true that at times when the river is full, and particularly in the winter months, this land is under water, but so is much land near the river which, without doubt, forms no part of the bed; and, but for the fact that this land did formerly form part of the bed of the river, I doubt whether anyone would have had the boldness to contend that in its present state and under its present conditions it formed part. I cannot help suspecting that the defendant put down the concrete path, and tried to acquire title to the land for the very reason that it had acquired additional value and importance as being riparian, and because he hoped to be able entirely to exclude the plaintiffs from their position as riparian owners, and from having access to the river. The defendant, however, at the bar before me, has disclaimed this view, and has conceded that in any point of view the plaintiffs are entitled to access to the river. I do not, however, find this concession in favour of the plaintiffs in his pleadings. On the above findings of fact the plaintiffs are clearly entitled to this land, subject only to a consideration of the remaining defence raised on behalf of the defendant. That defence is in fact inconsistent with the first and main defence which I have alone to deal with. For by it the defendant takes up this position. He says that the land had ceased to be part of the bed of the river for more than twelve years before action brought, and that during all that period he alone has been in possession of it, and has thereby acquired a title to it under the Statute of Limitations. In my opinion the defendant has failed in substantiating this case. It is difficult, if not impossible, to say exactly when this land ceased to be bed of the river and became part of the adjacent bank, but the defendant has utterly failed in establishing before me that he has been, as against the plaintiffs, for twelve years in possession of this land since it ceased to be part of the river bed. In truth, the defendant, conceding (as he does) that the plaintiffs have a right of access over this land to the river, has rendered it almost hopeless for him to contend that he has been in possession as against the plaintiffs. If the plaintiffs had ceased to be in possession of the land how could they have acquired or retained the right of access? The fact is that there has been nothing done since the land ceased to be river bed which would enable the defendant to say that the plaintiffs have lost possession of their property down to the verge of the river. The first act of the defendant which,

unchallenged, would or might, in my opinion, have amounted to a taking possession of this land as dry land forming part of the bank was the putting down of the concrete path, and this act was immediately complained of by the plaintiffs and led to this action being brought. With regard to the other facts relied on by the defendant in support of his claim of possession for the statutory period, I need only refer to two. No doubt, the defendant did dig a small ditch in this land on the site of which he subsequently put the concrete, and from time to time he cleared this ditch out. But this ditch was not noticeable from the plaintiff's land, and when it was first made and for some time afterwards the land was in its transition state, and I think it would be extremely hard on riparian owners like the plaintiffs if they were to be held excluded from their position and no longer entitled to the land down to the margin of the river by reason of acts of the kind I am now considering, done on the margin of the river, in its transition state. The only other fact I need refer to is the planting of trees on this land by the defendant or his predecessor in title, and the occasional trimming of these trees. But these trees were planted at a time when the land did, in my opinion, form part of the river bed, and the fact that some trimming of the trees was done by the defendant or on his behalf down to the time that I have called the transition period, and possibly even for a short time after the land finally passed into its present condition, is not sufficient to support the defendant's claim. As I have already said, the defendant has failed to prove before me his plea of possession for the statutory period of this land as land not part of the river bed, and, this being so, his second defence also fails. It follows that the plaintiffs are entitled to succeed, and I make the following declaration in their favour: "Declare that the land in dispute was at the time when the defendant put down the concrete complained of, and has since continued to be, and now is, land belonging to the plaintiffs, and not part of the bed of the river." Then there will be given liberty to apply to enforce the declaration if necessary, and liberty to apply generally. And I order the defendant to pay the costs of the action.

Solicitors for the plaintiffs, *Vigers* and *Richardson*.

Solicitors for the defendant, *Soames, Edwards*, and *Jones*, for *Rowell* and *Lomas*, Rickmansworth.

QUEEN'S BENCH DIVISION.

Thursday, Nov. 14.

(Before Mathew, J.)

Hay v. The Corporation of Trinity House. (a)

Shipping—Light dues—Exemption from—Order in Council of 16*th May* 1893.

The master of a ship took on board at Malta three persons who wished to return to England. These persons paid no passage money, and the master provided and paid for their food for which they paid the master 4*l. each. The vessel touched at a port in England to obtain bunker coal, and the three persons were there landed.*

Held, that the landing of these persons did not deprive the ship of the exemption from light dues at that port which the ship would otherwise be entitled to.

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

Commercial action tried by Mathew, J.

The agreed statement of facts was as follows:—

The *Chelona* is a British steamship belonging to the port of Sunderland, of which the plaintiff, Hay, is managing owner. The other plaintiffs with the said Hay are owners of the said vessel, and the plaintiff was suing on behalf of himself and others the owners of the vessel. The defendants are the general lighthouse authority for (*inter alia*) the port of Portland.

In July 1894 the *Chelona*, in the course of a voyage from Eupatoria to Aarhuus in Denmark, laden with a cargo of barley, called at Malta for the purpose of obtaining bunker coals. While there, namely, on the 22nd July 1894, the master of the *Chelona*, at the request of a friend, took on board three persons who wished to return to England. The *Chelona* then proceeded on her voyage. The said three persons were charged no passage money, and did not in fact pay any passage money for their carriage or render any services on board the vessel.

The master of the *Chelona* provided and paid for the food consumed by the said three persons on the voyage in question, and charged the said three persons 4*l.* a head for the same, which sum was received by the master and was not accounted for by him to the plaintiff.

On the 2nd Aug. 1894 the *Chelona*, in accordance with instructions received at Malta, touched at Portland for the purpose of obtaining bunker coals. While at that port the master landed the said three persons.

The defendants thereon demanded the payment of the sum of 16*l.* 18*s.* 4*d.* from the plaintiff for light dues alleged to have been incurred by the owners of the vessel in consequence of her calling at Portland and landing the said three persons.

This sum the plaintiff refused to pay, contending that the *Chelona* was exempted from paying light dues by the terms of an Order in Council, dated the 16th May 1893, made in pursuance of sect, 398 of the Merchant Shipping Act 1854 (now sect. 646 of the Merchant Shipping Act 1894).

After some correspondence the plaintiff, in order to avoid a distress or the arrest of the *Chelona*, paid the said sum of 16*l.* 18*s.* 4*d.* to the defendants under protest, and is now seeking to recover the same in this action.

The question for the opinion of the court was whether the plaintiff was liable in the circumstances to pay to the defendants the said sum for light dues.

The Order in Council (dated the 16th May 1893) provides:

All steamships which shall put into or touch at any port in the United Kingdom or in the Isle of Man for the purpose of filling up with coal their permanent bunkers in which cargo is never carried shall be exempted by the general lighthouse authorities respectively from the payment of the light dues receivable by either of the general lighthouse authorities at such port, notwithstanding that such steamships shall also take on board at the port aforesaid provisions to be consumed on board or stores required for the proper navigation or equipment of the vessel during the voyage in which she is engaged: provided, nevertheless, that the said exemp-

tion shall be subject to the terms or conditions following, that is to say, that the said exemption shall not apply to any such steamship as aforesaid unless the person or persons liable to pay light dues in respect thereof shall satisfy the person so appointed to collect the same that such steamship has not taken on board at the port aforesaid a larger quantity of coal than was sufficient with the coal already on board the same to fill up her permanent bunkers . . . and that such steamship has not called for or received orders, or broken bulk, or taken on board mails, cargo, or passengers at the port aforesaid."

Butler Aspinall, for the plaintiff, was stopped.

H. F. Boyd for the defendants.—Light dues are dealt with by sects. 643 and 646 of the Merchant Shipping Act 1894, and by the latter section a general lighthouse authority may, under an Order in Council, exempt any ships from light dues. The Order in Council in question here says that if the ship has gone into a port for bunkering it is exempted, and the exemption is not lost if the ship takes on board provisions for the voyage or stores. To bring the plaintiff within the exemption he must show that he went into the port only for the purpose of coaling. Here it is not so; as the ship went into the port to land passengers. If the exemption applies to the landing of three persons it would equally apply to the landing of any number of persons. The words in the proviso "not broken bulk," must be read as meaning "not depositing goods or passengers" at the port. The ship is liable under the Act to the light dues, and is not within the exemption.

Aspinall in reply.—The test as to what is the purpose of going into a port is laid down in the case of the *Neptune Steam Navigation Company* v. *The Corporation of Trinity House* (3 Times L. Rep. 615), which would show that this ship did not go into the port to land passengers. This is intended to be an exemption, and to judge of the exemption the substance of each case ought to be looked at. The mere fact that an advantage is taken when the ship puts in for the purposes of the voyage to land a few persons, as in this case, does not take away the exemption.

MATHEW, J.—My judgment in this case must be for the plaintiff. I think this ship is within the exemption of the Order in Council made in May 1893. Under a previous order ships putting into a port for the purpose of obtaining bunker coals were exempt from these light dues; but many ships took advantage of the opportunity to take stores on board, and light dues were claimed against such ships. To meet that case a new order was made, which expressly provides for the case of taking stores and provisions on board, but the exemption given by the order is subject to a proviso set out at the end of the order. Now the facts in this case show that by agreement the master took on board three persons who wanted to return to England. The ship was to touch at an English port to take coal on board for the voyage on which she was about to sail. The ship touched at the port of Portland accordingly, and when there the three persons were landed, and it is said that the defendants are upon that ground entitled to claim light dues. The defendants contended that the plaintiff was bound by the master's act, and it was asked if instead of three persons a hundred persons were landed would the plaintiff still be exempt. In such a case it might well be said that the purpose of calling was not to take coal on board, but to land passengers. But what was done here is analogous to the captain taking a friend on board and dropping him at some particular port. Such a case would clearly come within the exemption. Here the three persons were taken on board by the master on the understanding that they were to pay 4*l.* each; but so far as the plaintiff is concerned they were taken as friends of the master. This does not bring upon the plaintiff the liability to pay light dues. He is within the exemption, and is therefore entitled to judgment.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Botterell* and *Roche*.

Solicitors for the defendants, *Sandilands* and *Co.*

Nov. 14 *and* 18.

(Before MATHEW, J.)

CHIPPENDALE AND OTHERS *v.* HOLT. (*a*)

Marine insurance—Policy of re-insurance—Clause in policy "to pay as may be paid on original policy"—Construction.

The plaintiffs re-insured with the defendant by a policy which provided that the re-insurance was to be "subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon, but against the risk of total or constructive total loss only":

Held, that, under this clause, the defendant was only bound to indemnify the plaintiffs against a loss for which the plaintiffs were liable on their policy, and that, consequently, where the plaintiffs had in good faith paid as for a constructive total loss, when in fact there was no constructive total loss, and no liability upon them to pay, they could not recover the amount from the defendant.

COMMERCIAL ACTION tried by Mathew, J.

The facts as stated in the judgment were as follows:—

The action was upon a policy of re-insurance on the ship *Ajimir*. The original underwriters re-insured with the plaintiffs, who in their turn re-insured with the defendant, by a policy which contained the following clause: "Being a re-insurance subject to the same clauses and conditions as the original policy and (or) policies, and to pay as may be paid thereon, but against the risk of total and (or) constructive total loss only."

The vessel stranded, and the owners gave notice of abandonment, and claimed that she was a constructive total loss. Their underwriters paid, and called upon the plaintiffs to indemnify them under their policy of re-insurance.

The plaintiffs paid, but the defendant refused to admit his liability on the ground that the vessel was not shown to be a constructive total loss.

The plaintiffs insisted that, whether there was a total loss or not, the defendant was bound to pay as the plaintiffs had paid. It was stated to be of importance that the clause should be construed before the question of fact was tried; and it was agreed, in chambers, that the argument should proceed on the assumption on the one hand that

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

there had been no constructive total loss, and on the other that the payment of a total loss had been made by the plaintiffs in good faith.

Joseph Walton, Q.C. and *Scrutton* for the plaintiffs.

H. F. Boyd for the defendant.

The arguments are sufficiently indicated in the judgment.

Cur. adv. vult.

Nov. 18.—Mathew, J. read the following judgment:—[His Lordship having stated the facts proceeded:] Upon the argument the plaintiffs' counsel contended that the clause should be construed literally, and that the sole condition of the defendant's liability was that the plaintiffs had been satisfied that they were liable and had made the payment in good faith. It was argued for the defendant that he was only bound to indemnify the plaintiffs against a loss for which the plaintiffs were liable on their policy. It was said for the plaintiffs that the possibility that a fraudulent use might be made of the plaintiffs' option to pay would not enter into the contemplation of either party, and that it was not unreasonable that the re-insurers should trust to the honour and sound judgment of those whose liabilities they had taken upon themselves. But the contention of the plaintiffs would involve this result, that the clause must be read as if it ran "to pay such an amount as the insurers might choose to pay, whether liable or not." This seems to me altogether unreasonable. Such a contract would be a wager, and not re-insurance. It was said that, unless the interpretation contended for were put upon the clause, no effect would be given to the final words "to pay as may be paid thereon;" for the identity of obligation was differently provided for by the words "subject to the same clauses and conditions as the original policy." But those words standing alone would not be applicable to a re-insurance policy, and might give rise to difficulties of construction, while the final words show clearly what was meant. Further, it was suggested that the words might be applicable to cases where there was a foreign adjustment, or a compromise in respect of an admitted liability. I see no ground for supposing that the form of the clause was meant to create a liability outside the limits of the original policy. The words "to pay as may be paid thereon" would seem to assume the existence of liability, proved or admitted, in respect of the loss re-insured.

Judgment for the defendants.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb.* and *Whatton.*

Solicitor for the defendant, *C. E. Harvey.*

Nov. 4 *and* 6.

(Before Mathew, J.)

The London and River Plate Bank Limited *v.* The Bank of Liverpool and Larrinaga and Co. (*a*)

Bill of exchange—Forged indorsements on bill—Acceptance and payment of bill under belief that indorsements are genuine — Right to recover money back—Mistake of fact.

When the person upon whom a bill of exchange is drawn accepts the bill with forged indorsements thereon under the belief that such indorsements are genuine, and in the same belief pays the bill at maturity to a bonâ fide *holder for value, he cannot afterwards, if such an interval has elapsed that the position of the holder may have been altered, recover back his money as money paid under a mistake of fact.*

A bill of exchange was drawn in three parts. Two of these parts were stolen, and, after forged indorsements had been made thereon, the draft was presented by a bonâ fide *holder for acceptance to and was accepted by the plaintiffs', who were bankers in London, and the plaintiffs, in the belief that the indorsements were genuine and that they were liable on the bill, and, without any negligence on their part, paid the bill to the defendants, who were* bonâ fide *holders for value. Some months afterwards, when the forgeries were discovered, the third of exchange was presented to the plaintiffs, and, being a genuine bill, was paid by them:*

Held, that the plaintiffs could not recover back the money so paid to the defendants as money paid under a mistake of fact.

Commercial action tried before Mathew, J.

The action was brought to recover from the Bank of Liverpool and Messrs. Larrinaga and Co. a sum of 261*l.* 0*s.* 11*d.*, alleged to have been paid by the plaintiffs to the defendants under a mistake of fact, and the plaintiffs now sought to recover the amount as money paid under a mistake of fact.

According to the statement of claim, which was indorsed on the writ, the plaintiffs claimed the above sum as the amount of first of exchange in favour of Fueyo and Co., accepted by the plaintiffs and paid to the defendants either personally or by their agents for that purpose under the mistake of fact that the indorsements thereon were genuine, and that the person presenting the same was the lawful holder thereof.

The facts were as follows:

On the 18th April 1893 a merchant of Monte Video, named Hipolito Garcia, who was desirous of making a remittance to a firm of Fueyo and Co., in Havana, purchased a draft drawn by the Monte Video branch of the plaintiff bank on the head office in London, for 261*l.* 0*s.* 11*d.*, payable 120 days after date to the order of Fueyo and Co. of Havana. The bill was issued in three parts in the usual way, and Hipolito Garcia forwarded two parts of the draft to his correspondents Fueyo and Co., in payment of an account. These drafts never reached their destination, and they appear to have been stolen in their transit through the post office.

Subsequently, a person, who called himself Pedro Garcia, appeared at Havana, having with him the first and second of exchange, and he called there upon a firm of Loychate and Co., and produced the draft which purported to be indorsed to him, first from Fueyo and Co. to Hipolito Garcia and then by Hipolito Garcia to him, and he asked Loychate and Co. to buy the bill on London. They did not know much about Pedro Garcia, and they therefore intimated to him that before they paid the amount of the bill they would like to know whether or not it would be accepted in England. Pedro Garcia fell in with that proposal, and accordingly the bill was, at the request

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

of Loychate and Co., indorsed to the firm of Larrinaga and Co. in Liverpool. Larrinaga aad Co. presented the bill for acceptance to the plaintiffs, and the bill was accepted by the plaintiffs, and upon intimation of that fact Loychate and Co. paid the amount of the bill to Pedro Garcia, who thereupon disappeared, and has not since been heard of.

The bill having in this way reached the hands of Larrinaga and Co., they in the usual course of business, discounted the bill with the Bank of Liverpool, and handed them the bill indorsed by themselves, and were credited with the amount at the time when the bill was so transferred. The bill matured about a fortnight after, and it was then presented by the Bank of Liverpool to the plaintiff bank, and was paid by them on the 19th Aug. 1893.

It was admitted that the Bank of Liverpool and Larrinaga and Co. had acted in perfect good faith, and it was asserted by the plaintiffs, and no doubt rightly asserted by them, that they had paid the bill under the impression that it was a genuine bill upon which they were liable.

Some time after Fueyo and Co., who expected to be paid the amount of their bill by Hipolito Garcia, informed him that they had received no remittance. Then it was discovered that the original first and second of exchange had been stolen, and had been dealt with in the way mentioned.

Hipolito Garcia then sent to Fueyo and Co. the third of exchange—that being a genuine bill—and that was forwarded with the proper indorsements to the plaintiffs, and they were compelled to pay it and did pay the same in July 1894.

The plaintiffs, therefore, paid the draft twice over, and under the circumstances they demanded from the Bank of Liverpool and from Larrinaga and Co. repayment of the money that they had handed over in discharge of the first and second of exchange, which they said they had paid under a mistake of fact.

Bigham, Q.C. (*Boydell Houghton* with him) for the plaintiffs.—There is no evidence whatever of any negligence on the part of the plaintiffs when they accepted the bill or paid the money, and this is admitted. When they paid this bill they thought it was a genuine bill; and they paid it in that belief, having no possible means of discovering that the indorsements were forgeries. That being so, and there being no negligence on the part of the plaintiffs, they, as acceptors, are entitled to recover this money back. In fact, neither the Bank of Liverpool nor Larrinaga and Co. had any title to the bill. The reason of the decision in *Price* v. *Neal* (3 Burr. 1354), that the money could not be recovered back, was that there was negligence in the plaintiff, which completely distinguishes that case from the present. The same principle is clearly seen in the cases of *Smith* v. *Mercer* (6 Taunt. 76); *Wilkinson* v. *Johnson* (3 B. & C. 428); *Milnes* v. *Duncan* (6 B. & C. 671); *Cocks* v. *Masterman* (9 B. & C. 902); which show that where there is negligence on the part of the plaintiff he cannot recover, but that he can recover his money back if there be no negligence.

T. G. Carver for both defendants.—We are entitled to know which of the two defendants the plaintiffs are suing, and the plaintiffs are bound to elect which of the two they will go against. This is not an action on the bill, but for money had and received, and I submit that neither of these defendants holds the money in question for the use of the plaintiffs. The Bank of Liverpool certainly do not, as they were merely acting for the purpose of collecting the money and handing it over or crediting their customer with it. It was remitted to them on account of Loychate and Co., and on that ground they are not liable to return it:

Holland v. *Russell*, 8 L. T. Rep. 468.

On the general question *Cocks* v. *Masterman* (*ubi sup.*), which was the last of a series of similar cases, is an authority which clearly decides this case in my favour. It was decided in 1829, and it has ever since remained unchallenged. That case adopted the true reason for the decision, namely, that if the plaintiff were allowed to recover in such a case the defendant would have lost his recourse or remedy on the bill against prior indorsees. That also is the basis of the decision of Gibbs, C.J. in *Smith* v. *Mercer* (*ubi sup.*). It has been argued that the decision in *Price* v. *Neal* (*ubi sup.*) was based on negligence, but on looking at Lord Mansfield's judgment it is clear he does not base his decision on negligence at all, and, although in *Smith* v. *Mercer* (*ubi sup.*) some of the judges no doubt lay some stress on negligence, Gibbs, C.J. puts the decision on the proper basis. That case was followed by *Cocks* v. *Masterman* (*ubi sup.*), and there all the judges adopted the ground taken by Gibbs, C.J. in *Smith* v. *Mercer*. Upon these authorities the plaintiffs cannot now recover this money, as the defendants are too late to have recourse to other parties, and have lost their remedies against such parties. Again, there can be no right of action here on any suggestion of a warranty: (sect. 55 of the Bills of Exchange Act 1882.) Where there is a sale of a bill there is a warranty that the bill is what it purports to be (sect. 58); but where there is an indorsement of a bill—as in this case—there is no such warranty (sect. 55). Again, the plaintiffs have chosen to accept this loss, and they must bear the consequence. They ought to have followed Garcia, and left Garcia to go against any of the others. The only obligation on the third of exchange was on the drawer; there was no legal obligation on the plaintiffs to pay it, and they ought not to have done so.

Bigham, Q.C. in reply.

Cur. adv. vult.

Nov. 6.—MATHEW, J.—This action is brought by the plaintiffs to recover from the Bank of Liverpool and from a firm of Larrinaga and Co., the sum of 261*l.*, the amount of a draft which had been accepted by the plaintiff bank, and which they had paid, but which they allege they paid under a mistake of fact. It appeared a long time after payment had been made that the indorsements on the draft were forgeries, and it followed that the plaintiffs were not liable on the draft at the time they paid it. It is admitted that the Bank of Liverpool and Larrinaga and Co., had become possessed of the bill in good faith, and so far as they were concerned, they were as ignorant as the plaintiffs of the fact that the indorsements were forged. The circumstances were these: [His Lordship then stated the facts as set out, and proceeded:] It was argued for

the plaintiffs that if it could be shown that the plaintiffs had not been negligent when they paid the money over, it might be recovered from the Bank of Liverpool, or from Larrinaga and Co. It was agreed that there was no evidence of negligence on the part of the plaintiffs; that when they paid the bill they paid it under the impression that it was a genuine bill, and that there were no means whatever of ascertaining that the indorsements on the bill were a forgery. It was said that the substance of the rule that where there was no negligence in a case of this sort, the acceptor paying a forged bill, could get the money back, was recognised in the early case of *Price* v. *Neale* (*ubi sup.*). In that case the acceptor of the bill—I am referring to one only of the two bills therein mentioned—in the belief that the signature of the drawer was genuine paid the amount. The bill turned out to be a forgery, and in an action to recover the money paid to the holder, Lord Mansfield said that the acceptor was bound to know the drawer's handwriting. From that it was urged that the foundation of the liability of the plaintiff in such a case was negligence, and that if there was no negligence the acceptor was entitled to recover the money back. But that is not the decision. If the forgery were cleverly executed one does not see how it is possible that the acceptor should know it was a forgery, and it would seem extraordinary that the right of the acceptor to recover the money paid to the holder should depend upon whether or not the forgery was cleverly executed. It was not said in that case that there had been negligence, nor was it said that if there had been no negligence the action would lie. Neither of those two propositions is laid down, and one or other would have been indispensable to the position taken up for the plaintiffs. The principle underlying the decision in that case seems to me to be this, that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not afterwards withdraw from that position; and no single case has been produced in which, where payment had been made on a forged indorsement to the holder in good faith, the money has been recovered back. That case was followed by *Smith* v. *Mercer* (*ubi sup.*), where it was said in the course of some of the judgments, that where a banker had paid a forged draft, believing that it had been accepted by his customer, he ought to know his customer's signature. The banker may not be able by any amount of care to ascertain whether or not the acceptance was a forgery, and the same observations I have made with regard to the former case apply to this also, and neither case establishes the principle contended for on behalf of the plaintiffs. The true principle is developed in the clearest possible form in the case of *Cocks* v. *Masterman* (*ubi sup.*). There was an intermediate case of *Wilkinson* v. *Johnson* (*ubi sup.*), which stands by itself, and which we need not discuss. In *Cocks* v. *Masterman* (*ubi sup.*) the simple rule was laid down in clear language for the first time that, when a bill becomes due and is presented for payment, the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered instantly, it may be the money can be recovered back, but if it be not and the money is paid in good faith and is received in good faith, and there is an interval of time, in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill, and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder should have time to give notice of dishonour to the other parties to the bill; but, even in such a case, it is manifest that the position of a man of business may be most seriously compromised even by the delay of a day. That clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and dictinct at present, and, as I have always understood, it is unimpeachable, and it has been recognised in a case of *Mather* v. *Lord Maidstone* (18 C. B. 273). In the case before me there cannot be a question that the position of the Bank of Liverpool would be seriously compromised if they were now compelled to repay this money because it was not until months afterwards that it was discovered that there was anything wrong with the bill, and meanwhile the Bank of Liverpool had lost their right of giving notice to Larrinaga and Co., that the bill had not been paid. I now come to refer to the exact position of the Bank of Liverpool in the matter. The Bank of Liverpool and Larrinaga and Co., are both made defendants, and the plaintiffs' counsel was called upon to elect as to which he was proceeding against. If Larrinaga and Co. had handed the bill for collection to the Bank of Liverpool, they would be the proper defendants on the assumption of liability. If, on the other hand, the bank of Liverpool were the holders of the bill by indorsement from Larrinaga and Co., the Bank of Liverpool would be the persons to be sued, on the same assumption of liability. In this case I am satisfied that the Bank of Liverpool were holders of the bill; that payment was made to them, and that therefore they are entitled to retain the money. Therefore, I think this action fails, and I give judgment for the defendants with costs. *Judgment for the defendants with costs.*

Solicitors for the plaintiffs, *Bompas, Bischoff, Dodgson, Coxe*, and *Bompas*.

Solicitors for the defendants, *Wynne, Holme*, and *Wynne*, for *H. Forshaw* and *Hawkins*, Liverpool.

Thursday, Oct. 31.

(Before MATHEW, J.)

NEMAN, DALE, AND CO. AND OTHERS *v.* LAMPORT AND HOLT. (*a*)

Shipping — Charter-party — Light dues — Port charges—Clause in charter "charterers pay port charges" — Whether light dues are "port charges."

By a clause in a charter-party the charterers were

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

"to have the option of shipping cattle on deck for Deptford or for destination. If discharged at Deptford charterers pay port charges."

The charterers under this option shipped cattle on deck for Deptford, and the vessel touched at Deptford to discharge these cattle, and then proceeded to Leith, her port of destination. Before the vessel was allowed to leave Deptford the shipowner was compelled to pay the whole of the light dues already incurred and to be incurred up to and including Leith, her place of destination. If the vessel had gone on to Leith without touching at Deptford the shipowner would have been liable to pay all the light dues there:

Held, (1) *that these light dues, being charges which the shipowner was compelled to pay at the port, were "port charges" within the meaning of the clause in the charter-party; and* (2) *that, inasmuch as the shipowner was compelled to pay the whole of these charges before the vessel could get away from Deptford, the whole of such charges fell upon the charterers.*

COMMERCIAL CAUSE tried before Mathew, J.

The action was brought by the plaintiffs, as owners of a certain steamship, against the defendants, as charterers of the ship, to recover a sum of 43*l.* 9*s.* 1*d.*, balance of freight claimed by the plaintiffs to be due to them from the defendants under a charter-party.

The charter-party provided that the steamer should proceed to one or two safe loading ports or places in the river Parana and (or) Buenos Ayres, and (or) La Plata, as ordered by the charterers' agents, and there receive a full and complete cargo of wheat, and (or) maize in bags, and (or) other lawful merchandise, and (or) cattle on deck, at shipper's risk, and proceed therewith to St. Vincent for orders to discharge in one safe port in the United Kingdom, or on the Continent between Bordeaux and Hamburg. The charter-party proceeded:

In case of other lawful merchandise or cattle being shipped the total freight to be paid to the steamer was to be the amount she would have earned had she been loaded entirely with wheat or maize. The charterers to have the option of shipping cattle on deck for Deptford or for destination. If discharged at Deptford charterers pay port charges, any extra freight so earned to be for the charterers' benefit.

Leith was the port of destination to which the vessel had been ordered to proceed; but under the option given by the charter-party, the charterers shipped cattle on deck for Deptford. The vessel accordingly called at Deptford, and these cattle were there discharged; but the vessel was unable to leave that port until the charges for lights had been paid. These charges included not only the lights up to Deptford, of which she already had the benefit, but also the lights up to and including Leith, her port of destination, and they amounted to the sum of 43*l.* 9*s.* 1*d.* These charges were collected at Deptford, and the plaintiffs, as owners of the vessel, were required at Deptford to pay, and did pay, this sum of 43*l.* 9*s.* 1*d.*, and the vessel could not get away from Deptford until these charges were paid, all such charges to the place of destination being collected in the port of London.

If the vessel had gone direct to her destination, namely, Leith, the light dues payable at Leith would have been 37*l.* 6*s.* 9*d.*, and would, at Leith, have admittedly been payable by the plaintiffs, as owners. By reason of the vessel calling at Deptford, this sum of 37*l.* 6*s.* 9*d.* was increased by the sum of 6*l.* 2*s.* 4*d.* in respect of light dues for Deptford, and the whole charge of 43*l.* 9*s.* 1*d.* was payable at Deptford.

The question now was, whether this charge for light dues, payable and paid at Deptford, fell upon the plaintiffs as owners, or upon the defendants, as charterers.

The defendants contended that these charges were not "port charges" within the meaning of the charter-party; that they were not liable for them; that if the vessel had gone on to Leith without touching at Deptford, the light dues would have been 37*l.* 6*s.* 9*d.*, and would have been payable by the plaintiffs, as it was admitted, and that at the very outside the defendants were liable only for 6*l.* 2*s.* 4*d.*, the charges incurred by reason of calling at Deptford, and they paid this sum into court.

The plaintiffs contended that it must have been known to the parties that these charges for light dues, up to and including the port of destination, were payable in the port of London, and were collected there, that the plaintiffs, as owners, were compelled to pay these charges at Deptford before the vessel was allowed to proceed, and that therefore these charges were "port charges" within the meaning of the charter-party, which were thrown upon the charterers if they discharged at Deptford, which they did.

H. F. Boyd for the plaintiffs.

J. A. Hamilton for the defendants.

MATHEW, J.—I think my judgment in this case must be for the plaintiffs. Under the terms of this charter-party the obligation of paying the charges in question is cast on the charterers. The charter is a charter for the vessel to proceed with all convenient speed to one of the ports of destination mentioned, bringing a cargo of wheat or maize in bags or other lawful merchandise, and (or) cattle on deck at shipper's risk. The charter goes on to say: "In case of other lawful merchandise or cattle being shipped the total freight to be paid to the steamer is to be the amount she would have earned had she been loaded entirely with wheat or maize." It may be that the freight payable in respect of the cattle, as between the shipper and the charterer, would be more than the freight payable for so much wheat or maize under this charter. Then the latter clause of the charter, which has given rise to the difficulty here, appears to have contemplated that the vessel might take on board a deck cargo of cattle to be delivered at Deptford. The clause runs thus: "The charterers to have the option of shipping cattle on deck for Deptford or for destination. If discharged at Deptford, charterers pay port charges." When the vessel touched at Deptford to discharge her cattle, she was unable to leave the port until the charges for lights had been paid—not only the lights she had had the benefit of up to Deptford, but the lights she was in the hope of having the benefit of up to Leith. The total of these charges was 43*l.* 9*s.* 1*d.*, and that amount had to be paid, and was paid, before the vessel could get away. The parties were aware of the circumstances which would lead to the obligation to pay this sum of

43*l.* 9*s.* 1*d.* before the ship could get away from Deptford. Are these charges within the clause in question? No suggestion has been made as to any special meaning of the word "charges," and it is not pretended that the word has any customary meaning, so that I have to say what its ordinary meaning is. I think the ordinary meaning is the charges which the shipowner must pay before the ship leaves the port. But then it was contended for the defendants that that would lead to a very unfair and unjust result, because it appears from the correspondence that if the vessel had gone to Leith direct these light dues must have been borne by the shipowner, and those dues would have been 37*l.* 6*s.* 9*d.*; and by reason of the vessel going to Deptford the charges were 43*l.* 9*s.* 1*d.*, making 6*l.* 2*s.* 4*d.* more than if the ship had gone direct to Leith. The defendants contended that the proper construction of this contract was that 6*l.* 2*s.* 4*d.* was, at the outside, all that was payable. But in answer to that argument, am I to alter the terms of this contract, and treat these parties as not knowing what they were about when they entered into it? I have to deal with this contract as it stands, and I see nothing unreasonable in the suggestion that the contract should have its ordinary, and, as it seems to me, its perfectly natural meaning, namely, that all charges payable at Deptford before the vessel got away should be borne by the charterers. The charter-party says: "Charterers to have the option of shipping cattle on deck for Deptford or for destination." If the cattle were shipped for the destination unquestionably the defendants would be right in saying that the whole of these light dues would have to be borne by the owner. That being present to the minds of the parties, what follows? "If discharged at Deptford, charterers to pay port charges." The plain meaning of this is, that all the charges incurred there, which otherwise might have fallen upon the owner, should be borne by the charterers. It is well to bear in mind what is written into this clause, because the print is altered in a very material way. A stipulation is put in "extra freight earned to be for charterer's benefit." I must give effect to the language used, which appears to me to be clear. The defendants practically suggest that I should write in "extra port charges," or "port charges in excess in consequence of the vessel being sent to Deptford." If the parties had intended that meaning they could have used the extra words, but they have not done so. I therefore give judgment for the plaintiffs.

Judgment for plaintiffs for 37*l.* 6*s.* 9*d. in addition to the sum paid into court.*

Solicitors for the plaintiffs, *W. A. Crump* and *Son.*

Solicitors for the defendants, *Stokes* and *Stokes*, for *Thornely* and *Cameron*, Liverpool.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Tuesday, Oct. 29.

(Before Williams and Kennedy, JJ.)

Re Nash and Sons; *Ex parte* Crofton, Craven, and Worthington.(*a*)

Bankruptcy—Practice—Taxation of costs—Right of official receiver to be present at Taxation—Bankruptcy Rules, 1886, *rules* 120-124.

The official receiver has no right to be present, or to be heard, at the taxation of the bill of costs of the solicitors to the trustee, or of any other party; but the court has power to order him to attend at the taxation, not as a litigant party, but merely to assist the taxing officer, or to enable himself to report efficiently to the Board of Trade in case they should require a review of the taxation.

Appeal from an order of his Honour Judge Parry, sitting in the County Court, at Manchester, whereby he held that the official receiver had a right to attend and be heard upon the taxation of the bill of Messrs. Crofton, Craven, and Worthington, the solicitors to the trustees in the bankruptcy of Nash and Sons.

The solicitors had carried in their bill of costs upon the 30th Dec. 1894. The registrar refused to tax the bill until the requirements of rules 120 to 124 of the Bankruptcy Rules 1886 had been complied with. The matter was referred to the judge, who directed the official receiver to apply for a copy of the bill in accordance with rule 122:

> Every person whose bill or charges is or are to be taxed shall on application either of the official receiver or the trustee, furnish a copy of his bill or charges so to be taxed on payment of 4*d.* per folio, which payment may be charged to the estate. The official receiver shall call the attention of the trustee to any items which in his opinion ought to be disallowed or reduced.

After the official receiver had obtained a copy of the bill, a fresh appointment for taxation was given by the registrar, when the official receiver attended and claimed a right to be present, and to be heard in opposition to such items as he thought, ought to to be disallowed or reduced. The solicitors opposed his claim, and the matter was referred to the judge, who decided in favour of the official receiver.

The solicitors appealed.

Cooper Willis, Q.C. for the appellants.—My contentions are, firstly, that the official receiver has no right to be present; secondly, that if he has a right to be present, he has at any rate no right to be present as a litigant party, or to be heard in controversy with any other party present. There is nothing in the Acts or rules which gives him any right to be present. Rule 122 only directs him to "call the attention of the trustee" not "of the taxing officer" to any items of which he may not approve. I should also like to call the attention of the court to the different practice under the Companies (Winding-up) Act 1890, and to the terms of the 25th rule under that Act, which, in other respects identical with rule 122, has in addition these words at the end, "and may attend and be represented on the taxation," thus showing that the framer of those rules did not

(*a*) Reported by Walter B. Yates, Esq., Barrister-at-Law.

think the words adopted in the Bankruptcy Rules 1886 gave the official receiver any right to attend. In the whole course of bankruptcy practice this is the first known instance of such a claim ever having been made by an official receiver.

C. A. Russell for the trustee.—I have no wish to appear as a litigant party on this appeal, and merely state, as my own view, that the scheme of the Act and the course of practice indicate that the official receiver should point out to the trustee before the taxation the items he wishes reduced.

Muir Mackenzie for the Board of Trade.—The Board of Trade take up the position that there is no provision in the Acts or rules excluding the official receiver from being present, but that he has no right to be there as a litigant party, or to instruct counsel to appear for him.

WILLIAMS, J.—This is a case of some importance, because it involves a question which is likely to arise not infrequently; and I am glad that we have had the advantage of having it argued by Mr. Cooper Willis, Q.C., who of his own personal experience has been able to give us information as to the practice, which has been confirmed by Mr. Tanner, the taxing master, of the High Court in Bankruptcy. In my judgment, on the rules, the official receiver has no right to be present and to be heard. This accords with all practice both in London and in the country. No official receiver has ever before put forward a claim to appear and be heard of right. I not only say this, but I say that no order of any judge could give him that right in his character of official receiver. As to whether he has a right to be present, I say, that in my judgment he has no such right, and the rules do not seem to me to contemplate his attendance. I recognise the expediency of his attendance in some cases. It is clear that the trustee and the solicitor to the trustee are in such a position that the trustee will not be a jealous critic of his own nominee. The taxing officer, however, generally sets matters right, and has done so habitually without the assistance of the official receiver. This does not exclude the right of the court to order that he be at liberty to attend. I have no doubt of the inherent power of the court to order the official receiver to attend, not as a litigant party, but to be consulted by the taxing officer, or in order to enable him to report efficiently to the Board of Trade in cases where they require the taxation reviewed. I think it very desirable in many cases that the official receiver should attend, and am of opinion that the court has power to order him to attend.

KENNEDY, J. concurred. *Appeal allowed.*

Solicitors for the appellants, *Croften, Craven,* and *Worthington.*

Solicitors for the trustee, *Booke* and *Edgar.*

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

Wednesday, Oct. 23.

(Before WILLIAMS and KENNEDY, JJ.)

Re CORNISH; *Ex parte* THE BOARD OF TRADE. (*a*)

Bankruptcy — Liquidation by arrangement — Trustee under — Power of Board of Trade to require an account — Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 162.

A trustee in a liquidation under the Bankruptcy Act 1869 *must furnish an account of the sums received and paid by him as such trustee if required to do so by the Board of Trade under the provisions of sect.* 162 (2) (*b*) *of the Bankruptcy Act* 1883, *and the Board of Trade, in order to justify them in requiring such an account, need not first prove that such trustee has in his hands since the passing of the Bankruptcy Act* 1883 *any money which he was empowered to collect, receive, or distribute; the object of such an account being to test the veracity of a trustee who denies the receipt of money which he ought to pay into the Bankruptcy Estates Account.*

THIS was an appeal from the decision of the judge of the Exeter County Court, who refused to make an order under sect. 162 of the Bankruptcy Act 1883 against a trustee under an old bankruptcy.

In the year 1875 a petition was filed by the debtor in the County Court for the liquidation of his affairs by arrangement, and on the 9th March E. Fewings was appointed trustee in the liquidation. Subsequently in Jan. 1895 the Board of Trade applied to the trustee on a regular form to render an account, and the trustee supplied a statement showing assets received to the amount of 850*l.* and payments made to the amount of 915*l.*

On the 18th Jan. the Board of Trade, not being satisfied, ordered the trustee, under sect. 162 of the Bankruptcy Act 1883, sub-sect. 2 (*b*), "to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition."

The trustee failed to comply with the order, and the Board of Trade applied to the County Court judge of Exeter to compel the trustee to furnish the account required. The trustee had not been granted a release by the creditors, but had paid into the Bankruptcy Estates Account at the Bank of England certain moneys that had been paid to him on account of the debtor's estate since the passing of the Bankruptcy Act 1883.

The County Court judge decided to refuse the application, and not to make the order asked for, feeling bound by the decision of *Re Chudley; Ex parte the Board of Trade* (14 Q. B. Div. 402), on the ground that there was no evidence before him that the trustee had "in his hands or under his control any unclaimed or undistributed moneys arising from the property of the debtor" since the passing of the Bankruptcy Act 1883. He further stated that but for the decision in *Re Chudley* he should have felt disposed to grant the application.

This was an appeal from his decision by the Board of Trade.

By the Bankruptcy Act 1883:

Sect. 162.—(1.) Where the trustee, under any bankruptcy, composition, or scheme pursuant to this Act

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

shall have under his control any unclaimed dividend, which has remained unclaimed for more than six months, or where, after making a final dividend, such trustee shall have in his hands or under his control any unclaimed or undistributed moneys arising from the property of the debtor, he shall forthwith pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish him with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

(2.) (*a*) Where after the passing of this Act any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule (one of which is the Bankruptcy Act 1869 under which this trustee was appointed), or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish such trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof. (*b*) The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account. (*c*) The Board of Trade, with the concurrence of the Treasury, may from time to time appoint a person to collect and get in all such unclaimed or undistributed funds or dividends, and for the purposes of this section any court having jurisdiction in bankruptcy shall have, and at the instance of the person so appointed, or of the Board of Trade, may exercise all the powers conferred by the Act with respect to the discovery and realisation of the property of the debtor, and the provisions of part 1 of this Act with respect thereto shall, with any necessary modifications, apply to proceedings under this section.

(3.) The provisions of this section shall not, except as expressly declared herein, deprive any person of any larger or other right or remedy to which he may be entitled against such trustee or other person.

(4.) Any person claiming to be entitled to any moneys paid into the Bankruptcy Estates Account pursuant to this section may apply to the Board of Trade for payment to him of the same and the Board of Trade, if satisfied that the person claiming is entitled shall make an order for the payment to such person of the sum due.

Any person dissatisfied with the decision of the Board of Trade in respect of his claim may appeal to the High Court.

Muir Mackenzie for the appellant.—This appeal ought to be allowed, as the decision of the learned County Court judge was wrong. The case of *Re Chudley*; *Ex parte the Board of Trade*, which he was of opinion decided this question, turned entirely on its own particular facts. In that case no one disputed that the trustee had in his hands after the Bankruptcy Act 1883 was passed a sum of money which was undistributed, and Cave, J. never meant to say that the words "such trustee," in sect. 162 (2) *b*, did *not* mean, what I suggest they do mean, *i.e.*, a trustee empowered to collect, receive, and distribute dividends, and, therefore, a trustee against whom an account can be ordered. It is the account which will show whether the trustee has or has not money in his hands which ought to be paid over, and that was why the court ordered an account in the case of *Re Caldewood*; *Ex parte the Board of Trade* (6 Morrell, 104), because the court wished to ascertain by that account what was the exact position of the trustee.

Ward Coldridge for the respondent.—The County Court judge's decision was correct. The Board of Trade are not entitled to ask for this account, their powers are defined by sect. 162, sub-sect. 2 (*b*), and the words "such trustee" in that section mean a trustee who, after the passing of the Act of 1883, is a trustee having "in his hands or under his control any unclaimed or undistributed moneys arising from the property of the debtor." They have not satisfied the court that this man was in that position. The case of *Re Chudley* governs this case, and *Re Caldewood* is a different case altogether, as in that case there were undistributed funds in the trustee's hands since the passing of the Act of 1883. Further, the Trustee Act 1888 is another objection to the making of this order. In that Act, sect. 1, a trustee is defined to be "a trustee whose trust arises by construction or implication of law as well as an express trustee," and such a trustee may set up the Statute of Limitations as an answer. This man is within that definition, and as the claim against him is not "founded upon any fraud or fraudulent breach of trust" to which he was party, sect. 8 is a good answer to the claim.

Re Page; *Jones* v. *Morgan*, (1893) 1 Ch. 304.

The trustee has in any event furnished a full and sufficient account.

Muir Mackenzie in reply.

WILLIAMS, J.—In my judgment this decision ought to be reversed. The learned County Court judge would, he says himself, have made the order if he had not thought himself precluded from doing so, by the decision in *Re Chudley*. According to my judgment there is nothing in that decision which precluded the learned County Court judge here from making the order which he otherwise would have made. Now, before I deal with the question of the effect of sect. 162, I think perhaps it is better at once to say what my understanding of the decision in *Re Chudley* is. In that case the application that was made for the order, and the answer which really was set up to it, was this: Mr. Yate Lee there relied upon the fact that prior to the making of the order the creditors had granted a release to the trustee, and he stated that the effect of that release was that there no longer was any obligation or power in the trustee to collect, receive, or distribute any funds whatever, and he argued that under those circumstances this Act of Parliament did not apply because sub-sect. 2 applies to persons who are empowered to collect, receive or distribute. Cave, J., in dealing with that argument, accedes to it to this extent; he agrees that the trustee must be a person empowered to collect, receive or distribute, but he says it is no objection to this order to say that there was this release which relieved the trustee of the obligation. He says that after this Act came into force, admittedly there was a time at which the trustee had money in his hands, part of the trust, which he was bound to collect, receive, or distribute. That is his answer to the argument. Then it was

said that because Cave, J. so deals with the argument, the Act of Parliament only applies to the case where the Board of Trade first prove that such a state of things exists; that is, first prove that the trustee since the passing of the Act has had in his hands a sum of money which he was bound to distribute, and the rest of it. I think for that reason that *Re Chudley* in no way prevented the learned County Court judge in this case from making this order. Cave, J. was only giving an answer to the argument of Mr. Yate Lee. He was in no sense defining the conditions under which the Act of Parliament or sub-sect. 2 of the 162nd section applied. Now, having said that, let me deal with the section itself and see whether it applies in this case. Sect. 162, sub-sect. 1, deals with the case of a trustee under the Act of 1883. I need not trouble about that, because it does not affect the present case. Sub-sect. 2 deals with the case of a trustee under the scheduled Acts, a trustee or a person empowered to collect, receive, or distribute funds. And it is provided that, where, after the passing of the Act, the trustee has in his hands funds which he is bound to deal with as trustee (which is putting it shortly) he is immediately to pay them into the Bank of England. It was said that when one comes to clause *b*, which is the clause that one has to construe here, one ought to read the words "such trustee" as meaning a trustee who, after the passing of the Act, has funds which he has to discharge himself of in his hands within the meaning and the definition of sub-sect. 2. I do not agree. I think "such trustee" means a trustee appointed under the scheduled Acts, and I so construe it. If that is the meaning of clause *b*, then Mr. Coldridge would not argue that as far as this Act of Parliament is concerned the Board of Trade would not have the right to ask for this account. It seems to me that clause *b* is intended to afford machinery to tax the veracity of a man who denies the receipt of moneys which he would be bound under sub-sect. 2, clause *a*, to pay into the Bank of England. The whole object of getting the account is that the Board of Trade may not be concluded by the bare assertion or bare denial of the trustee. I have no doubt that, when the words "such trustee" are used in clause *b*, they mean merely a trustee appointed under the scheduled Acts, and I do not think that Cave, J. ever meant of deciding anything to the contrary in his decision of the case of *Re Chudley*. Now the only other matter I have to deal with, is the suggestion that the Trustee Act of 1888 affords an objection to the making of this order. I do not think so at all. Under certain circumstances the trustee in this case would be an accountable party. The object of the Act of Parliament is to make him furnish such an account as would show whether he is an accounting party or not. When he has done that, it may or may not be that a claim for the balance arising on that account would be barred by the Statute of Limitations. I have nothing to say to that at all. But it seems to me that the trustee is *prima facie* here as trustee an accounting party. The mode in which he himself dealt with the fund that he received, paying it into the Bank of England under the obligations of this very section, recognises his position as an accounting party, and in my judgment the order is one which the learned judge ought to have made.

KENNEDY, J.—I entirely agree both in the conclusion which my brother has arrived at, and the reason for it, and therefore I add nothing.

Appeal allowed. Leave to appeal granted.

Solicitor for the appellant, *The Solicitor to the Board of Trade.*

Solicitors for the respondent, *Collyer* and *Collyer.*

Tuesday, Nov. 19.

(Before WILLIAMS, J.)

Re MARDON; *Ex parte* THE BOARD OF TRADE. (*a*)

Bankruptcy—Appointment of trustee — Objection by Board of Trade—Notification to court—Powers of court—Bankruptcy Act 1883 (*46 & 47 Vict. c.* 52), *sect.* 21.

A debtor having assigned all his property to two trustees for the benefit of his creditors was adjudicated bankrupt, and the creditors unanimously selected one of the two trustees to be the trustee in bankruptcy. The Board of Trade objected to the trustee under sect. 21 *of the Bankruptcy Act* 1883 *on the ground that his connection with the bankrupt's estate "makes it difficult for him to act with impartiality," and at the request of the creditors notified the objection to the court.*

Held, that the objection was valid, for that, as the selected trustee was in his capacity of trustee under the deed accountable to himself as trustee in the bankruptcy, his position was one which was in fact likely to make him other than impartial.

Re Lamb; Ex parte The Board of Trade (71 *L. T. Rep.* 312; (1894) 2 *Q. B.* 805) *discussed.*

THIS was a notification by the Board of Trade to the High Court (at the creditors' request) of their objection to the appointment of Mr. Foster by the creditors as trustee in the bankruptcy of Mardon.

On the 5th April 1895 the debtor executed a deed of assignment of his property to Mr. Foster and Mr. Brown, as trustees, for the benefit of his creditors.

On the 3rd July a petition was presented against the debtor, the act of bankruptcy alleged being the execution of the deed of assignment on the 5th April; on the 12th Aug. the debtor was adjudicated bankrupt; on the 23rd Aug. the first meeting of creditors was held, when the creditors unanimously resolved to appoint Mr. Foster, one of the trustees under the deed of assignment, to be the trustee in bankruptcy.

By the Bankruptcy Act 1883:

Sect. 21.—(2.) The person so appointed (as trustee) shall give security in manner prescribed to the satisfaction of the Board of Trade, and the board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate or any particular creditor makes it difficult for him to act with impartiality in the interests of the

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

creditors generally. (3.) Provided that where the board make any such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity.

The Board of Trade objected to the appointment of the trustee under the above section, and were requested by the creditors to notify their objection to the Court of Bankruptcy in order that the court might decide on its validity.

The *Solicitor-General* (Sir R. Finlay) and *Muir Mackenzie* for the Board of Trade.—The present application is that the court shall decide on the validity of the objection raised by the Board of Trade to the appointment of Mr. Foster as trustee. The person appointed by them is an accounting party to the estate, and this will render it difficult for him to act with impartiality:

Re Martin; Ex parte The Board of Trade, 58 L. T. Rep. 889; 21 Q. B. Div. 29.

The creditors say that Mr. Foster never acted under the deed, so there can be no objection to his appointment, but he will have to account to himself as trustee, and this will render it difficult for him to act impartially. [WILLIAMS, J.—The decision of the Court of Appeal in *Re Lamb; Ex parte The Board of Trade* (71 L. T. Rep. 312; (1894) 2 Q. B. 805) prohibits me from going into this question. I am prepared to find a possible pecuniary interest in the trustee and that the Board of Trade have made a valid objection.]

Reed, Q.C. and *Carrington* for the creditors.—The case of *Re Martin* decides that each case must rest on its own merits. Mr. Foster is not an accounting party to the estate, he has offered to repay the whole amount of the payments made by him under the deed, except, of course, the absolutely necessary payments, including his own remuneration, and he is a very well-known man. The question is, is the objection good, having regard to all the facts of the case? [WILLIAMS, J.—No, that is *Lamb's* case. I have merely to find whether the facts give the trustee a pecuniary interest. I have nothing to do with the Board of Trade's discretion.] The wording of sect. 21 is, "makes it difficult for him to act with impartiality." The court must decide whether the circumstances are such that make it difficult for him to act with impartiality. Lord Esher says in *Re Lamb*, at p. 815: "I do not deny that, when the Board of Trade have made their objection, and creditors are dissatisfied with it and with the grounds of it, they have a right to take the objection before the judge of the High Court acting in bankruptcy, and to dispute whether the objection is a valid objection, and, for the purpose of determining that question, the judge must go into the facts which are pertinent, and he must determine those facts according to the evidence which is before him." The real question is, does the court think that the facts are such as make it difficult for Mr. Foster to act impartially? The section says someone must decide this question, and the creditors, if dissatisfied with the Board of Trade's decision, have a right to come to the court for its decision. This trustee was elected unanimously.

Muir Mackenzie, in reply.

WILLIAMS, J.—This was a case under sect. 21 of the Bankruptcy Act 1883. That section says: (2.) "The person so appointed [as trustee] shall give security in manner prescribed to the satisfaction of the Board of Trade, and the board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally. (3.) Provided that where the board make any such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity." In this particular case the creditors did unanimously appoint Mr. Foster as trustee in the bankruptcy. He had been appointed with a Mr. Brown as trustee of a deed under which the bankrupt had assigned his property to trustees for the benefit of his creditors, such an assignment being an act of bankruptcy. The acting trustee was really Mr. Brown, but in point of title Mr. Foster was also one of the assignees, and as such undoubtedly became accountable to the estate of the bankrupt for his dealings with the estate as trustee *de son tort*. I say *de son tort* because people who act during the time a deed of assignment is available for the purposes of a petition are acting in that capacity. The Board of Trade do not apparently approve of the person who is trustee under a deed such as this being also trustee in the bankruptcy. No doubt from a creditor's point of view there is a great deal to be said for a person acting as the trustee under the deed continuing to act as trustee in bankruptcy, as such a person is often one of good position and of good repute and one against whose character for honour and propriety there is no impeachment, and after bankruptcy it would often be a great saving to creditors that the person acting as the trustee should continue as such, the expenses would often be less and the estate realised often much more; on the other hand there are cases not infrequent where the trustee under the deed is nominated either in the debtor's interest or in some other interest than that of the creditors, or where he considers that the estate exists for his own personal benefit; in these cases it is undesirable that he should be trustee in the bankruptcy. The position taken up by the Board of Trade is, that on the balance it is undesirable that the trustee under such a deed should be trustee in the bankruptcy, and in all these cases it makes objection to the appointment, and here the creditors have requested the Board of Trade to notify the objection to the High Court. In my judgment in this case I ought to find in favour of the validity of this objection; *i.e.*, I find that the trustee, Mr. Foster, as trustee under the deed of assignment, is accountable to himself as trustee in the bankruptcy, and his position is a position which is in fact likely to make him other than impartial. I am not finding on the facts of this case that Mr. Foster will be placed in a position in which he will be likely to be other than impartial; on the contrary, the counsel for the Board of Trade, on being asked if there was any item in the account which there was ground

for impeaching, said he could not say so, as the accounts had not been examined. I merely decide that the objection of the Board of Trade is a valid objection because the trustee as trustee under the deed will have to account to himself in bankruptcy, and this makes it difficult for him to act with impartiality. I thought when I decided *Re Lamb* (*ubi sup.*) that I ought to perform the same duties which the Board of Trade in the first instance have to perform, that is to decide whether in any particular case the Board of Trade ought or ought not to object to the appointment of any particular person as trustee, that is, having regard to all the facts of the case, as, for instance, the amount of the interest of the proposed trustee. I still think that it would have been to the advantage of the creditors if the law had been as I supposed, and that I had the right to exercise that discretion, but the Court of Appeal decided otherwise. I therefore content myself by saying that I decide this case on the ground that the trustee will have to act in a matter in which he is personally interested.

Solicitor for the creditors, *George Robson.*

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Nov. 22.

(Before Lord Herschell, Smith and Rigby, L.JJ.)

Re Kingston Cotton Mill Company Limited; *Ex parte* Pickering and Peasegood. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Misfeasance—Officer of company—Auditor—Companies (Winding-up) Act 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

The auditors of a company appointed under articles which, so far as regards audit, are substantially the same as those contained in clauses 83 *to* 94 *of Table A. to the Companies Act* 1862 *are officers of the company within the meaning of sect.* 10 *of the Companies (Winding-up) Act* 1890.

Re The London and General Bank Limited (72 *L. T. Rep.* 611; (1895) 2 *Ch.* 166) *followed.*

The Kingston Cotton Mill Company Limited was incorporated in 1879 to carry on a certain cottonspinning business and was now in liquidation.

On the 11th Feb. 1895 a misfeasance summons was taken out against the directors therein named, and B. Pickering and A. E. Peasegood, the auditors of the company, by the official receiver and liquidator, asking for a direction that they were liable to pay certain sums of money alleged to have been improperly applied in payment of dividends on certain preference shares, and that they had been guilty of misfeasance and breach of trust in relation to the company in that they authorised, sanctioned, participated, or recommended or permitted the issue of reports and statements containing false and misleading entries with respect to the company's property, stock-in-trade, and reserve fund.

This was a summons taken out by Pickering and Peasegood, asking that all further proceedings in the misfeasance summons might be stayed against them, on the ground that they were not officers of the company within the meaning of sect. 10 of the Companies (Winding-up) Act 1890.

The applicants had been appointed auditors under the company's articles of association, which, so far as the provisions for audit were concerned, were substantially the same as those contained in clauses 83 to 94 in Table A. to the Companies Act 1862.

The articles of the company, so far as they are material, were the following:—

98. The directors and other officers of the company, and their respective heirs, executors, and administrators, shall be indemnified . . . out of the funds of the company from and against all costs, charges, damages, and expenses which they may respectively incur or sustain in or about the execution of their respective offices. . . .

123. The directors shall cause true accounts to be kept . . .

124. Such accounts shall be kept in such manner and upon such principle as shall be decided by the auditors.

129. Once at least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors.

130. The first auditors shall be appointed by the directors. Subsequent auditors shall be appointed by the company in general meeting.

132. The auditors may, but need not, be members of the company, but no person shall be eligible as an auditor who is interested otherwise than as member in any transaction of the company, and no director or other officer of the company shall be eligible during his continuance in office.

133. The appointment of auditors shall be made by the company at their ordinary meeting in each year.

134. The remuneration of the first auditors shall be fixed by the directors, that of subsequent auditors shall be fixed by the company in general meeting.

135. Any auditor shall be re-eligible on his quitting office.

136. If no auditor shall be appointed at any ordinary meeting, or if any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith appoint an auditor to act until the next ordinary meeting.

138. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.

139. Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company. He may, unless he is himself an accountant, employ accountants or other persons at the expense of the company to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the company.

140. The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet containing the particulars required by these articles, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and in case they

(*a*) Reported by W. Ivimey Cook and W. C. Biss, Esqrs., Barristers-at-Law.

have called for any explanation or information from the directors, whether such explanation or information has been given by the directors, and whether the same has been satisfactory, and such report shall be read, together with the report of the directors, at the ordinary meetings.

The summons was heard before Williams, J. on the 2nd Nov. 1895.

Swinfen Eady, Q.C. (*Eve*, Q.C. with him) for the summons.—An auditor is no more an officer of the company than is a banker or other professional man called upon to give advice to a company. The point is not concluded by the decision of the Court of Appeal in *Re The London and General Bank Limited* (72 L. T. Rep. 611; (1895) 2 Ch. 166). That was the case of a banking company, and the decision turned on the provisions of sect. 7 of the Companies Act 1879. An auditor is not a permanent official of the company. He is appointed for a certain purpose and for a fixed time, viz., until the next audit. In *Re The London and General Bank Limited* (*ubi sup.*) the judges of the Court of Appeal expressly guarded themselves against laying down as a general proposition that an auditor was an officer of the company. A banker is not an officer of the company:

Re Imperial Land Company of Marseilles; Re National Bank, 22 L. T. Rep. 598; L. Rep. 10 Eq. 298;

Nor is a solicitor:

Re Great Western Forest of Dean Coal Consumers' Company; Carter's case, 54 L. T. Rep. 531; 31 Ch. Div. 496.

It is true that in *Re Liberator Permanent Benefit Building Society* (71 L. T. Rep. 406) a solicitor was held to be an officer of the company, but there the solicitor had been formally appointed at a salary, and had acted as the general financial manager of the company. Here the auditors were appointed for a year only, and were paid by a fee. How then does their position differ from that of a medical man or a consulting engineer employed by the company? An auditor takes no part in the management of the affairs of the company. He is appointed for the purpose of audit only. Where a person is employed by a company for a particular work at a fixed fee he does not become an officer of the company.

Cozens-Hardy, Q.C. and *W. D. Rawlins* for the official receiver and liquidator.—The decision in *Re London and General Bank* (*ubi sup.*) really covers the present case, and is binding on the court. The fact that the company there was a banking company did not affect the decision. We do not suggest that the duties imposed on the auditors of this company are more onerous than those imposed on the auditors of the London and General Bank; but they are certainly not less so. It is an essential part of a company that there should be auditors; whether they are paid by salary or fees is immaterial. They are appointed annually, and are given wide powers over the directors. Every word of the judgments in *Re The London and General Bank Limited* (*ubi sup.*) applies to this case. No doubt there may be exceptional cases in which an auditor is not to be considered an officer of the company. The kind of person contemplated by the Act of 1890 is shown by sect. 10.

Swinfen Eady, Q.C. in reply.—The mere fact that a person has been guilty of misfeasance or breach of trust in regard to a company does not make him an officer of that company.

WILLIAMS, J.—On this summons a question is raised whether the auditors of this particular company are officers of the company within the meaning of sect. 10 of the Companies (Winding-up) Act 1890. I should like to say, to start with, that, although that section is very like sect. 165 of the Companies Act 1862, such slight differences as there are between the two sections show obviously that the Legislature did not mean to curtail but to enlarge the operation of sect. 165. If this case had come before me apart from any previous decisions, I do not think I should have had much hesitation in holding that the auditors of this particular company, having regard to the duties they had to perform, were officers of the company within the meaning of sect. 10 of the Act of 1890. Notwithstanding the various decisions on sect. 165 of the Act of 1862, I see nothing in any of them which would prevent my deciding the present case as I should have done if there had been no such decisions. Mr. Swinfen Eady says that I ought not to hold that every person who has been guilty of misfeasance or of breach of trust in relation to a company, is therefore an officer of the company. I agree with him. I have not, and am not going so to hold. Then he says that I ought not to hold that every person who is in such a position that he can be compelled to repay moneys or to restore property misapplied or retained, or to contribute money to the assets of a company by way of compensation in respect of such misapplication, retention, misfeasance, or breach of trust is an officer of the company. I agree again. I can conceive cases of that kind in which there might be a retention of moneys or a breach of trust, and yet the person who wrongfully retained such moneys, or was guilty of such breach of trust, would not come within this section. I can also quite conceive an instance where a person might be in such a position that he could by the application to the case of the ordinary principles of law be compelled to contribute moneys to the assets of the company by way of compensation for the breach of his duty towards the company, and yet not be a person whose misdeeds could be dealt with under this section. The truth of the matter is that, in addition to the commission of such a breach of trust or misfeasance as is defined by the section, it is absolutely necessary in order to bring the case within the section that the person guilty of the misconduct should be an officer of the company. In the present case I have only to decide whether the persons sought to be made liable are or are not officers of the company. Mr. Swinfen Eady does not deny, as I understand him, that the duties of these auditors are such that they might be guilty of misfeasance or breach of trust; but he says that, even assuming they were guilty of such misfeasance or breach of trust, they are not within the section because they are not officers of the company. Now, Mr. Eady, when he was pressing this argument upon me, took as an instance the case of an accountant or auditor (if he likes that word better) called in to report to a committee of investigation nominated by the shareholders, and he submitted that no possible difference could

be suggested between that case and that of an auditor appointed by the shareholders. It seems to me that there is a very great difference. I have not, however, to decide whether such a person acting in such a capacity would or would not be an officer of the company. From my recollection of the *obiter dicta* of judges in previous cases, and of the uses which have been made of them, I think it safer not to express any opinion on the matter at all, and I only propose to say that, whatever might be the position of such an accountant making such a report to such a committee, it is to my mind perfectly obvious that his position would be a very different one from that of an auditor. Let us see what is the position of an auditor appointed under these articles. He is not a person who is called in according as he is or is not wanted. He is appointed in each year. He is a person without whose appointment it would be impossible under these articles for the business of the company to be carried on in any year; that is to say, so far from being appointed occasionally or accidentally to perform duties which might or might not arise, he is a person who is appointed to perform duties without the performance of which the company could not, according to the articles, in any year go on or the directors perform their duties. More than that; he not only has to make the audit and the report without which the dividends could not be declared or the financial business of the company carried on, but he has this duty to perform in conjunction with the directors of the company. It is quite true that he is acting antagonistically to the directors in the sense that he is appointed by the shareholders to be a check upon them, but at the same time he and they together do a series of acts without the doing of which a dividend cannot be declared. The directors, either with or without the assistance (in fact one knows it is always with the assistance) of the officers of the company, prepare a balance-sheet. The auditors check that balance-sheet against the books of the company, and then they perform the duties which are set forth in arts. 138 and 140. The auditors having been supplied by the directors and officers with a copy of the balance-sheet, examine it with the accounts and vouchers, and having done that — a piece of work which is the result of the performance of duties both by the directors and auditors—they are to make a report to the members upon the balance-sheet and those accounts which have so come into existence and been audited, and in the words of art. 140, "in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet containing the particulars required by the articles, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs." I want to say generally of auditors that I have no doubt myself but that auditors who have to perform such duties are not only in this case, but in all cases, officers of the company. I am very glad to think that, in arriving at this conclusion, I am arriving at one which seems to me to be clearly expressed by so distinguished a judge as Kay, L.J. in *Re The London and General Bank Limited* (*ubi sup.*). He there says: "I have come to the same conclusion;" — that is, to the conclusion that the auditors in that particular case were officers of that company—"but I wish to guard myself against being understood to hold that in every case of a joint-stock company the auditor employed by the joint-stock company is an officer of the company." By that I understand the Lord Justice to mean that an auditor generally will be so, but that he desires to guard himself against being understood to say that in no case can an auditor be other than an officer of the company. He goes on to illustrate what he means: "I can quite conceive that there may be cases of a joint-stock company who call in an auditor to make a particular audit where the auditor called in could not be properly treated as an officer of the company." By that I understand him to mean that if the auditor has to perform those duties which we know are so generally performed by auditors of companies—duties in which the directors and the auditors have each of them to intervene, and the auditors have to report upon the balance-sheet and accounts presented to them by the officers of the company—in such a case the person performing those general duties would clearly be an officer of the company; but the Lord Justice does not wish to be understood as saying that in the case of a particular audit, of which I think Mr. Eady supplied an admirable example when he suggested an audit required by a committee of investigation nominated by the shareholders, that that would necessarily make the auditor who had to perform that duty, and who was called in for that purpose, an officer of the company. The Lord Justice continues: "We have got to deal in this case with a banking company limited, whose duties in respect of having their accounts audited are prescribed by the Act of 1879." Then, after referring to the provisions as to audit contained in sect. 7 of that Act, he goes on to set out the articles of the London and General Bank, which seem to me to impose upon the auditors of that bank duties almost identical with those imposed by the articles on the auditors in the present case. I did not understand Mr. Eady, who called my attention strongly to the fact that the Companies Act 1879 has no application to a case like the present, which is the case of an ordinary commercial company and not a banking company, to ask me to come to the conclusion that the Court of Appeal in *Re The London and General Bank Limited* (*ubi sup.*) meant to say that the auditors were officers of the company in that case because of the provisions of that Act, and it seems to me that, whether I were asked to say that or not, the Lords Justices did not mean in any way to say that. I mention that fact as one emphasising the duty that an auditor has to render to a banking company. I confess I do not quite understand what it is that Mr. Eady suggests in the present case prevents these auditors from being officers of the company. I have already pointed out that they are not called in to perform an accidental or occasional duty. They are called in to perform the duties of an office which is created by the articles themselves. He says they are paid by fees; but so are the directors. He says that they are not appointed permanently, but are elected from time to time. That, however, is the case with the directors. I think it is much the safest thing in a case like the present, having regard to the articles of this company simply to say that I come to the

conclusion that these particular auditors are officers of the company. But although that may be the safest thing to do, I cannot persuade myself to stop short at that stage. I prefer therefore to say at once, I think that these auditors are officers of the company, and that they are so because they have to perform a duty prescribed by the articles, a duty which they have to perform in conjunction with the officers of the company, and which as appears by the articles of the company is necessary as a basis of the action of the shareholders in reference to the declaration or non-declaration of a dividend. I cannot conceive why such persons as these auditors should not be officers of this company. It is said that I ought not to say that they are officers of the company because the bankers and solicitors are not Of course they are not. They may have duties to perform which would make them such, but *primâ facie* neither bankers nor solicitors have to perform similar duties to those prescribed for the auditors of this company by these articles. In fact, the duties of the bankers and solicitors are not prescribed by the articles of the company at all. Under these circumstances, in my judgment, I am bound to hold that these auditors are officers of the company within the meaning of sect. 10 of the Act of 1890.

From this decision the auditors appealed.

Swinfen Eady, Q.C. and *Eve*, Q.C., for the appellants, used similar arguments to those in the court below, and in addition to the cases there cited referred to

Re Patent Bread Machinery Company; *Ex parte Valpy and Chaplin*, 26 L. T. Rep. 228; L. Rep. 7 Ch. App. 289, 291;

Re Canadian Land Reclaiming and Colonising Company; *Coventry and Dixon's case*, 42 L. T. Rep. 559, 561; 14 Ch. Div. 660, 670;

Re Native Iron Ore Company, 34 L. T. Rep. 777; 2 Ch. Div. 345;

Re International Pulp and Paper Company; *Knowles' Mortgage*, 37 L. T. Rep. 351; 6 Ch. Div. 556, 560.

[Lord HERSCHELL referred to *Re South Durham Iron Company*; *Smith's case*, 40 L. T. Rep. 572; 11 Ch. Div. 579.]

Cozens-Hardy, Q.C. and *W. D. Rawlins*, for the official receiver and liquidator, referred to

Wright v. *Horton*, 56 L. T. Rep. 782; 12 App. Cas. 371;

Re The London and General Bank Limited, 72 L. T. Rep. 611; (1895) 2 Ch. 166.

Lord HERSCHELL.—In this case an application is made under the 10th section of the Companies (Winding-up) Act 1890 to proceed against the directors and the auditors of the company on the ground that they have been guilty respectively of misfeasance within the meaning of that section. We have not here to determine whether they have been guilty of such misfeasance. We have not the facts before us. We have not even to determine whether the allegations in the summons show a *primâ facie* case of what would be misfeasance under the statute. All that we have to determine is, whether the auditors in the present case are persons in the position of and coming within the meaning of the word "officers" under the 10th section so as to entitle the liquidator to proceed against them. Now, a question very similar to this came before the Court of Appeal in the case of *Re The London and General Bank Limited* (*ubi sup.*). The question there was, whether the auditors of the London and General Bank were officers within the meaning of the section in question. This court held that they were, and I can see no substantial distinction between that case and the present. I will allude in a moment to the distinctions which have been suggested, but it seems to me that it would be frittering away the case altogether if we were to rest our determination upon any of the distinctions which alone can be made in the present case. Now, I desire to express no opinion upon the question whether *Re The London and General Bank Limited* was rightly or wrongly decided. It may be that the reasoning in that case is open to criticism. It may be that some considerations which bear upon the question were not referred to, or had not full effect given to them; on all that I express no opinion at all. I desire to retain absolute liberty of action, in case it should hereafter become necessary, on the question whether *Re The London and General Bank Limited* was rightly decided. Now let us see what that case did decide. It decided that the auditors appointed in that case were officers within the meaning of that section. On what grounds? Under the Companies Act of 1879 certain articles contained in Table A. to the Companies Act of 1862, which prior to that Act it was open to companies either to adopt or reject as they pleased, became by statute absolutely binding on banking companies. That, even if not strictly accurate, is sufficiently accurate for the purpose of this case. They had to appoint auditors, and certain provisions were made applicable to them, which were in substance the provisions of Table A. so far as auditors are concerned. Now, the London and General Bank, besides these, what I may call compulsory articles, had also articles of its own. The reasoning in that case was rested largely, I may say mainly, on this—that the auditors were by the provisions of the Act of 1879, which were applicable to the bank, made officers of the company. The language of those provisions was dwelt upon as showing that they were officers of the company. It is true, and this distinction is suggested, that in that case they were so denominated in an indemnity clause, whereas in the present case they are not so denominated. But it would be far too narrow a distinction to rest any different decision on that ground. Therefore, in the present case, the articles are in substance the same, the auditors are created officers, if they are officers in that case, in precisely the same way as in the present case. I can see no substantial distinction between the two cases. If misfeasance of officers extended to the auditors in the case of the London and General Bank, it seems to me that no substantial reason can be given why misfeasance of officers should not extend to auditors in the present case. I cannot in substance distinguish the two cases. The reasoning which led to the conclusion in the one case seems to me logically necessarily to lead to it in the other. All that we decide is that, in a case identical with *Re The London and General Bank Limited* (as I take this to be in substance), the auditor is an officer. We decide that as bound by the previous decision of the Court of Appeal. Beyond that our decision does not go. I say this in consequence of some general observations made by the learned judge in the court below, as

to which I express no opinion. For these reasons I think that this appeal must be dismissed.

SMITH, L.J.—I am of the same opinion. We are bound by the case of *Re The London and General Bank Limited* (*ubi sup.*), and the real question now is whether or not the present case can be distinguished in substance from that case, and from the reasoning of the learned Lords Justices in coming to the conclusion that in that case the auditors were officers of the company. It was contended by the appellants that the auditors in that case were officers by statute, but it was pointed out by Mr. Cozens-Hardy that, although that was so, in substance, Table A. was incorporated in the articles of the bank. The next thing that was pointed out was that in that case there was an interpretation clause which included auditors as officers, which was not the case here. The third distinction pointed out was that in the case of the bank the indemnity clause referred to "any director, auditor, . . . or other officer;" and in the present case that clause (art. 98) mentions "officer" but not "auditor." Except for those three distinctions the cases are absolutely identical. In my opinion we should be frittering away the judgment of the Court of Appeal in *Re The London and General Bank Limited* altogether if we were to try and distinguish the present case from it. Therefore, in any case which comes within the terms of *Re The London and General Bank Limited*, the auditor is an officer of the company; but further than that I am not prepared to go on the present occasion.

RIGBY, L.J.—I arrive at the same conclusion, that is to say, that we are in this case bound by the decision in *Re The London and General Bank Limited* (*ubi sup.*). I cannot see any substantial distinction between the articles with regard to auditors that were made compulsory on the company by the Act of 1879 and the present case; and although in the articles of association there, there were minor differences I do not think they are sufficient to differentiate the two cases, and we are bound loyally to follow the case of *Re The London and General Bank Limited*. I give no opinion one way or the other whether in support of or against the general question; and especially I give no kind of opinion, I do not think I ought to, with regard to other questions which are raised in the judgment of Williams, J., which might seem to have a more general effect than the decision in the case of *Re The London and General Bank Limited*.

Solicitors for the auditors, *Collyer-Bristow, Russell, Hill*, and *Co.*

Solicitors for the official receiver and liquidator. *Robbins, Billing*, and *Co.*

Nov. 18 *and* 19.

(Before Lord HERSCHELL, and SMITH and RIGBY, L.JJ.)

JOHN HARPER AND CO. LIMITED *v.* THE WRIGHT AND BUTLER LAMP MANUFACTURING COMPANY LIMITED. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Design — Copyright — Infringement — Patents, Designs, and Trade Marks Act 1883 (46 & 47 *Vict. c.* 57), *ss.* 51, 52, 58, 60—*Designs Rules* 1890, *r.* 9.

The plaintiffs were the registered proprietors of two designs for upright hexagonal oil stoves, consisting of a church window of a particular style of architecture, with tracery above and below. The defendants sold similar stoves, and adopted the design of a church window of a different style of architecture, with tracery above and below, but the tracery was different in character.

Held, that the defendants' design was an "obvious imitation" of the plaintiffs' designs within the meaning of sect. 58 *of the Patents, &c., Act* 1883; *that, although there were differences in details, yet in all essential features their designs were alike; and that in those essential features the plaintiffs' designs were dissimilar to all previous designs for oil stoves.*

The Hecla Foundry Company *v.* Walker, Hunter, and Co. (61 *L. T. Rep.* 738; 14 *App. Cas.* 550) *applied.*

Decision of Kekewich, J. (ante, *p.* 336) *reversed.*

The insertion of the words "pattern, shape, or configuration" in the application for the registration of a design, as required by rule 9 *of the Designs Rules* 1890, *does not prevent the registration from being a registration of the design as a whole.*

A person who has registered a design is not deprived of his right to protection merely because he has, without fraudulent intent, put on articles that he sells registered numbers which ought not to be there.

Where variations in a registered design are immaterial and not improvements nor advantageous, and do not make a wholly new and desirable design, anyone desiring to manufacture the article represented can, as soon as the original registration term expires, exactly copy what was originally registered, provided that he avoids those variations.

THE plaintiffs were the proprietors of a registered design for an oil stove sold by them under the name of the "Cathedral Stove." The design consisted of a church window, with tracery above and below, and was applied to the sides of an upright hexagonal frame or case made in some kind of metal, and containing an oil lamp for heating purposes. The plaintiffs were also the registered proprietors of a similar design, which was in the nature of an improvement on the design last mentioned.

The defendants sold oil stoves of hexagonal shape, to which they applied a similar design of a church window, with tracery above and below. The window in the defendants' stove was of a different character and style of architecture from that of the plaintiffs' stove, and the tracery above and below was different; but the two stoves necessarily bore a resemblance to each other, inasmuch as they were both upright, both hexagonal, and both presented to the eye the representation of a church window as being the most distinguishing feature in their ornamentation.

The plaintiffs brought this action claiming an injunction to restrain the defendants from manufacturing, selling, offering for sale, or in any manner dealing with, stoves to which either of the plaintiffs' registered designs, or any part thereof, or any obvious or colourable imitation

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

thereof, had been applied, and from infringing the rights of the plaintiffs in their said designs. They also claimed damages, or, at the plaintiffs' option, an account of profits.

By their statement of defence the defendants alleged (*inter alia*) that the plaintiffs not only sold stove frames made according to the drawing deposited on the registration of the first design and marked with the registered number, but also sold stove frames differing in some particulars from that drawing, and marked on such parts of the stove frames as agreed with the drawing, with the registered number, and on other parts thereof, with three other numbers, which three numbers were the numbers of alleged designs registered in the names of the plaintiffs; and that the marking of the stoves was calculated to mislead the public, and was not a proper compliance with the provisions of the Patents, &c. Act 1883.

According to the evidence the design of the defendants was executed for them by a person who was shown one of the plaintiffs' stoves, but was instructed to make an original design for a similar article.

On the 2nd July 1895 the action came on for trial before Kekewich, J., when his Lordship decided (*ante*, p. 336) that only the actual design, and not the idea, was protected by registration; and that, as the defendants' design was essentially different from those of the plaintiffs, the action failed.

From that decision the plaintiffs now appealed.

Bousfield, Q.C. and *Warrington*, Q.C. (with them *J. H. Fisher* and *Slater*) for the appellants.—The defendants have appropriated the designs of the plaintiffs, and the defendants' design is a "fraudulent or obvious imitation" of the plaintiffs', within the meaning of sect. 58 of the Patents, Designs, and Trade Marks Act 1883. The question must be tested by the eye, and when the plaintiffs' and the defendants' stoves are compared, and the points of resemblance are observed, namely, the church window on both with tracery above and below, the upright hexagonal shape, and the shape of the cover with the knob at the top, it is apparent that the distinguishing features of the plaintiffs' designs have been adopted by the defendants:

Hecla Foundry Company v. *Walker, Hunter, and Co.*, 61 L. T. Rep. 738; 14 App. Cas. 550.

The defendants' design may not be a copy of the plaintiffs', but it is an imitation. It need not, however, be a copy; it need only be an imitation "fraudulent" or "obvious" to bring it within the section. But since it is proved that the defendants had the plaintiffs' design before them and directed their designer to imitate it, there can be no doubt that the imitation in addition to being obvious is also fraudulent. The onus is, therefore, on the defendants to show that their design is not an infringement of the plaintiffs' under sect. 58 of the Act:

Grafton v. *Watson*, 51 L. T. Rep. 141.

Marten, Q.C. and *Moulton*, Q.C. (with them *W. N. Lawson*) for the respondents.—First, we say that there has been no infringement by the defendants of the plaintiffs' designs. The differences between the defendants' design and those of the plaintiffs are very conspicuous. The varieties in the tracery and other parts are quite apparent when the stoves are lighted in the way that they are intended to be used. Then we say that the plaintiffs have claimed the shape of their designs independently of the pattern. The registration is therefore invalid:

Designs Rules 1890, r. 9;
Patents, &c., Act 1883, sect. 60.

[Lord Herschell.—The plaintiffs have claimed the whole; but to my mind it is immaterial here whether they have claimed the shape separately or in combination. They certainly claimed the totality; whether also the separate parts, does not seem important in the present case.] Thirdly, the conduct of the plaintiffs in respect of their registration disentitles them to relief. The marking of the articles is incorrect. The plaintiffs have made stoves marked with four numbers. The marking is calculated to deceive the public, leading them to suppose that that is registered which is not registered: (Patents, &c., Act 1883, sects. 51, 52.) Lastly, having regard to the existence of the plaintiffs' first design, the registration of their second design can only be maintained in respect of the details of the modification. Those details are not the same in the defendants' design as they are in the plaintiffs'. [Lord Herschell.—Knowledge common to the trade must be taken into consideration.] We submit that that is not so, for in the interpretation of letters patent and also of designs the right is to that which is registered:

Clark v. *Adie*, 36 L. T. Rep. 923; 2 App. Cas. 315.

The court must, from that which is registered, be able to ascertain what the person has who has registered. The Act does not contemplate knowledge by the public of designs previously registered. The public have no access to the register of designs. They are warned that something is registered. They are not able, therefore, to see what there is to avoid.

Bousfield, Q.C. replied, at the desire of the Court, on the last point only.

Lord Herschell.—In this case the plaintiffs bring an action against the defendants alleging that they have infringed two designs which they, the plaintiffs, registered. I will deal with the two designs separately. The first design was registered in April 1891. The registration was accompanied by a photograph showing a stove such as the plaintiffs have since sold, and which they allege the defendants have copied. I leave till a later stage the questions raised with regard to the form of the registration beyond saying this, that whatever else is covered by that registration it appears to me that the design is covered; that is to say, the design as a whole as shown by that photograph. The defendants, in the season subsequent to the plaintiffs bringing this stove before the public, brought out a stove of which the plaintiffs complain as an infringement of that first registered design. At the trial the learned judge at the close of the plaintiffs' case came to the conclusion that there was no infringement, and gave judgment for the defendants. The defendants' case, therefore, was not gone into. But inasmuch as it seemed to the interest of all parties expedient, if we thought that there was an infringement shown by the plaintiffs' case, that the whole case should be disposed of here, we permitted the defendants' counsel to state all the facts which they could have proved if the defen-

dants' case had been heard by the learned judge in the court below. And those facts being admitted by the counsel for the plaintiffs, we have now the whole case before us, and therefore we are able to deal with it without sending it down for a new trial. The learned judge thought that the plaintiffs had not proved an infringement by the defendants of their design. Now, how is a question of that sort to be tested? That point was dealt with in the House of Lords in the case of *The Hecla Foundry Company* v. *Walter, Hunter, and Co.* (61 L. T. Rep. 738, at p. 739; 14 App. Cas. 550, at p. 555). I will read a passage from the opinion which I expressed to the House of Lords in that case: "It seems to me therefore that the eye must be the judge in such a case as this, and hat the question must be determined by placing the designs side by side and asking whether they are the same, or whether the one is an obvious imitation of the other. I ought, perhaps, to qualify this by saying that, as a design to be registered must by sect. 47 be a 'new or original design, not previously published in the United Kingdom,' one may be entitled to take into account the state of knowledge at the time of registration, and in what respects the design was new or original, when considering whether any variations from the registered design which appear in the alleged infringement are substantial or material." Now, here the two designs have been placed side by side; the eye has been left to judge. The impression produced upon all the members of the court has been this, that the one design is an "obvious imitation" of the other; that in all their essential features they are alike; and that in these essential features they both of them differ from anything that had been previously known. Better proof than that, that the one design is an obvious imitation of the other, it seems to me it would be impossible to give. On what ground do the defendants say that the one is not an obvious imitation of the other? They point to the different details, the different parts of the design, and they show in each part of the design differences of detail. They undoubtedly show that; but to my mind that has no bearing upon the question whether the one is or is not an obvious imitation of the other. You may produce precisely the same design in all its essential features though you make differences in all, or almost all, its details. Now, what are the essential features of the design? It is always difficult to give reasons in a case of this sort beyond saying, "I look at the two, and the one seems to be an obvious imitation of the other." But I will endeavour, so far as I can, to do so. The general features of the plaintiffs' design are these: Supported upon feet above which is a base sloping upwards, there is a stove, hexagonal in form, with open iron tracery to a height of about a fourth, or something less than a fourth, of the total height of the stove. Above that there is a Gothic window, and above that again tracery corresponding to that which is below the window. Then there is a projecting cornice, with the six sides of the cover sloping upwards to an apex surmounted by a knob with a brass ball at the top. That would perhaps be a tolerably adequate description, I should say, of the design of the plaintiffs' stove. Now, the whole description that I have given would be equally applicable to the defendants' stove, and it would be inapplicable to any form of stove previously known. That seems to me to go a long way to show that the one is an obvious imitation of the other. If anyone, having seen the plaintiffs' stove, had described its general features to a tradesman, and had asked to be supplied with such a stove, the tradesman, if in possession of one of the defendants' stoves, would have supplied that stove, and it would have been recognised as answering the description of the stove ordered. Yet when you come to look at the kind of ornamentation, and even to a certain extent in some respects to the form also, you can point to notable differences when the two are placed side by side. The cover of the plaintiffs' stove is concave; there is a convexity about the cover of the defendants.' But all these differences in detail do not prevent the two designs from being essentially the same. That is the conclusion at which I should arrive seeing the two designs side by side, and knowing nothing of the history of the case. But what is the evidence? It appears that the defendants employed a designer, and after putting him in possession of the plaintiffs' stove instructions were given to him to make an original design for a similar article. Now, what was the meaning of that? In what respect was it to be a similar article? It was to be a stove? That could not be the meaning of it. There were many stoves. It could not merely mean that it was to be an hexagonal stove, because the defendants could have told their designer to make an hexagonal stove of a certain height without ever showing him or calling his attention to the plaintiffs'. It could not be merely that it was to have some open iron tracery about it, because instructions for an hexagonal stove with iron tracery and of a certain height would have been enough. What was the meaning of giving him the plaintiffs' stove and telling him to make a similar article? Why, that the stove was to be similar in its essential features and in that which made it attractive to the public, and in that which made it a good article of commerce. But it was to be original in design; that is to say, the defendants, although manufacturing an article which would appear to the public to be like the plaintiffs' stove, were to be able to point to originality in all its details. A clearer direction to a designer to make an obvious imitation it seems to me it would be difficult to find. That is what I understand the instructions to have been, and that is what the designer understood the instructions to be. It seems to me he followed out his instructions extremely well. Therefore we are not here left to the mere judgment of the eye. The history of the case shows that what was intended is what has been produced. I can entertain no doubt, therefore, that in this case one of these is an obvious imitation of the other. I think that the learned judge in the court below erred in considering too much the details as essentials of the design. The designs may be the same although the details largely differ. He pointed out that, although in each case there was a cathedral window, it was a cathedral window of a different order of architecture in the two. No doubt, if the whole point of the design had consisted merely in a cathedral window of a particular style of architecture, it would have been an answer to say, "I have made a cathedral window of a different kind; therefore my design is not the same as yours." But the

design consists of the whole thing, in the proportion of the parts, the relation in height of the lower tracery to the window, and of the upper tracery to the window, and in the form of the lid. All these matters together make the design, and being able to point to a particular part or parts and show that the differences are manifest does not answer the allegation that the one design is the same as the other. The learned judge in the court below said that there was originality in the plaintiffs' idea of putting in a cathedral window. He added, however, that "the plaintiffs unfortunately have lost the benefit of their original idea; but they have lost it through another design which is original, except in so far as the idea was borrowed from their design." But, if that which was certainly a part at least of the originality of their idea was copied from them, then it is difficult to see how the second can be an original design. The truth is that the defendants took all the essential elements of the plaintiffs' design. The learned counsel for the defendants have contended that, even if the conclusion be arrived at that the defendants' design as a whole was an infringement of the plaintiffs', yet the plaintiffs cannot succeed on several grounds. First it is said that, when the plaintiffs registered their design, they registered it with a statement of the nature of the design as applicable for the pattern and for the shape and configuration; and that, therefore, they claimed it for each of those apart from the other. The defendants contend that, if you take the shape, there is not sufficient originality about the shape to make it a good design or a new design for the shape alone; and that, therefore, the registration is bad and the plaintiffs have no rights. The Rules of 1890, relating to the registration of designs, contain a rule (rule 9) which prescribes that there shall be a statement of the nature of the design accompanying the application for the registration of the design, whether it is applicable for pattern, shape, or configuration. That rule makes it essential for the person claiming the design to distinguish between those several things named in the rule, and to show for which of them he makes his claim. Well, the rule is not a very intelligible one. The thing to be registered is the design, which, of course, is speaking of the design as a totality. Then the applicant is to state the nature of the design, whether applicable for shape, pattern, or configuration. That is not very intelligible. It would be intelligible if the rule said that the applicant shall state whether what he claims as novel is shape, pattern, or configuration. But the language used—whether the design is applicable for either one or other of those things—according to its literal interpretation is certainly not very intelligible. But I do not in the present case intend to decide whether this amounts to a separate claim by the plaintiffs for the pattern, and for the shape, and for the configuration. It is unnecessary to decide it. It might have been necessary if the infringement had been something different from what it is. Whether the plaintiffs claim these several parts or not they claim the whole—they claim the design. Whether the insertion of those words which the rule requires to be inserted has the effect contended for I do not know, and I do not propose to say. It is unnecessary to say so here. But whatever they mean, they do not to my mind prevent the registration from being a registration of the design as a whole. What is registered is the design, and there is no difficulty here to my mind in determining what the design registered was. That design, I think, has been obviously imitated by the defendants. Therefore, I do not say more upon that point. Then it is said that the plaintiffs are disentitled to relief, because they have misled the public. It is said that, they have obtained registration for their handles to the stove, and for a cover to the stove—a particular pattern of ornamentation of the cover—and that they have first of all on stoves which they have sold put the registered number of the original design, and also put the registered number of the designs which they registered subsequently as applicable to particular parts of the stove. It is said that that was misleading, and that the public would not know to what those numbers referred; and if the lid was a new registered lid, then they ought not to have put on the number of the original design, because that was a different design. Now there is nothing in the Act of Parliament which deprives a person who has registered a design of his right to protection, and to prevent infringement of it if he puts on articles that he sells registered numbers which ought not to be there. If he sells without putting the registered number on a design which is within his registration, then no doubt he loses his protection, and it may sometimes be a difficult question to know exactly what numbers he ought to put on, and on what parts of the articles sold. It is only natural that a person who has registered designs should err on the side of caution, because if he does not put the number there he certainly loses his rights. But there is no clause in the Act of Parliament which deprives him of his rights if he mistakenly puts numbers on the articles which he sells which have no business there. Now, what might be the case if a person were fraudulently to put numbers on with a view to misleading the public it is unnecessary to say. But it appears to me to be a most hopeless contention to suggest that a person owning registered designs, who in the course of his business may sell some articles bearing registered numbers which should not be there, thereby, without any such provision in the Act of Parliament, loses his rights as a registered proprietor. If the courts were so to hold they would be making the law; they would not be interpreting it. There is no authority for making it the law, and it seems to me that it would be a very bad and very senseless law, and one tolerably certain in some cases to work great injustice. Therefore I have no disposition to make any such law, even if I felt myself entitled so to do. The whole of these matters were quite unconnected with the defendants or their infringement, and are as straws seized by a drowning man to save himself if he can, and have about the same value as straws have for that purpose. I think that that disposes of the whole of the arguments addressed to us upon the first claim in respect of the first infringement. Then what happened was this: The plaintiffs made what they considered an improved design. It had many of the essential features of their first design, but they considered it an improvement. In it the stove had an extended base, and was considered by the plaintiffs to be in that respect advantageous. The year after the plaintiffs had

brought out their new design, and had placed their new stove made according to that design upon the market, the defendants brought out a cathedral stove with all the upper part of it, and with all the substantial features which existed in the plaintiffs' original stove, and with the extended base. Now the argument is, that although the defendants' stove may be an infringement of the plaintiffs' first registered design because it contains its essential features, yet it is not an infringement of the plaintiffs' second registered design. It is said that the second registered design, having regard to the existence of the first, can only be maintained in respect of the details of the modification, and that the details of the modification are not the same in the defendants' as they are in the plaintiffs'. If that could be made out it might well be a good defence. First of all, was there anything to prevent the plaintiffs from obtaining protection for their second as a new and original design? I cannot see that there was. It is a new design. It is not a design identical with the design already registered. No doubt it is largely founded upon it. That is admitted. It professes to be largely founded upon it. But you may have a new design, though the design is founded upon one which you have previously registered. Nothing has been produced which to my mind shows that there was such a common knowledge before the date of the second registration as to prevent that design then registered from being a new and original design. Then have the defendants infringed? Now I quite agree that on this part of the case the matter is not so clear as to my mind it is on the question of what I will call the first infringement. There is more to be said, but still applying the test which has been applied in previous cases as the proper test, I own it appears to me that the design complained of, the defendants' design, is an obvious imitation of the plaintiffs'. Now the defendants might have enlarged the base of a stove without infringing the plaintiffs' design. There is a multitude of ways in which it might be done; but whether they would be appropriate, whether they would be good designs, whether they would make a design which as a whole was effective, would depend upon the way in which this was done. Now the scheme or idea of the plaintiffs' modification which they registered was to provide this enlarged base by a sloping projection immediately under the windows which formed the feature of the stove—making, as Mr. Bousfield has said, something that may be called a window-sill—and then from that point having the sides of the stove again perpendicular and bringing the line and making the continuity between the line at each corner of the hexagonal, and a line as found again below this window-sill. It is difficult to describe the thing, but that one may call the general features of their design. Now the same features are found in the defendants' design. There might be hundreds of ways in which you might make an enlarged base without infringing that, and very possibly no other way would have produced the same general and pleasing effect. If I look at these two side by side it seems to me that the same essence of the design is to be found in each of the two. Therefore I come to the conclusion that a case is made out as regards the second infringement claimed as well as the first. Mr. Moulton suggested it would be very hard on the public that a person who had registered a design could, by insignificant variations, registered from time to time, extend the term for which he obtained protection. What seems to me to be the complete fallacy in the argument is, that it does not extend the term, but as soon as the original registration expires everybody can exactly copy what was originally registered. If those variations are immaterial, and not improvements, and not advantageous, and do not make a wholly new and desirable design, anybody desiring to manufacture the article represented has only to avoid those variations. He is at full liberty to make use of the original design as he pleases. Therefore I cannot see that the public is in the slightest degree affected if those alterations and modifications are immaterial, slight, and unimportant, and do not make the thing as a whole a desirable thing, which the public will seek to become the owners of. If they do, what better proof can you have, that it was a new and original design which the person designing ought to be entitled to have the benefit of? In the present case there has been nothing to show that enlarged bases for stoves anything like either those of the plaintiffs or the defendants had been before the public previously. The plaintiffs follow their introduction to public notice of their first design by a second. The following year the defendants introduce their second design, the first being copied from the plaintiffs', and bearing a strong resemblance to it. Now that seems to me certainly to assist the conclusion which I should arrive at independently, that there was a novelty in the plaintiffs' second design—in that modification something which made the thing as a whole a desirable design—and that the defendants, seeing that, sought to put before the public something which they might sell which contained the essential features of the plaintiffs' second design. For these reasons I think that the case is made out as regards the second design as well as the first. I think, therefore, that the judgment of the learned judge in the court below must be reversed, and that judgment must be entered for the plaintiffs in the action, with an injunction in the usual terms, and the usual inquiry as to damages. There will also be an order for delivery up or destruction as is usual in these cases. The defendants must, of course, pay the costs of the action and the costs of this appeal.

Smith, L.J.—The plaintiffs in this action are a company limited, and they are proprietors of two registered designs, one registered in April 1891, and the other in June 1892. They bring this action against the defendants for having infringed those registered designs. The case came on for trial before Kekewich, J. when, having heard the plaintiffs' case, he arrived at the conclusion that they had made out no infringement. Being of that opinion all other matters became immaterial, and accordingly the learned judge gave judgment for the defendants. The plaintiffs appeal to this court, and other matters have been argued before this court, we being of opinion that, if we came to the conclusion that there had been an infringement, we could settle those other matters which would, I understand, have come before Kekewich, J. if he had not stopped the case in the manner in which he did. Now, the points seem to me to arise in this

order: First, the plaintiffs must show, as regards both their registered designs, that they had a new and original design which had not previously been registered, and they must show some substantial novelty in the design, having regard to the nature of the article itself. Many printed documents were put in in this court for the purpose of showing that the design which was registered in April 1891 was not a new and original design because of matters which were well known to the trade and to the public prior to that date. Now, in my opinion, they wholly failed in this. Nothing prior to April 1891 was shown to lead the court to the conclusion that any stove similar in design to that which the plaintiffs had registered in April 1891 had been in vogue, or known at all; and therefore that part of the case fails for the defendants. The next point which arises is this: The defendants say that the plaintiffs' claim is bad because what they claimed in their application for registration was in respect of pattern, ornament, shape, and configuration. They claimed in respect of each of those separately; they did not claim for those collectively. And the defendants went on to say that, as regards shape, that would be a bad claim, because, as they alleged, a similar shape for an hexagonal stove standing upright was known before. But, in my opinion, whatever this claim may embrace, it does embrace these matters collectively. The plaintiffs' claim is in respect of the design, and they claim as part and parcel of that design the pattern, ornament, shape, and configuration. The word "totality" has been used more than once during this case. I adopt that word. The plaintiffs claim the design—the pattern, ornamentation, shape, and configuration—that is to say, the totality of the design. When that was put to Mr. Moulton, because he took the point that the claim was for separate and distinct matters, and not for a totality, he said: "If that is the view of the construction which is to be put upon this registration, then I have nothing to say as regards the infringement of the registration No. 1." I think Mr. Moulton was wise as regards that. Speaking for myself, I never saw a more palpable infringement than between those two stoves. Speaking for myself, I say this—I said it in the course of the argument—that if I went into a shop and saw the plaintiffs' cathedral stove and ordered it, and the shopkeeper sent me home the defendants', I should not have the slightest idea that I had not got what I had ordered. At a distance they are entirely similar. One is an obvious imitation of the other. But I agree that, if they are brought into close proximity, and the tracing and so on are pointed out, of course one can see a dissimilarity between the one stove and the other. But it is such a dissimilarity that, in my judgment, if they were not together no one could carry those dissimilarities in his mind. Therefore to say that one is not an infringement of the other is to say what, in my judgment, in the face of the facts of this case, is not the truth. I desire to add a few words also upon a matter which has been touched upon by Lord Herschell. It is the manner in which the defendants set about making their stove, which we have held to be an infringement. Mr. Priest, who was a witness, who, my brother Kekewich remarked, gave his evidence very fairly, said this: "The defendants brought me the plaintiffs' stove." What did they do that for? They brought or sent to him the plaintiffs' stove. The witness proceeded: "They gave me instructions to make an original design for a similar article, and to make it of similar size to the plaintiffs', and, as I understood, it was to have the same number of sides." Put that together, and ask what is the meaning of that. You make an original design. You make a design which will stand attack, but make it as near to the plaintiffs' "as ever you can." That is the meaning of that order, and the result of Mr. Priest's work is that we have these two stoves which are as similar as possible to each other, except in some parts of the tracery. That the one is a mere colourable imitation of the other I have not the slightest doubt; therefore it seems to me that, as regards this first registration of April 1891, the plaintiffs have made out their case. There was a point taken about the plaintiffs having placed some numbers upon some other stoves which they subsequently made, and after the infringement had taken place complained of in this action. It is said that that was not right. Lord Herschell has dealt with that point. He himself has said that it is catching at a straw. I quite agree with him in that. I am not quite clear that I ever grasped the point, because I do not think any point in substance existed in it as regards the defence to this action. I now come to the second part of the case, and that is as regards the registration in June 1892. That is a registration for an improvement upon the original registration of April 1891. It is an improvement on the plaintiffs' original registered design applicable for pattern and shape. Now I understand that the plaintiffs wanted a stove which would carry a heavier lamp, and therefore afford a better heat. They wanted the stove to be enlarged, and therefore, as an improvement upon the original design, the plaintiffs brought out the design of June 1892, and got that registered as an improvement upon the first. It is said that that was not novel. I think that the improvement is novel. It is said that it is only an enlargement of the base of the original design. But, as was pointed out by Mr. Bousfield, the object was to keep the same semblance of the cathedral stove which was in the design of April 1891, and not to depart from that. That idea was adopted of enlarging the base in the manner in which it was in the registered design in June 1892. I think that there was novelty, and I think that it is a good registration. Now what do we find the defendants doing? The original design was, as I have already said, brought out in 1891. The defendants subsequently brought out that which this court holds now to be an infringement. When the second design of June 1892 was registered, and the stove was brought out in the next year, we find the defendants with regard to that doing the same thing as they had previously done. But it is said by Mr. Moulton that the two stoves are different, and that, if we hold design No. 2 to be good on account of the improvement as regards the base, you must take it as it is improved, and when you look to that which is said to be an infringement upon No. 2, it is not an infringement at all. Now, as I look at the plaintiffs' No. 2, it seems to me that they make a wider base by means of a sloping shelf; whereas the defendants make a

wider base by means of sloping steps. The same kind of exterior is kept; the same look remains in the one as in the other. And I think, therefore, that an infringement has been made out by the plaintiffs of the registration of June 1892, as in the case of the registration of April 1891. It therefore follows that there must be an injunction and an inquiry as to damages, and an order as to giving up the articles in the ordinary form.

Rigby, L.J.—I set aside in this case all the evidence as to the state of knowledge at the time when the plaintiffs registered their first stove; or rather I treat all that evidence as of no importance. None of the articles produced at all resemble to my mind the design of the plaintiffs. We have therefore simply got to trust to the eye, and, looking at the two stoves of the plaintiffs and the defendants respectively, I am not only satisfied that one is an obvious imitation of the other, but I am also satisfied (quite independently of the evidence, though that of course assists the conclusion) that the design of the defendants would never have come into existence if it had not been for the design of the plaintiffs. Again, considering the second registered design of the plaintiffs, taking into account what has been said about its resemblance to the first, I judge when I look at it that it is a novel design. Looking again to the alleged infringement of the copyright in that design, I come to the same conclusion, namely, that the defendants' stove would not have existed as it does but for its being an imitation of, and in fact copied colourably from, the second registered design of the plaintiffs. That being so, I make no question about the validity of the registration in each case, or the fact of infringement. I would only say, with regard to the question that was raised as to shape and configuration, that what is the subject of protection under this Act is a design. But it is not every design that can be protected. According to the definition contained in sect. 60 of the Act, a design is to be "applicable to any article of manufacture or to any substance, artificial or natural, or partly artificial or partly natural." Then the section goes on to say (in order that there should be no doubt as to the meaning of the word "applicable"), "whether the design is applicable for the pattern, or for the shape, or configuration, or for the ornamentation thereof, or for any two or more of such purposes." Now that is a limitation. There is no question in the first part of the section as to the meaning of the word "design," and then follows an explanation of the word "applicable" in order that any mistake about the meaning of that word should be avoided. When rule 9 of the Designs Rules 1890 is looked at, you find that the application is, of course, for the registration of a design. The claim is to be a claim for protection for a design. But the rule does go on, in somewhat curious language, I think, to say that, in making that claim for a design, the applicant shall state whether it is applicable for the pattern, or for the shape, or configuration of the design. It appears to me that there are very many cases in which that would be appropriate and useful. But whether the statement there made would limit the claim of the plaintiffs for protection in the design we have not now to determine at all. In the case before us, the claim is for the pattern, the configuration, the shape, and so on, but not as applied to anything except their stove. I have no doubt that the plaintiffs have in no way limited their rights to protection for that design by stating the shape, pattern, or configuration, and so on, altogether to which it is applicable. The design is applicable in its totality in every way in the present case, and the argument founded on that rule I think comes to nothing. With reference to the other and more general point, that the plaintiffs have in some cases misused their registered designs, I look in vain in the Act to find that any such misuser would cause a forfeiture of their right. I do find a very stringent obligation upon them in every case and upon every article sold which represents their registered design that they shall under pain of forfeiture make a reference in the words of the Act to registration. But I can understand that in many cases a person who has a registered design may be in great difficulties. He would always want to be quite safe, and as long as he does nothing more than make himself quite safe under the Act I cannot see that he is doing anything wrong. But even if he put a reference to the register upon a thing which it was impossible to suppose that he thought to be covered by that registration, it may be provided for (I have not referred to the Act) in some way by penalties or otherwise. But the Act does not say that, even in a strong case like that, he should forfeit his protection for the design actually registered. And I cannot find that, even if we wish to introduce any such clause, we have any jurisdiction to do so.

Appeal allowed.

Solicitors for the appellants, *E. Flux, Leadbitter*, and *Paterson*, agents for *Slater* and *Co.*, Darlaston.

Solicitors for the respondents. *Burton, Yeates*, and *Hart*, agents for *Johnson, Barclay, Johnson*, and *Rogers*, Birmingham.

Aug. 8 *and Nov.* 13.

(Before Lord Esher, M.R., Kay and Smith L.JJ.)

Strachan *v.* The Universal Stock Exchange Limited (No. 2). (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Gaming contract—Deposit of money by one bettor with the other to abide the event—Determination of wager—Recovery by depositor—Gaming Act 1845 (8 *& 9 Vict. c.* 109), *s.* 18.

The Gaming Act 1845 *by sect.* 18 *provides that, "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing . . . which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."*

Held, that money deposited by one bettor in the hands of the other to abide the event on which their wager shall have been made cannot be recovered by an action brought by the depositor after the wager has been determined, when he has not before such determination repudiated the contract and claimed back the money.

This was an appeal by the plaintiff from the judgment of Cave, J. at the trial of the action with a jury.

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

The action was brought to recover certain valuable securities and also a sum of 3000*l.*, all of which had been deposited by the plaintiff in the hands of the defendants, as cover or security, with regard to certain transactions entered into between them as to the rise and fall of the market prices of stocks, shares, and securities.

At the trial of the action the jury found that the whole of these transactions were gambling transactions, and in the present appeal it was not denied that the 3000*l.*, in respect of which this appeal was brought, was money deposited in the hands of the defendants to abide the event of wagering transactions.

By the written terms of the contract between the plaintiff and the defendants, the accounts between them were to be made up every three months. In April 1894 the defendants required the plaintiff to deposit further cover, and threatened, if this was not done, to close the account. No further cover was deposited. On the 25th April, before the arrival of the usual account day, the plaintiff closed the account, and demanded back the securities and money deposited, and the next day commenced this action. At the trial of the action before Cave, J., with a jury, the learned judge held that the plaintiff was not entitled to the return of the money, but he gave judgment for the plaintiff for the return of the securities or their value.

The defendants moved for judgment, or a new trial upon so much of the judgment as was in favour of the plaintiff.

The Court of Appeal dismissed the application (*ante*, p. 6; (1895) 2 Q. B. 329), and the plaintiff then appealed from that part of the judgment of Cave, J. in which the learned judge had held that the plaintiff was not entitled to repayment of the 3000*l.* deposited by him with the defendants.

Aug. 8.—*Bigham*, Q.C. (*Muir Mackenzie* with him) for the plaintiff.—No valid distinction can be drawn between a deposit of securities and a deposit of money. The court is therefore bound by its previous decision that the plaintiff was entitled to recover his securities:

Strachan v. *The Universal Stock Exchange*, *ante*, p. 6; (1895) 2 Q. B. 329.

The money was deposited as security only. It had never been appropriated by the defendants before the action was brought in payment of their claim under the gambling transactions. They could not have appropriated it until the date of the next account day after the day on which this action was commenced.

Pollard (with *Lawson Walton*, Q.C.) for the defendants.—The moment that the bets were decided the money became the defendants' property. There was no revocation or withdrawal of the deposit before that moment, and therefore cases such as *Hampden* v. *Walsh* (33 L. T. Rep. 852; 1 Q. B. Div. 189) have no application here. The plaintiff should have given notice of withdrawal before commencing the action. There is no cause of action until the depositor has repudiated the transaction:

Gatty v. *Field*, 9 Q. B. 431.

Any implied promise to repay the deposit would be void under the Gaming Act 1892.

Bigham, Q.C. replied.

Cur. adv. vult.

Nov. 13.—Lord Esher, M.R.—The plaintiff in this case is an officer on half-pay who has had gambling transactions with a stock and share dealing company for differences on the Stock Exchange. The transactions were merely bets, and they amounted to a sum of about 3,000,000*l.* The company, being unwilling to trust the plaintiff in these transactions, required him to give some security. The plaintiff agreed, and deposited with them some money securities and a sum of 3000*l.* as cover for the bets. These bets, for they were nothing more, were presently decided, and the plaintiff was the loser. The company then assumed to pay themselves out of the securities and the money deposited with them. The plaintiff brought an action claiming the return both of the securities and the 3000*l.* At the trial of the action Cave, J. held that he was entitled to recover the securities but not the money. Upon the respondent's application to this court, it was held (73 L. T. Rep. 6; (1895) 2 Q. B. 329) that the plaintiff was entitled to recover the securities. The question now before the court is as to the plaintiff's claim to recover the 3000*l.* deposited by him with the defendants. I confess that I have been very unwilling to decide against the plaintiff. But what I feel obliged to hold is, that when a person is so foolish as to deposit money in the hands of the person with whom he is betting to abide the result of the bet, he cannot recover it after the bet has been decided. The result is that, if he wins the bet, the holder of the money deposited is entitled not only to refuse to pay the debt but also to keep the deposit. My decision must go to that length. If anyone is so foolish as to bet with a person who requires a deposit of money before the bet is made, he is liable, though he may win the bet, not only not to be paid the amount of the bet, but to lose his deposit as well. That seems to me to be the true construction of the Gaming Act 1845. I am aware that it has been held that, when a deposit like that has been made, the depositor is entitled to withdraw it at any time before the wager is determined. That seems to me to be an encroachment upon the plain words of the Act. However, I shall not attempt to question those decisions. The question in this case is whether that encroachment is to be extended so as to entitle the depositor to withdraw his deposit after the bet has been decided, the deposit being made, not with a stakeholder, but with the other party to the bet. I think that in such a case the depositor cannot recover his deposit after the bet has been decided. I am fortified in my opinion by the words of Turner, L.J. in *Manning* v. *Purcell* (7 De G. M. & G. 55). He says, at page 66: "I am of opinion as to the payments of the first class" (*i.e.*, payments in respect of bets and deposits upon bets decided in the testator's lifetime) "that, having regard to the provisions of the statute, they could not have been recovered from the testator in his lifetime, and that therefore the payments by the administratrix in respect of these can be regarded only as voluntary payments and not valid as against the estate." On that ground, knowing the result of my judgment, I hold that the law prevents the plaintiff in this case from recovering the money deposited by him with the defendants. The appeal must be dismissed.

Kay, L.J. delivered the following written judgment.—The plaintiff and defendants in Sept. 1893 entered into a contract for gambling in stocks and shares by pretending to buy for a future day, and debiting or crediting one another for any change in the market price on the day named, without in fact buying or selling any stock or shares. The plaintiff deposited with the defendants, who are brokers, certain property as security for the performance of this contract. These securities were not realised, and he has been held entitled to recover them. But he also deposited with the defendants 3000*l.* in money, in two different sums of 2000*l.* and 1000*l.* The former sum was deposited on the 10th Feb. 1894, the latter on the 27th of the same month. The receipts for these sums show that they were deposited as what is called cover, that is, to abide the result of the gambling, and if the result was in favour of the brokers to enable them to pay themselves by appropriating the deposit, or so much of it as was necessary. Accounts were furnished by the brokers every three months, and, in the first rendered after these deposits were made, they were entered to the broker's debit on the days of receipt, the balance being 2413*l.* 16*s.* 11*d.* in favour of the plaintiff. Thus 586*l.* 3*s.* 1*d.* of the 3000*l.* was shown to have been used, and the account showed that, to make up the required cover of 3000*l.* for future transactions, 586*l.* 3*s.* 1*d.* must be paid to the brokers, and on the assumption that this would be done there was an entry "Deposit retained 3000*l.*" Interest was credited to the plaintiff upon the 3000*l.* on one side of the account, and on the other he was debited with interest on the pretended purchases. The plaintiff paid 586*l.* 3*s.* 1*d.* on the 8th March, and the 3000*l.* having been thus made good the gambling went on until the 25th April, when the plaintiff gave notice to the defendants to close the account. On the 26th April the plaintiff commenced this action to recover the 3000*l.* It appears from the account since rendered, which has been put in by the plaintiff, that at that date he was indebted to the defendants to an amount much exceeding the 3000*l.*, the account being stated precisely in the same way as the former account which he had received, and the 3000*l.* being entered in two sums of "balance 2413*l.* 16*s.* 11*d.*" and "cash 586*l.* 3*s.* 1*d.*" as the first items to the plaintiff's credit. But attention was particularly called to the fact that interest on 3000*l.* was credited to the plaintiff up to the 23rd June the day of delivering this last account, and this, it was said, showed that the 3000*l.* had not been appropriated. Before the commencement of this action there was no repudiation by the plaintiff of the gambling transaction. By sect. 18 of 8 & 9 Vict. c. 109, the contract between the plaintiff and the defendants for gambling was "null and void." By the latter part of this same section it is provided that "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." If this deposit comes within those words it cannot be recovered. It is suggested that the statute only refers to money or valuables deposited with a third person as stakeholder. The statute does not say so; it says with "any person." And I am not able to conceive any valid reason for construing it to have the suggested meaning. The object is to discourage gaming and wagering by making the money won or lost irrecoverable, and also by making any deposit made to abide the event irrecoverable. What can it matter with whom it was deposited? If it could be recovered, the intention as well as the letter of the statute would be violated. It was quite familiar that money was deposited with one of the gamblers as well as with a third party as stakeholder. For example, it was common in betting with a bookmaker to deposit the amount which he might win on cash bets in his hands, to be his in case he won, if not, to be returned when he paid his loss. This very thing occurred in *Manning* v. *Purcell* (7 De G. M. & G. 55). The testator in that case kept a betting office and betted on horse races, and received deposits from the persons who betted with him. Some of these bets were determined against him in his lifetime and some after his death. His widow and administratrix paid the bets decided in the testator's lifetime and returned the deposits as to them. She also returned the deposits as to those bets which were decided after the testator's death. With respect to the latter, it was held that she was right to return the deposits, because the bets undecided were cancelled by the testator's death. But as to those decided in his lifetime, she was not allowed to retain the amount out of the estate, upon the ground that 8 & 9 Vict., c. 109, s. 18 made both the bets and the deposits irrecoverable. Turner, L.J. said that, as to these payments, "having regard to the provisions of the statute, they could not have been recovered from the testator in his lifetime, and that, therefore, the payments by the administratrix in respect of these can be regarded only as voluntary payments and not valid against the estate." I should consider this decision binding on me if I disagreed with it, but for the reasons already indicated I respectfully say I entirely agree with it. But then it was argued that at any time before the money was appropriated by the defendants, the plaintiff could repudiate the void contract and reclaim the deposit. This was decided in *Varney* v. *Hickman* (5 C. B. 271), and *Hampden* v. *Walsh* (*ubi sup.*) and in the Privy Council in *Trimble* v. *Hill* (42 L. T. Rep. 103: 5 App. Cas. 342). One of the grounds in the first of these cases, and I confess the most intelligible to me, is that upon the repudiation the money ceased to abide the event, and became money of the plaintiff in the hands of the defendant without any good reason for detaining it. But in *Gatty* v. *Field* (*ubi sup.*) it was held that the repudiation must be made before action brought, and as there is no cause of action until repudiation this is not merely a technical objection. But there is a question whether the plaintiff in this case could at the time of bringing this action have repudiated so as to entitle him to a return of the deposits, and upon the facts which I have stated, I do not think he could. He did not bring this action until the 3000*l.* was more than absorbed by his losses, and he knew from the manner in which the accounts sent to him were stated that the 3000*l.* would be treated as appropriated towards those losses. It has been sought to avoid this difficulty by saying that, in the account rendered after action, the

plaintiff was credited with interest on the 3000*l.* down to the date of sending in that account, although it showed a large balance against him. But as this 3000*l.* was entered as the first item of the plaintiff's credit, this credit of interest must be treated as a mistake if it really credited interest beyond the 25th April when the account was closed. For these reasons I think that the appeal fails.

SMITH, L.J. read the following written judgment:—The plaintiff, who is a retired officer upon half-pay, had transactions with the defendants, who trade under the name and style of the Universal Stock Exchange Limited, in shares amounting upon paper to over three millions of money in about six months. It was part of the agreement between them that the plaintiff should deposit with the defendants 3000*l.* in money, and also certain other securities that form no part of the point now in question. The action came to trial before my brother Cave, when a special jury found that the bargains which the plaintiff was seeking to repudiate were bargains by way of gaming and wagering, in other words, that the plaintiff and defendants were bettors *inter se* and *in pari delicto*. The learned judge therefore gave judgment for the return of the securities deposited by the plaintiff with the defendants which then still remained in their possession unappropriated by them, but refused to order the return of the 3000*l.*, being of opinion that the evidence showed that before the plaintiff had sought to put an end to the wagering and gaming which was being carried on between him and the defendants, the money had, according to the agreement which had existed, been exhausted by the losses sustained by the plaintiff. The defendants appealed to this court against the judgment of Cave, J., ordering the return of the securities, and we dismissed the appeal. The plaintiff, though he gave no notice by way of cross appeal, now appeals against that part of the judgment of Cave, J., which refused to give judgment for the repayment to him of the 3000*l.*, and the question is whether the refusal was correct. There was good evidence from which the jury might find, as they did, that the transactions which took place between the plaintiff and the defendants were by agreement between them gaming and wagering transactions, they being of opinion that neither party was in reality under liability to take up a single share, the differences in the prices of named shares, as they from time to time appeared in the list of quotations, being the standard upon which the parties were to game and wager, and which differences were alone to be accounted for by the one to the other. The object with which the 3000*l.* was deposited by the plaintiff with the defendants was, that the defendants might be certain, without having to look to either the solvency or honour of the plaintiff, of being able to obtain payment of any money which upon the wagering transactions might appear to their credit against the plaintiff. The statute 8 & 9 Vict. c. 108, sect. 18, enacts that all contracts by way of gaming and wagering shall be null and void, and it also enacts that no suit shall be brought or maintained to recover any sum of money alleged to be won upon any wager, or that shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. It will be seen that this section does not make the agreement illegal, but renders it void, and, as was well pointed out by Lush, J. in *Haigh* v. *The Town Council of Sheffield* (31 L. T. Rep. 536: L. Rep. 10 Q. B. 102), a wager is made by the statute a thing of a neutral character. It is not forbidden. It leaves an ordinary betting debt a mere debt of honour, depriving it of all legal obligation, but not making it illegal. It is manifest that no action can be brought by the one against the other to enforce any contract so declared to be void; but it has been held, by authorities which it is far too late now to question, that as soon as one party to a gaming contract receives notice from the other party that the former declines to abide any longer by the wagering contract, money deposited by him thereupon ceases to be money deposited in the hands of the latter "to abide the event on which any wager shall have been made," and any money still in the latter's hands, unappropriated by him, becomes money of the former, without any good reason for the latter detaining it, and in such case an action for money had and received to the plaintiff's use will lie. This was held as long ago as the year 1828 by the King's Bench in *Hastelow* v. *Jackson* (8 B. & C. 221); again in 1847 by the Common Pleas in *Varney* v. *Hickman* (5 C. B. 271); followed in 1876 by *Hampden* v. *Walsh* (*ubi sup.*); and adopted in 1880 by the Privy Council in *Trimble* v. *Hill* (42 L. T. Rep. 103: 5 App. Cas. 342). This principle was also, as it appears to me, re-enunciated by Turner and Knight Bruce, L.JJ., in the case of *Manning* v. *Purcell* (7 De G. M. & G. 55). This notice may be given before as well as after the event, to abide which the money has been deposited, has come off; but in the latter case it must be given before the money has been appropriated to the purpose, for which it had been deposited, for if appropriated it is no longer money of the plaintiff's in the defendants' hands. If it is still unappropriated, the defendant cannot set up the gaming and wagering contract to retain it; for the statute enacts that such a contract is void, and the result therefore is that if one party to a gaming and wagering contract gives to the other party notice in time that he withdraws from the contract, he can recover back his deposit, whether in the hands of his co-bettor or of a third party; *aliter* if he does not. Now, in the present case, when the plaintiff gave the notice to the defendants that he withdrew from any further carrying on of the gaming, and put an end to the contract, which he was entitled to do, it is admitted that he was largely indebted to the defendants for differences, and, in my judgment, my brother Cave took the correct view (notwithstanding Mr. Bigham's criticisms upon the form of the accounts) of the transactions between the parties when he held that as the plaintiff became from time to time in debit to the defendants for differences, the 3000*l.* *pro tanto* became used up, and that as a matter of fact every farthing of the 3000*l.* had been exhausted and more, when the notice was given by the plaintiff, and that this being the real truth of the case, the plaintiff could not recover back the 3000*l.*, nor any part of it. Cave, J. was right in refusing to order the return to the plaintiff of the 3000*l.* In the case of the securities deposited, the plaintiff was in time with his notice, and in this he was not. This appeal must share the same fate as

that of the defendants' appeal, and be dismissed with costs.

Appeal dismissed.

Solicitor for the plaintiff, *Theodore Allingham.*
Solicitors for the defendants, *Last* and *Sons.*

Tuesday, Nov. 19.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

CLUTTON AND CO. *v.* ATTENBOROUGH. (*a*)

ON APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of exchange — Cheque — Fictitious payee — Ignorance of drawer — Bills of Exchange Act 1882 (45 *& 46 Vict. c.* 61), *s.* 7, *sub-sect.* 3; *s.* 73.

Where a cheque has been drawn payable to a fictitious or non-existing person, and has been delivered by the drawer to be used as a cheque, it is, under sect. 7, *sub-sect.* 3, *of the Bills of Exchange Act* 1882, *a cheque payable to bearer, and the drawer is liable upon it to a holder in due course although he was not aware at the time he signed it that the payee was a fictitious or non-existing person.*

Judgment of Wills, J. (ante, *p.* 64; (1895) 2 *Q. B.* 306) *affirmed.*

THIS was an appeal from the judgment of Wills, J. at the trial of the action without a jury, which is reported *ante*, p. 64; (1895) 2 Q. B. 306.

The facts are fully stated in the report of the case in the court below, but for the purposes of this report they may be shortly stated as follows:

A clerk in the service of the plaintiffs, a firm of land agents, forged certificates representing that work had been done on their behalf by George Brett, and thereby induced them to sign several cheques for sums amounting in all to about 3558*l.*, payable to George Brett or order.

There was in fact no such person as George Brett.

The plaintiffs after signing the cheques, in ignorance of the non-existence of George Brett, sent them to their account department that they might be forwarded to the payee. The clerk there stole the cheques, forged an indorsement, and negotiated them with the defendant, who gave value for them in good faith. The cheques were duly honoured on presentment, and this action was brought by the plaintiffs; on their discovery of the fraud, to recover from the defendant the amount of the cheques as money paid under a mistake of fact.

By the Bills of Exchange Act 1883 (45 & 46 Vict. c. 61) it is provided as follows:

Sect. 7, sub-sect. 3. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

Sect. 73. A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

At the trial of the action without a jury, Wills, J. gave judgment for the defendant.

The plaintiffs appealed.

Tindal Atkinson, Q.C. and *Meek* for the plaintiffs. — Wills, J. held that the payee was a "fictitious or non-existent person" within the meaning of sect. 7, sub-sect. 3, of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), and that the cheque was therefore to be treated as payable to "bearer." The cheque was not a cheque of the plaintiffs at all, because they did not designate any person as payee; it was a forgery by their clerk. The provisions of sect. 7, sub-sect. 3, of the Bills of Exchange Act apply only to cases where the drawer designates a payee whom he knows to be a "fictitious or non-existent" person. Here the plaintiffs did not know, but were deceived by their clerk. The drawer is the person who designates the payee, and he does not designate a "fictitious or non-existent" person unless he intends to do so. The case of *The Bank of England* v. *Vagliano* (64 L. T. Rep. 353; (1891) A. C. 107), relied upon by the defendants, is quite distinguishable from this case; that was an action between a bank and its customer. The law as to a "fictitious or non-existent" payee is the same since the Act as it was before. The cheque never was negotiated at all; it never was delivered by the drawers, but was stolen from them; it was not their cheque.

Sir *Edward Clarke*, Q.C., *Joseph Walton* Q.C., and *Macaskie*, for the defendant, were not called upon.

Lord ESHER, M.R. — I have not the very smallest doubt as to this case. The plaintiffs signed a cheque, being induced to do so by the fraud of a clerk in their service. When the cheque was drawn, the plaintiffs did not put it away in a desk so that it might not be used, but they delivered it to their clerk that he might hand it on to someone else. They gave it out as a cheque to be used as a cheque, and afterwards it came into the hands of the defendant, who gave value for it in good faith. In my opinion, if anyone signs a cheque, a negotiable instrument, in his own handwriting, he becomes liable to anyone who afterwards takes the cheque, so signed, in good faith and for value. If the cheque is presented to the drawer's banker, and he sees the signature of his customer, he has no duty except to pay it. It has been argued by the learned counsel on behalf of the plaintiffs that this document was not a cheque at all. The plaintiffs signed it as a cheque and delivered it as a cheque, therefore they cannot say now that it is not a cheque. A person who takes a cheque relies simply upon the signature of the drawer. In this respect the drawer of a cheque is in the same position as the acceptor of a bill of exchange. If a bill of exchange is issued, accepted by Rothschild, anyone would on the faith of that signature discount the bill without considering who the drawer of it might be. That is what happened in *Vagliano's* case (*ubi sup.*), and in this respect the drawer of a cheque is on the same footing as the acceptor of a bill of exchange. Therefore in my opinion, and I say it in the broadest way, a person drawing a cheque in his own handwriting is liable upon his signature, and upon that alone, to anyone who may become holder of the cheque in good faith and for value. The law on this point is contained in the Bills of Exchange Act 1882, which is the code of law by which questions on bills of exchange must now be decided. The words of sect. 7, sub-sect. 3, are, as Lord Herschell said, in the House of Lords, per-

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

fectly plain. The present case is within the words of the Act, and that is all that is wanted. The code declares that the law is that a cheque of this kind is to be treated as payable to bearer. The appeal must therefore be dismissed.

Lopes, L.J.—It seems to me that the decision of the House of Lords in *The Bank of England* v. *Vagliano Brothers* (*ubi sup.*) is conclusive as to the meaning of sect. 7, sub-sect. 3, of the Bills of Exchange Act 1882. An endeavour has been made on behalf of the plaintiffs to import into the sub-section a qualification to the effect that the payee must be fictitious or non-existing to the knowledge of the drawer. That contention seems to me to be directly in contradiction of the decision of the House of Lords. An attempt was also made to draw a distinction between the position of the drawer of a cheque and that of the acceptor of a bill of exchange. It seems to me that, upon the question now before us, there is no difference whatever between them. The House of Lords has given a clear explanation of the meaning of the sub-section, and we are bound by their decision to hold that the plaintiff in the present case cannot recover.

Kay, L.J.—I agree. The case is decided by the decision of the House of Lords in *The Bank of England* v. *Vagliano Brothers* (*ubi sup.*). The plaintiffs signed a cheque payable to George Brett or order, and they then gave it to their clerk for the purpose of its being issued and used as a cheque. George Brett was "a fictitious person" in this sense, that no individual was intended by that name. The plaintiffs' clerk forged an indorsement, took the cheque to the defendant, who gave value for it in perfect good faith, and received payment for it on presenting it to the plaintiffs' bankers. Then the plaintiffs bring this action to recover the money paid upon the cheque. Sect. 7, sub-sect. 3, of the Bills of Exchange Act 1882 provides that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." Upon that it has been argued that the sub-section is not applicable to the present case unless it be proved that the plaintiffs, when they signed the cheque, knew that George Brett was a non-existing person. That very point was decided in *Vagliano's* case. The House of Lords said that no mention is made in the sub-section of the knowledge of any person, and that therefore to put into it any such words as suggested would be to impose a limitation which is not in the Act. Expressions to that effect occur over and over again in the speeches delivered by the learned Lords. Lord Herschell says: "I confess I cannot altogether follow the meaning of the words fictitious 'as regards' the acceptor. I have a difficulty in seeing how a payee, who is in fact a 'fictitious' person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world—how such a payee can be fictitious as regards one person and not another. The truth is, the words 'as regards' the acceptor, are treated as equivalent to the words 'to the knowledge of' the acceptor. But I do not think these expressions are synonymous." In another passage he says that the words of the sub-section appear to him free from ambiguity, and he adds "'where the payee is a fictitious or non-existing person' means surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee." Again he says: "For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that, in order to establish the right to treat a bill as payable to bearer, it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary, if it be sought to charge the acceptor, to prove in addition that he was cognisant of the fictitious character of the payee." Those words are applied to a bill of exchange, but a cheque is an inland bill of exchange, though it differs in some respects from an ordinary bill. Though the drawer of a cheque is not exactly the same as an acceptor of a bill, yet for this purpose he is in the position of an acceptor, and every word that was said by the learned lords in *Vagliano's* case applies as much to the drawer of a cheque as to the acceptor of an ordinary bill of exchange. If, in fact, a cheque is drawn in favour of a fictitious person, the knowledge of the drawer is just as immaterial as the knowledge of the acceptor of a bill in similar circumstances. The present case is absolutely within the decision in *Vagliano's* case. It was further argued that this cheque was never issued as a cheque. I cannot agree with that view of the facts. The cheque was drawn by the plaintiffs, and given by them to their clerk to be used as a cheque, and it is impossible after that to allow them to say to an innocent holder for value that they never issued it. The moment that the cheque was drawn it was payable to bearer. It is true that the clerk forged an indorsement, but that was unnecessary to complete the liability of the plaintiffs, because the cheque was already payable to the bearer.

Appeal dismissed.

Solicitor for the plaintiffs, *H. S. Clutton.*

Solicitors for the defendant, *Stanley Attenborough* and *Tyer.*

Thursday, Nov. 21.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

The Colonial Securities Trust Company Limited v. Massey. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Court of Appeal—Rehearing—Trial by judge without a jury—Order LVIII., r. 1.

Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the court below on the facts was right, and that presumption must be displaced by the appellant.

If the appellant satisfactorily makes out that the judge below was wrong, then the decision should be reversed; but if the case is left in doubt the Court of Appeal will not disturb the decision of the court below,

So held by Lord Esher, M.R. and Lopes, L.J.

Per Kay, L.J., dissenting: Upon such an appeal, when the case is one of great doubt and difficulty and the Court of Appeal is unable, upon a consideration of the whole evidence, to come to any confident conclusion, great weight should be given to the judgment of the judge in the court

(a) Reported by E. Manley Smith, Esq., Barrister-at-Law.

below, but in other cases the Court of Appeal should itself try the case, and make the order which it thinks ought to have been made in the court below.

THIS was an appeal from the judgment of Day, J, at the trial of the action without a jury.

All the material evidence had been taken on commission.

Day, J. gave judgment for the plaintiffs.

The defendant appealed.

Cripps, Q.C. and *P. Rose Innes* for the defendant.

Bompas, Q.C. and *T. Willes Chitty* for the plaintiffs.

Lord ESHER, M.R.—I am of opinion that this appeal should be dismissed. The way to consider it is to determine the rule of conduct by which the Court of Appeal should be guided in hearing an appeal from the judgment of a judge who has tried an action without a jury. I think that this court should shape its conduct in the same way as the Court of Appeal in Chancery used to do before the Judicature Act. That court acted on the rule that it would not and ought not to allow an appeal unless it was satisfied that the judge of the court below was wrong. If the Court of Appeal was left in doubt whether he was right or wrong, the rule was that the burden of proof was on the appellant, and, if he did not satisfy the court that the judge below was wrong, the court would dismiss the appeal. If witnesses have been called before the judge in the court below, we are more unwilling to overrule his decision, because, when there is a conflict of evidence, the judge has had the opportunity of observing the witnesses themselves and of judging of their credibility from their demeanour. When witnesses have not been examined before the judge, when the whole matter has to be decided by documents or on the examination of witnesses, which has been taken elsewhere, then the court is not hampered by the consideration that the judge at the trial has seen the witnesses, but the same rule should be applied that, unless the court be satisfied that the judge decided wrongly, his judgment should not be overruled. The rule of practice has been well expressed by Lopes, L.J. in *Savage* v. *Adam* (99 L. T. 212; (1895) W. N. 109). He said that, "Where a case, tried by a judge without a jury, comes to the Court of Appeal, the presumption is that the decision of the court below on the facts was right, and that presumption must be displaced by the appellant." That is the true presumption. The appellant, whether he be plaintiff or defendant in the action, opens the appeal, and he does so for the reason that the burden of proof in this court ies on him. Though an appeal is a rehearing, it s not conducted in this court in the same way as the trial was conducted in the court below. In the same case that I was reading from just now Lopes, L.J. said, that if the appellant "satisfactorily makes out that the judge below was wrong, then, inasmuch as the appeal is in the nature of a rehearing, the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the court below." That is the rule by which the court is to be guided in deciding the present appeal. [His Lordship then proceeded to discuss the evidence in detail.] I cannot say that the learned judge was wrong in the view which he took in this conflict of evidence. Not only is the matter so doubtful that I think this court ought not to overrule his decision, but I may say that I agree with him, and I think that he took absolutely the right view. I think the appeal should be dismissed.

LOPES, L.J.—I agree that we ought not to disturb the judgment of Day, J. I do not propose to repeat what I said in *Savage* v. *Adam* (*ubi sup.*), since the Master of the Rolls has read it, and has agreed with it. I think that the appeal should be dismissed.

KAY, L.J.—This is an appeal from the judgment of a judge at the trial without a jury, and as the question to be decided depends upon evidence that has been taken on commission, we have here exactly the same materials for coming to a decision as the learned judge had before him in the court below. By Order LVIII., r. 1, "all appeals to the Court of Appeal shall be by way of rehearing," therefore there can be no doubt that this court is now in the position of rehearing the present case. So far as regards the evidence which has been taken on commission, we have the same means of judging as Day, J. had. Our duty is to examine the evidence, and see whether we agree with or differ from him. I agree that where a case is one of considerable doubt, and where, on consideration of the whole evidence, the court cannot come to any confident conclusion, great weight ought to be given to the judgment of the court below, but the duty of the court in that respect does not go farther than that. The court should, in my opinion, try the case for itself, and should then make the order which it thinks should have been made by the judge at the trial. If I had been trying the present action I should not have been satisfied that the plaintiff had made out the case which he had to prove. The learned judge at the trial came to a different conclusion, and the Master of the Rolls and Lopes, L.J. have agreed with him. I do not agree with them, but I think it right to indicate my opinion, because it seems to me that a judge ought to state his opinion, and abide by it, unless he is convinced that he is wrong; which I am not.

Appeal dismissed.

Solicitors for the plaintiffs, *Bompas, Bischoff*, and *Co.*

Solicitors for the defendant, *Ingle, Holmes*, and *Co.*

Monday, Nov. 25.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

THE BRITISH WAGGON COMPANY *v.* GRAY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Writ of summons—Service out of the jurisdiction—Defendant domiciled in Scotland—Jurisdiction of court—Agreement to submit to jurisdiction—Order XI., r. 1 (*e*).

By Order XI., r. 1 (*e*), *the court may allow service out of the jurisdiction of a writ of summons in an action founded on a breach within the jurisdiction of a contract which ought to be performed within the jurisdiction, "unless the*

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law

defendant is domiciled or ordinarily resident in Scotland or Ireland."

Held, that the parties to a contract cannot thereby authorise the court to allow service upon a defendant domiciled in Scotland contrary to Order XI., r. 1 (e).

This was an *ex parte* application by the plaintiffs on appeal from a refusal by Mathew, J. at chambers to give leave for service of the writ of summons on the defendant in Scotland.

By an agreement in writing made between the plaintiffs, a company carrying on business at Rotherham, and the defendant, who was domiciled and resident in Scotland, the plaintiffs let to the defendant certain coal waggons at the rent therein mentioned. The agreement contained the following clause:

This agreement shall in all respects be construed and carried into effect according to the law of England, and for the purposes thereof the tenant hereby submits to the jurisdiction of the High Court of Justice in England.

This action was brought to recover certain instalments of rent alleged to be due.

The plaintiffs applied for leave to serve the writ of summons upon the defendant in Scotland.

Mathew, J. held that, under Order XI., r. 1 (*e*), he had no jurisdiction to grant leave.

The plaintiffs appealed.

T. Willes Chitty for the plaintiffs.—As no place is specified for payment of the rent, payment is to be made at Rotherham, and there is therefore a breach within the jurisdiction of a contract which ought to be performed within the jurisdiction which brings the case within the first part of Order XI., r. 1 (*e*). As to the latter part of the rule the defendant has contracted himself out of it. The contract means that the court is to have jurisdiction to grant leave to serve the writ of summons in an action upon the defendant in Scotland, notwithstanding the latter part of rule 1 (*e*). Parties can give jurisdiction to the court by contract. That is not the same thing as professing to give jurisdiction merely by consent:

The M. Moxham, 34 L. T. Rep. 559; 1 P. Div. 1;
The Tharsis Sulphur Company v. *La Société des Metaux*, 60 L. T. Rep. 924.

Lord Esher, M.R.—This is an application for leave to serve a writ in Scotland upon a person domiciled and resident there. The case comes within the very words of Order XI., r. 1 (*e*). The action is founded upon an alleged breach within the jurisdiction of a contract which ought to be performed within the jurisdiction. Where that is the case the court has jurisdiction to allow service out of the jurisdiction "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." In a case which comes within the proviso, the court has no power to allow service in Scotland or Ireland. The question in this case is one of jurisdiction. The court has no jurisdiction to give leave to serve the writ on the defendant. Then it was contended that the defendant has contracted that the court might allow service upon him. It is not alleged that the plaintiffs have by contract a right against the defendant to serve the writ upon him in Scotland, but it is said that the parties have contracted to give the court jurisdiction in a case where the rules provide that the court is to have none. My first answer to that contention is, that the contract does not contain any such agreement as is alleged. But I do not found my judgment on that. I decide this case upon the same ground as that upon which Mathew, J. decided, that even if the parties had contracted to give the court jurisdiction, such a contract would be of no avail. The court cannot give leave to serve a writ out of the jurisdiction in a case where such a thing is forbidden by the orders and rules, even though the parties to the action should agree to give power to the court. Two cases were cited with the view of showing that parties can by contract give jurisdiction to the court to do something forbidden by the rules. Neither case is an authority for that proposition. In *The M. Moxham* (*ubi sup.*) both parties were before the court, and the only question was, what law was applicable to the point to be decided. In *The Tharsis Sulphur Company* v. *La Société des Metaux* (*ubi sup.*) it was only decided that service of a writ in England upon a person appointed by a foreigner to accept service on his behalf was good. That was not a question of the jurisdiction of the court. I base my decision in the present case upon the ground that the court has no jurisdiction to give leave for service of a writ out of the jurisdiction in a case where such a thing is expressly forbidden by the rules, even though the parties to the action have contracted with each other that the court should have jurisdiction.

Lopes, L.J.—I am of the same opinion. Upon the true comstruction of this contract I do not think that the parties intended to give the court jurisdiction to give leave for service of the writ in Scotland. But assuming that that was the intention of the parties, I am of opinion that under the latter part of rule 1 (*e*) they had no power to give the court jurisdiction to allow service of the writ in Scotland. The Rules of the Supreme Court are made under the authority of an Act of Parliament and have the effect of an Act of Parliament, and they prohibit the court from doing that which the plaintiffs are now asking the court to do.

Kay, L.J.—This is a simple case. It is an action for breach of contract, and the defendant is domiciled and resident in Scotland. Service of the writ of summons upon him there is expressly forbidden by the Rules of the Supreme Court. Then it is argued that by the terms of the contract the defendant has submitted himself to the jurisdiction of the High Court. It was argued that by it he submits to be served in Scotland, but I do not agree that even that much can be implied from it. However, assuming that the defendant has contracted with the plaintiffs to accept service in Scotland of an English writ, I cannot see how that would give power to the English court to give leave for such a service of the writ when it is absolutely forbidden by the rules of the court. To grant the plaintiffs' application would be entirely *ultra vires* of the court.

Appeal dismissed..

Solicitors, *Bell. Brodrick*, and *Gray*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Oct. 26 *and* 31.

(Before KEKEWICH, J.)

Re ANGERSTEIN; ANGERSTEIN *v.* ANGERSTEIN. (*a*)

Will—Construction—Heirlooms—Person entitled to "actual" possession.

Chattels were bequeathed on trust as heirlooms to go along with and be used and enjoyed by the person for the time being entitled under the limitations of the settlement to the "actual" possession of the settled real estate. The tenant in tail died in the lifetime of the tenant for life.

Held, that the chattels had not vested absolutely in the tenant in tail.

Lord Scarsdale *v.* Curzon (3 *L. T. Rep.* 29; 1 *J. & H.* 40) *applied.*

ADJOURNED SUMMONS.

John Julius Angerstein, who died on the 29th Jan. 1823, by his will dated the 16th Jan. 1823, gave and devised his freehold estates in the counties of Norfolk, Suffolk, Lincolnshire, and Kent to his son John Angerstein for his life, with remainder to the children of his son and their issue for such estates or interest, either absolutely or conditionally, and on such shares and manner as his son and his then wife should jointly appoint, and in default as the survivor of them should appoint, with remainder over in strict settlement. And the testator gave and bequeathed all the books and plate, and all the pictures, drawings, and prints whereof and whereto he should be possessed or entitled at his death, save as therein mentioned, to his trustees, their executors, administrators, and assigns, upon trust to permit his son to use and enjoy the same during his life, and after his death upon trust

To permit and suffer the same to go along with and be used and enjoyed by the person or persons who shall for the time being, by virtue of the limitations hereinbefore contained, be entitled to the actual possession of my said freehold estates situate in the said county of Norfolk, as or in the nature of heirlooms to the same estate, so far as the rules of law and equity will permit.

John Angerstein, whose wife was then dead, in exercise of the powers given him by the above will, executed three indentures of settlement dated respectively the 5th, 6th, and 7th Aug. 1852, of the freehold estates settled by the above will, which estates became, upon the death of John Angerstein, under the three indentures of settlement, vested in William Angerstein as tenant for life in possession, with remainder to his eldest son, W. John Nettleship Angerstein, in tail.

John Angerstein, who died in 1856, by his will bequeathed certain chattels as heirlooms to be held and enjoyed by the person or persons who under the indenture of the 5th Aug. 1852 and his will should for the time being be entitled in possession to his freehold mansion-house, but so nevertheless that the same or any part or parts thereof should not for the purpose of transmission vest absolutely in any tenant in tail, or in tail by purchase of the mansion-house, who should not attain the age of twenty-one years.

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

W. John Nettleship Angerstein, who attained the age of twenty-one years on the 19th Sept. 1864, in 1866, with the concurrence of his father William Angerstein, barred the entail, and shortly afterwards resettled the estates, by which resettlement William Angerstein's life estate was restored, and W. John Nettleship Angerstein became the next tenant for life, with remainder to his first and other sons successively in tail male.

In 1874 the affairs of W. John Nettleship Angerstein were liquidated by arrangement, and the trustee under his liquidation in 1876 sold all his assets to William Angerstein.

On the 7th Feb. 1892 W. John Nettleship Angerstein died.

In Dec. 1893 his only son, Julius Henry W. Angerstein, attained the age of twenty-one years, and was therefore tenant in tail of the settled estates subject to William Angerstein's life interest.

This was an originating summons taken out by William Angerstein as plaintiff, to which Julius Henry W. Angerstein and the trustees of the two wills were made defendants, to determine whether the books, plate, pictures, and other chattels belonged to the plaintiff, under the limitations of heirlooms contained in the two wills, absolutely in his own right and as assignee of the estate and interest of W. John Nettleship Angerstein deceased, or whether the plaintiff was entitled only to a life interest therein.

Vaughan Hawkins for the plaintiff.—The effect of these clauses is to vest the heirlooms absolutely in W. John Nettleship Angerstein, the person who attained a vested estate tail in the real estate:

Foley v. *Burnell*, 1 Bro. P. C. 274; 4 Bro. P. C. 319;

Holloway v. *Webber*, 19 L. T. Rep. 514; L. Rep. 6 Eq. 523;

Martelli v. *Holloway*, 5 H. of L. 532.

The only question is as to the meaning of the word "actual" in the first will. *Lord Scarsdale v. Curzon* (3 L. T. Rep. 29; 1 J. & H. 40) will be relied on to show that "actual" means "physical," so as to exclude a tenant in tail dying before coming into such possession, but the words of gift in that case are very different to the words here.

R. Younger for Julius Henry W. Angerstein, the present tenant in tail.—The plaintiff is only entitled to a life interest in the heirlooms. *Lord Scarsdale* v. *Curzon* (*ubi sup.*) establishes the rule that "where there are clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded (see Theobald on Wills, edit. 4, p. 593). At the time of the decision in *Foley* v. *Burnell* (*ubi sup.*) it was doubtful whether a testator could legally impose a condition of actual possession, but in *Lord Scarsdale* v. *Curzon* (*ubi sup.*) it was decided that he could.

F. E. Farrer and *Reginald Hughes* for the trustees of the two wills.

Vaughan Hawkins in reply.—In this case there has been an absolute disentail. When the estate tail was barred the limitations of the heirlooms came to an end and they vested in the tenant in tail, the condition of "actual" possession, even if it means physical possession, being exhausted.

KEKEWICH, J.—The question which I have to decide is, whether the applicant is entitled to certain heirlooms settled by these two wills. He claims through a person who was no doubt tenant in tail in remainder of the hereditaments to which the heirlooms were annexed, but which tenant in tail never came into possession. It is unnecessary for me to go through the devolutions of title, they are not long; but if that tenant in tail was entitled to these heirlooms so as to make a transfer of them to another person, then it is conceded that the applicant is now entitled to them through him. That is the short question. I will take first the second will, that of John Angerstein. The clause settling the heirlooms there is in a form which is familiar to all conveyancers and persons at all acquainted with this branch of the law. It does not differ in any way from the form which has been adopted many times by many persons. It seems to me to come distinctly within what has been referred to as the code of law or within the rule recognised in all the cases, including *Lord Scarsdale* v. *Curzon* (*ubi sup.*), which is stated—and I have taken care to verify the accuracy of it—by Mr. Theobald in his last edition (4th edit.) at p. 592, thus: "The gift of personalty as heirlooms to the persons for the time being entitled to the real estate, so far as the rules of law and equity permit, vests absolutely not in the tenant for life of the real estate but in the first tenant in tail at birth, whether he comes into possession or not." And so clearly does the clause in the second will come within that rule that Mr. Younger very properly declined when I put the point to him to argue the case further. As regards those chattels, therefore, I hold the applicant to be entitled absolutely. As regards the earlier will there is more difficulty. That is a will of John Julius Angerstein, and there the words are by no means the same. As my judgment depends upon language it is as well to read them. They are given "upon trust to permit and suffer the same to go along with and to be used and enjoyed by the person or persons who shall for the time being by virtue of the limitations hereinbefore contained, be entitled to the actual possession of my said freehold estates situate in the said county of Norfolk as in the nature of heirlooms to the same estates, so far as the rules of law and equity will permit." That is in form somewhat different from what I have before read, but in substance the only real difference is that the word "actual" is attached to "possession." The chattels are to be used and enjoyed by the person or persons for the time being "entitled to the actual possession." Now, I at once give the go-bye to Mr. Vaughan Hawkins' argument in reply, based on the suggestion that conveyancers would write this out in some form that suits his argument, and that a conveyancer would take those words as instructions for a settlement. That seems to me entirely beside the question which I have to decide. I have to decide what is the meaning of those words before me, to say what is the proper legal effect of these words, and not to consider how any person regarding them as instructions might elaborate them so as to give effect to the presumed intention of the testator; because, when one is drawing from instructions, one has to go a little beyond the exact words, and sometimes, at any rate, to guess at what is intended by their language, which necessarily is not always explicit. The testator has here distinctly said that they are to go to the person entitled to the actual possession. Does the introduction of that word "actual" make any difference? If it were omitted it seems to me that, whatever one might consider the intention of the testator to be if the clause were *res integra*, the first tenant in tail would take according to the rule which I just now read from Mr. Theobald's book, and one would be bound by the decisions in *Foley* v. *Burnell* (*ubi sup.*) and other cases. But he has introduced the word "actual," and to my mind, having now considered it carefully, the whole question depends upon whether "actual" adds anything really in substance to the clause. I asked Mr. Vaughan Hawkins to postpone his reply in order that I might look more carefully into *Lord Scarsdale* v. *Curzon* (*ubi sup.*). It is not a very long case as regards the facts, but the judgment is of very considerable length, and is a most interesting disquisition on the practice of conveyancers and the precedents which the learned Vice-Chancellor had at his command, and it goes into all the cases up to that time with considerable care, and I thought that it was only right that I should look at it more carefully than was possible during an argument in court. I have taken advantage of the opportunity to read it, and the result of that and of my consideration of the subject generally is that "actual" does make a very large and important difference. I think that is decided by *Lord Scarsdale* v. *Curzon* (*ubi sup.*). The words there were "actual freehold." It was not "entitled to the actual possession," but "seised of or entitled to the actual freehold," and it was on those words, after serious consideration, in a reserved judgment, that the Vice-Chancellor came to the conclusion that the code of law which he cited, that is to say, the rule which I read just now, was not applicable to the particular heirlooms which were covered by those words. Is there any difference in substance between "entitled to the actual possession" and "seised of or entitled to the actual freehold?" I should have thought, if I had been at liberty to form an opinion of my own, that there was really no difference at all, it was only two phrases, merely meaning the same thing. I see that the reporter of *Lord Scarsdale* v. *Curzon* (*ubi sup.*) was himself of that opinion; of course, I am not guided by that, but on page 43 of 1 J. & H.; p. 30 of 3 L. T. Rep., I find it is stated that the deed contained various clauses in which the words "actual freehold" were so used that they could only be construed as signifying "freehold in possession." The argument went on that footing, and the Vice-Chancellor came to that conclusion. I do not propose to go into his judgment at length, but on page 65 of 1 J. & H.; p. 34 of 3 L. T. Rep., I find the Vice-Chancellor saying, citing a precedent of Mr. Davidson's: "Heirlooms are given to be enjoyed, so far as the rules of law and equity will permit, by the persons who shall be in the actual possession, or in the receipt of the rents and profits," and he comments upon that and adds, "That is framed in order to tie up the chattels to the person in possession." So that he had the very words before him which I have here. He repeats that in different language on pages 66 and 67 of 1 J. & H.; p. 35 of 3 L. T. Rep. I do not think I need go beyond that. On page

66 he says: "In order to determine the construction of these clauses I must first settle the meaning of the phrase 'the person seised of or entitled to the actual freehold.' In my opinion this can have no other meaning than "the person in possession." He repeats himself, not unnaturally, in a case of that character: "I think it impossible to give to the words 'the person seised of or entitled to the actual freehold' any other meaning than the person in possession. I am far from saying that the words 'actual freehold' have any such technical sense, nor do I rest my opinion on the phraseology pointed out in some passages of Coke upon Littleton, but on the whole of this settlement I have no doubt about the meaning of these words." Then one more citation: on the top of page 67 he says "'actual,' therefore, must mean in possession, or the clause would have no meaning." I have dwelt upon that for this reason: As I pointed out to Mr. Younger, whatever one's own impression of the grammatical meaning of the words, whatever one's view from a knowledge of what testators generally desire would be, I am bound not to construe the words in the second will in any manner contradictory to the rule to which I have referred, and there is nothing more important, particularly with reference to anything connected with real estate, than that titles should not be in any way shaken by any decision of the court, and it would be wrong to go as far as, in opening the case, Mr. Younger invited me to do, as to treat it as a mere question of construction, as I should do with a will of some modern testator giving a legacy. I have no business to do that in a case of this kind. I am bound to consider the language with reference to the rules which have been laid down. Therefore, whatever might have been my opinion upon the meaning of the words "actual possession," grammatically or otherwise, I should take great care not to give judicial utterance to that opinion if I had seen that any judge, certainly a judge of the eminence of Wood, V.C. and so long ago as 1859, had construed those words in a different way. But I have his authority for saying that "actual freehold" and "actual possession" have the same meaning, and that "actual possession" does take heirlooms out of the rule. I have had the curiosity to see whether that was not only the point decided but the point argued in *Lord Scarsdale* v. *Curzon* (*ubi sup.*), and it is so. On page 45 of 1 J. & H. there is a summary of the argument on this point which probably came from Mr. Rolt, who was the leading counsel: "If therefore it is competent to limit chattels so that the absolute interest shall go to the first person who shall become entitled to settled estates within the limits allowed by the rule against perpetuities) in possession in inheritance, so as to exclude intervening remaindermen, this deed does so. It is competent to do so." Those are the two points to which the Vice-Chancellor directs his discussion of the authorities and the precedents. He goes through the history of these limitations, and comes to the conclusion that it is competent and that it was done. Those were the two points argued—that there was nothing in law to prevent this being done, and that as a matter of fact it was done. That it is possible in law to do it is not denied here, and could not be, and that it is done here seems to me to follow from the decision of the Vice-Chancellor quite as much as from the grammatical meaning of the words. I have again taken the trouble to look carefully at the exceptions to the rule as laid down in Mr. Theobald's book, at page 593. He says: "If the gift of the chattels is to the person actually seised at the death of the tenant for life, or to the person seised of the actual freehold which is defined as freehold in posseseion, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded" — "Or there are other clear words referring to actual possession." I do not know there can be other clearer words than the words "actual possession" themselves, and I think he has stated the rule correctly that in that event a tenant in tail who dies before coming into possession is excluded. The result is, that the tenant in tail who did not come into possession had no right to pass these heirlooms to any stranger, and that the applicant is not absolutely entitled to them. Beyond that I do not go.

Solicitors: *Farrer* and *Co.*; *Warren, Murton,* and *Miller*; *Stuart* and *Tull.*

Nov. 21, 22, *and* 23.

(Before ROMER, J.)

LYNDE v. THE ANGLO-ITALIAN HEMP SPINNING COMPANY LIMITED. (a)

Company—Contract to take shares—Rescission—Misrepresentation—Agent—Promoter.

Speaking generally, in order to make a company liable for misrepresentations inducing a contract to take shares from it, the shareholder must bring his case within one or other of the following heads:

(1) *Where the misrepresentations are made by the directors, or other the general agents of the company entitled to act, and acting on its behalf.* (2) *Where the misrepresentations are made by a special agent of the company, while acting within the scope of his authority.* (3) *Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by the misrepresentations.* (4) *Where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue.*

Where, therefore, the directors of a company did not know, when allotting, that an application for shares was induced by the representations of a promoter, whom they knew to be applying to his friends to subscribe for shares, but who was not authorised to act on behalf of the company, or to make representations:

Held, that, assuming material misrepresentations to have been made by the promoter, the applicant for shares was not entitled to rescission of his contract as against the company.

Re Metropolitan Coal Consumers Association; Karberg's case (66 *L. T. Rep.* 700; (1892) 3 *Ch.* 1) *distinguished.*

ON the 28th Nov. 1890 the defendant company was registered with a capital of 50,000*l.*, for the

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

object of acquiring certain lands, buildings, works, and mills, at Ferrara, in Italy, known as the "Ferrara Hemp Works," previously carried on by Messrs. Francisco Navarra and Co.

The promoters of the defendant company were M. C. Thomson and Arthur Waithman; and it was provided by art. 120 of the articles of association that the directors should adopt, on behalf of the company, a certain agreement made between Arthur Waithman and M. C. Thomson of the one part, and a trustee for the defendant company of the other part, whereby, after reciting that the promoters had arranged to get 20,000*l.* debentures subscribed, and that they had incurred various expenses in the formation of the company, it was agreed that, on the completion of the purchase of the Ferrara Hemp Works, the defendant company should pay to Arthur Waithman and M. C. Thomson 5000*l.* in cash; and they should be entitled to have certain founders shares allotted to them.

On the 9th Dec. 1890 the plaintiff, William Alfred Lynde, who was a solicitor in Manchester, had an interview with Arthur Waithman, who was at that time a personal friend of his. At this interview the plaintiff alleged that (*inter alia*) the following misrepresentations were made to him by Mr. Waithman on behalf of the defendant company: (1) That the business of Francisco Navarra had been bought as a going concern at a very low price, and that it was a very good business. (2) That Arthur Waithman was to get nothing out of the formation of the company, and that it had been agreed that no promotion money was to be paid.

The memorandum and articles of association of the company were handed to the plaintiff on this occasion.

At another interview of the 16th March 1891 the plaintiff alleged that A. Waithman had represented (3) that he and M. C. Thomson had agreed to forego the benefits of the agreement mentioned in art. 120.

The plaintiff alleged that these representations were false, and he produced a memorandum-book in which the statement had been entered at the time, or within an hour or so of the interviews. This was corroborated by more detailed entries in his day-book.

At the time when these representations were made there were two acting directors of the company, and Waithman was not a director, or a general agent of the company; nor was he authorised on behalf of the company to procure shares, or to make any representations to the plaintiff or others to induce them to take shares. Waithman and Thomson did in fact procure the shareholders, and the directors knew that Waithman and Thomson were applying to their friends to subscribe. No prospectus of the company was ever issued.

On the 28th May 1891 the plaintiff applied for 300 shares in the company, and agreed to accept the same or any smaller number that might be allotted to him "subject to the memorandum and articles of association of which a copy has been supplied to me." This application was made on a printed form, obtained by Waithman from the company's solicitor, and handed to the plaintiff.

The 300 shares, together with three founders' shares of 1*l.* each, were duly allotted to the plaintiff on the 10th June 1891; and he paid on allotment, and in respect of subsequent calls, a total sum of 153*l.*

In Dec. 1891 Waithman and Thomson were appointed directors of the company.

On the 14th Nov. 1894 the plaintiff, as he alleged, discovered the true facts with regard to the representations, and wrote on that day to the company repudiating his shares. Upon the company declining to repay the amount paid on the shares, he issued his writ on the 20th Dec. 1894, and claimed rescission of the contract on the ground of misrepresentation, repayment of the sums paid, and consequential relief.

The defendant company denied the misrepresentations, and that A. Waithman was their agent or authorised to make representations, and pleaded laches and delay. They also counterclaimed for an unpaid call of 75*l.*

The result of the evidence as to the alleged misrepresentations sufficiently appears in the judgment.

Eve, Q.C. and *C. Macnaghten* for the plaintiff.—No doubt, according to *Karberg's case* (66 L. T. Rep. 700; (1892) 3 Ch. 1), the applicant for relief must prove the misrepresentations, and trace them to the defendant company. Mr. Waithman came here with the printed application forms of the company to the plaintiff, and they knew that he was a promoter, and was getting subscriptions for shares. That brings the present case within *Re Canadian (Direct) Meat Company; Tamplin's case* (W. N. 1892, pp. 94, 146), which the Court of Appeal held was covered by *Karberg's case* (*ubi sup.*). [ROMER, J.—With great respect I do not think it was. The case does not appear to have been argued on the appeal. In *Karberg's case* the offer to take shares was on the terms of the prospectus.] On the facts, the representations were made, and are sufficiently brought home to the company and adopted by them when allotting the shares.

Hopkinson, Q.C. and *Mulligan* for the defendant company.—The clear rule of law is that misrepresentations must have been made by the person against whom restitution is sought, or by his agent. Here Mr. Waithman, not being an agent of the company to make representations, cannot bind the company. *Tamplin's case* (*ubi sup.*) does not lay down any different proposition of law. The company would be bound if they knew that untrue representations had been made. But the plaintiff does not bring himself within any of the cases on this point. A secretary of a company has no general authority to make representations to induce persons to take shares in a company:

> *Newlands* v. *National Employers Accident Association Limited*, 53 L. T. Rep. 242; 54 L. J. 428, Q. B.

Nor are the misrepresentations of one of the directors of a company sufficient to entitle a shareholder to be relieved from being a contributory:

> *Holt's case; Re The Universal Provident Life Association*, 22 Beav. 48.

So also in the case of representations by the promoters of a company:

> *Re Hull and London Life Assurance Company: Gibson's case*, 2 De G. & J. 275.

Here the plaintiff made his application subject to

the memorandum and articles of association, and one of those articles (120) was quite inconsistent with the alleged misrepresentation as to there being no promotion money. It put the plaintiff upon inquiry at least. Then there has been such delay as disentitles the plaintiff to relief. A delay of a month may be too long:

Re Snyder Dynamite Projectile Company Limited; Skelton's case, 68 L. T. Rep. 210;
Re Russian (Vyksounsky) Ironworks Company; Taite's case, 16 L. T. Rep. 343; L. Rep. 3 Eq. 795;
Re Scottish Petroleum Company, 49 L. T. Rep. 348; 23 Ch. Div. 413.

In this last case Baggallay, L.J., at p. 434, stated that the delay of a fortnight in repudiating shares in a going concern might be fatal.

Eve, Q.C. in reply.

ROMER, J.—The first question which I desire to deal with is this: Assuming that Mr. Waithman did make material misrepresentations to the plaintiff which induced him to apply for the shares, could the plaintiff at any time on that ground hold the company liable, and have the contract set aside? Now, it appears to me that, speaking generally, to make a company liable for misrepresentations inducing a contract to take shares from it, the shareholder must bring his case within one or other of the following heads: (1) Where the misrepresentations are made by directors or other the general agents of the company entitled to act, and acting on its behalf; as, for example, by a prospectus issued by the authority or sanction of the directors of the company inviting subscriptions for shares. (2) Where the misrepresentations are made by a special agent of the company, while acting within the scope of his authority; as, for example, by an agent specially authorised to obtain, on behalf of the company, subscriptions for shares. (3) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by the misrepresentations; as, for example, when directors, on allotting shares, know in fact that the application for them has been induced by misrepresentations, even though made without any authority. (4) Where the contract is made on the basis of certain representations, whether the particulars of these representations were known to the company or not, and it turns out that some of those representations were material and untrue; as, for example, if the directors of the company knew, when allotting, that the application for shares was based on the statements contained in a prospectus, even though that prospectus was issued without authority, or even before the company was formed, and even if its contents were not known to the directors. I think *Karberg's case* (66 L. T. Rep. 700; (1892) 3 Ch. 1) was one falling within and decided under this head. In that case Lindley, L.J. said that one of the questions they had to answer was this: "Was the prospectus the basis of the contract formed by the application and allotment of shares?" And he answers that in his judgment, where he says this: "The offer to take shares is an offer to take them on the terms of the prospectus, and on no other terms, and the acceptance of the application by the allotment of shares is an acceptance of the offer on those terms, and not on other terms." And I gather that that was the ground of the decision in *Karberg's case* (*ubi sup.*). There may possibly be other cases not coming within the above heads, though none occur to me at the present time, and certainly the present case, if it does not come within any of the above heads, has no special features about it which would entitle the plaintiff to the relief which he seeks. Now, it appears to me, that the plaintiff does not bring his case within any of these heads. Such misrepresentations (if any) as were made to the plaintiff, were made by Mr. Waithman, one of the two promoters of the company, and the company at the time had two directors entitled to act for it. Mr. Waithman was not a director, or general agent of the company. No doubt, the promoters had a great deal to do with the company at the time, and their wishes and views may have been highly regarded by the directors; but I see nothing to justify me in coming to the conclusion that the promoters are to be regarded as really constituting the company, or that the directors left everything in their hands, or were what may be called dummies, and left it to the promoters to do what they pleased in the affairs of the company. Nor was Mr. Waithman, when he made the representations he did make to the plaintiff, authorised to act on behalf of the company in getting shares, or authorised to make any representations on behalf of the company to the plaintiff, or others, to induce him or them to apply for shares. The fact that Mr. Waithman was a promoter of the company did not in itself authorise him to procure shares for the company, or to make representations to the plaintiff on its behalf. A contract to take shares may be induced by misrepresentations made by an officer of a company, or by a promoter of a company, or by a person assisting in procuring shares of a company; but that fact alone will not be sufficient to enable the contract to be rescinded. The cases cited by Mr. Hopkinson are sufficient to show this. And although the company knew that Mr. Waithman was applying to his friends to get them to subscribe for shares, that did not, in my opinion, make him the company's agent, or put the company to inquire as to whether he had made any, and, if any, what, representations to those friends to induce them to subscribe. In most cases directors must be aware that subscriptions for shares are obtained through the intermediacy of some people interested in the company, and it would lead to the most astonishing results if that was held sufficient to affect the directors with knowledge of, or to put them upon inquiry as to, the representations, if any, made by the intermediary to the people applying for the shares. The fact that in the case of this company some applications, including that of the plaintiff, were made on printed forms prepared by the company's solicitors, does not, in my opinion, make any real difference. Mr. Waithman got his forms by applying to the company's solicitors, because he wanted his friends to make proper applications for shares. No authority was given by the directors to the solicitors to supply Mr. Waithman with forms, nor can the directors, by seeing these forms used, be held thereby to have adopted Mr. Waithman as their agent in obtaining applications for shares. The directors did not issue any prospectus themselves, or try to get applications for shares, and, no doubt, because they thought Mr. Waithman and Mr. Thomson

would get a sufficient number of their friends to take up the necessary number of shares. But this did not, in my opinion, make Mr. Waithman and Mr. Thomson the special agents of the company to procure subscriptions on its behalf, or authorise them to make any representations on behalf of the company with a view of inducing their friends to subscribe. And, lastly, this is not a case like *Karberg's case* (*ubi sup.*), or coming at all within the fourth head. The application for shares made by the plaintiff was not one made conditional upon, or to the knowledge of the directors, based upon any special or other representations made by Mr. Waithman. The application was not even, to the knowledge of the directors, induced by representations by Mr. Waithman, though, even if it had been, whether that would in itself have been sufficient to bring the case within my fourth head, or have entitled the plaintiff to rescind, I need not now inquire. I should have been glad if I could leave the case there. I might certainly do so, because the point of law I have decided is fatal to the plaintiff's case. But the case may go elsewhere, and I think the judges of the courts above are entitled to know what the view of the judge who tried the case is upon the facts of the case. And therefore I feel bound to state the result upon my mind of the evidence upon the question of fact. Were misrepresentations in fact made to the plaintiff by Mr. Waithman which he relied upon, and were they material, and did they lead to this contract? Now, the onus of proving that, is upon the plaintiff. And I need only say that he has not discharged that onus to my satisfaction. I am not convinced that any material misrepresentation was made, certainly I am not satisfied that any misrepresentations were made or relied upon by the plaintiff, and induced him to apply for these shares. Representations undoubtedly were made by Mr. Waithman to the plaintiff. But these representations were all verbal; there is no document in the case except the notes, which I shall have to refer to in a moment. There is a conflict of testimony on all the really material alleged misrepresentations between the plaintiff and Mr. Waithman, and there is no other evidence except the evidence of these two witnesses before me, for they alone were present at the interviews at which the representations were said to have been made. But the plaintiff says that the court should hold that his case is the true one, because at the important interviews of the 9th Dec. 1890 and the 16th March 1891, he made, very shortly after the interviews, elaborate notes as to what passed, which notes he produces and relies upon. Now, the plaintiff cannot tell exactly where or when he made those notes, though he is convinced that he made them very shortly after, if not immediately after the interviews took place. I am not satisfied myself as to when those notes were made. I am not convinced that they do accurately represent what was said by Mr. Waithman at the interviews, although, when written, they might represent the memory of the plaintiff as to what passed. Let me take an example. The plaintiff alleges that at the first interview of the 9th Dec. 1890, Mr. Waithman told him that he was to get nothing out of the defendant company, and that no promotion money was to be paid. Now, it does seem difficult to suppose that Mr. Waithman should have made this statement to an acute lawyer like the plaintiff, when at the same time Mr. Waithman handed to that lawyer a copy of the memorandum and articles of association of the company, and in those articles was set forth, at fair length, in art. 120, the very contract under which 5000*l.* was to be paid to Mr. Waithman and Mr. Thomson; and that is the payment now complained of by the plaintiff. But it is suggested that Mr. Waithman might have hoped that the article would escape the plaintiff's attention. It did not, for the plaintiff, according to his own account, did read art. 120, and that appears from what passed at the interview of the 16th March 1891. If the notes are correct, and Mr. Waithman did make the statements to the plaintiff there appearing, the plaintiff must have known that he had been grossly deceived by his friend—for Mr. Waithman was his friend at that time. When the plaintiff discovered that, what did he do? Did he write to Mr. Waithman complaining? No. When he meets him on the 16th March 1891, and alludes to the subject, does he reproach Mr. Waithman with making gross misrepresentations? Not at all. His note as to the March interview says this: "Saw Waithman; pointed out art. 120, and said I thought it was a great deal to pay for simply getting mortgages of 20,000*l.*, for that was what it was, if he was to have nothing for the promotion of the company." That hardly looks the way in which a man would deal with the question, if in fact there had been such direct misrepresentations as appears in the note of the first meeting. And if Mr. Waithman had been detected in making such a fraudulent statement on the 9th Dec. 1890, one would have expected that his friend, so deceived, would have had nothing to do with the company, and no more to do with his friend. But, at any rate, it is difficult to conceive that he could have relied in this matter upon what Mr. Waithman had told him. However, I need not, and I will not go through the alleged misrepresentations in detail, or further discuss the subject. I have stated the result upon my mind, the result being simply this, that the alleged misrepresentations are not established to my satisfaction. I ought perhaps to say a word about certain alleged admissions made by Mr. Waithman at the interview or interviews between him and the plaintiff. At these interviews no one else was present. If the plaintiff intended to attack Mr. Waithman, and charge him with misrepresentations, and intended to use what passed as admissions of Mr. Waithman; to say the least of it, it would have been better that a solicitor should have taken care to have some independent person present. What he does is to have these interviews alone with Mr. Waithman, and then he makes most elaborate notes which represent Mr. Waithman, at these interviews, as having made clean admissions, in favour of the plaintiff, of these misrepresentations. I can only say this with regard to the conflict of evidence between Mr. Waithman and the plaintiff, and with regard to these notes, I think that the plaintiff's over keenness and engrossment in his own case has made him mistake what was said, and put down probably involved explanations for actual and clean admissions. At any rate, again I am not convinced that the important admissions, as stated by the plaintiff, were in fact made. I need not, having decided the question of law and

expressed my opinion upon the question of fact, further deal with the other points which arise, especially the point, as to delay. It follows that, in my opinion, the action has failed, and must be dismissed with costs. There will be judgment on the counter-claim with costs.

Solicitors for the plaintiff, *Bower, Cotton,* and *Bower.*

Solicitors for the defendants, *Bloxam, Ellison,* and *Co.*

Nov. 7 and 8.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re BUILDING ESTATE BRICKFIELDS COMPANY LIMITED; PARBURY'S CASE. (*a*)

Company — Winding-up — Contributory — Fully paid-up shares—Statement in certificate—Non-registration of contract—Estoppel—Companies Act 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.

W., who was entitled, under a contract with a company, to an allotment of certain fully paid-up shares therein to himself or his nominees, was instructed by P. to apply for an allotment to him of certain fully paid-up shares in the company, and was paid by P. therefor. W. did not act on these instructions, but retained the money and obtained from the company an allotment to P. of certain of the shares to which he (W.) was entitled. The share certificate sent by the company to P. contained a statement that the shares were fully paid up. P. acted on the faith of this statement, and under the belief that the shares allotted to him had been actually paid for in cash. No contract for the issue to W. of fully paid-up shares had been filed under sect. 25 *of the Companies Act* 1867. *The company having gone into liquidation, the liquidator placed P. on the list of contributories in respect of the shares allotted to him.*

Held, that P. was entitled to rely on the statement on the certificate that the shares were fully paid up, and that the company and its liquidator were therefore estopped from alleging that the shares were not in fact fully paid up.

SUMMONS.

The Buildings Estates Brickfield Company Limited was incorporated in Nov. 1879.

In 1878, prior to the incorporation of the company, A. F. Parbury instructed one Wright, who was one of the promoters of the company, to procure for him an allotment of 100 ordinary shares of 5*l.* each in the company, as soon as the company was incorporated, and gave him 500*l.* to pay for them.

Wright never acted upon these instructions, but retained the 500*l.*, and shortly after the incorporation of the company procured an allotment by the company to Parbury as his nominee of 100 ordinary fully paid-up shares of 5*l.* each, to which he (Wright) was entitled as one of the vendors under a contract with the company.

In Dec. 1879 the company sent to Parbury a certificate for the 100 shares, which stated that the shares were fully paid up.

Parbury subsequently sold twenty of these shares.

The company having gone into liquidation the official receiver and liquidator placed Parbury on the list of contributories in respect of eighty shares.

This was a summons taken out by Parbury asking that the list of contributories and the liquidator's certificate finally settling the same might be reviewed and varied by excluding therefrom the name of the applicant in respect of the eighty shares, or in the alternative that it might be declared that the eighty shares standing in his name were, at the date of the winding-up order, fully paid up, or were to be deemed fully paid up in favour of the applicant, and that the applicant was under no liability in respect thereof.

The ground alleged by the official receiver and liquidator for placing the applicant's name on the list was that, inasmuch as he had not paid cash to the company for his shares, and there was no registered contract, the applicant was not entitled to treat the shares as fully paid up.

The applicant alleged that he was not aware until after the commencement of the winding-up that Wright had not applied for the shares for him, and paid the company cash according to his instructions.

It did not apppear from the evidence that any notice that the requirements of sect. 25 of the Companies Act 1867 had not been complied with, had been received by the applicant.

By the Companies Act 1867, sect. 25, it is provided that

> Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

Upjohn for the summons.—Where a person is induced to accept shares in a company upon a representation by the company that the shares are fully paid up, and he acts in good faith upon that representation, the company is estopped from alleging that the shares are not fully paid up:

Burkinshaw v. *Nicholls*, 39 L. T. Rep. 308; 3 App. Cas. 1004; and s. c. *nom. Re British Farmers' Pure Linseed Cake Company*, 38 L. T. Rep. 45; 7 Ch. Div. 533.

Here the applicant received from the company a certificate which stated on the face of it that the shares were fully paid up, and having no notice that they were not in fact fully paid up, the company and its liquidator are estopped from alleging that the shares were not so paid up. There was nothing in the circumstances of this case to put the applicant upon inquiry. Sect. 25 of the Act of 1867 has no application as between the company itself and its shareholders:

Blyth's case, 36 L. T. Rep. 124; 4 Ch. Div. 140.

He also referred to

Re London Celluloid Company, 59 L. T. Rep. 109; 39 Ch. Div. 190;

Carling, Hespeler, and Walsh's cases, 33 L. T. Rep. 645; 1 Ch. Div. 115;

Re Macdonald, Sons, and Co., 69 L. T. Rep. 567; (1894) 1 Ch. 89.

E. S. Ford for the official receiver and liquidator.—The mere issue of a certificate stating that the shares are fully paid-up is no answer to sect. 25. It is laid down in Buckley on the Companies Acts (6th edit., p. 557), that "the original allottee

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

and . . . every subsequent transferee with notice holds the shares as unpaid." The applicant in the present case being the original allottee, cannot, I submit, set up an estoppel. An original allottee in order to escape the operation of sect. 25, must either prove the payment in cash for the shares, or the issue to him of the shares in pursuance of a registered contract. [WILLIAMS, J.—Do you say that the doctrine of estoppel is not applicable to the proof of payment under sect. 25?] Estoppel is applicable in the case of a transferee for value, but not in that of an original allottee. The issue of a certificate is not necessary to the issue of shares within sect. 25 of the Act of 1867:

Blyth's case (*ubi sup.*).

The applicant cannot set up any estoppel unless he can show that he in fact relied on the certificate:

Re Vulcan Ironworks Company, W. N. 1885, p. 120.

Here he must either have known the circumstances under which the shares were issued, or he was put upon inquiry. [WILLIAMS, J. referred to *Jones* v. *Gordon*, 37 L. T. Rep. 477; 2 App. Cas. 616.]

Upjohn replied.

WILLIAMS, J.—This is a very curious case, and raises a new point. Parbury is the allottee of these eighty shares upon which the question in this case arises. He was originally allottee of 100 shares, and he has dealt with twenty of those 100 shares by sale, and there are only eighty left. He has been placed on the list of contributories because cash has not been paid, and the liquidator says that by virtue of sect. 25 of the Companies Act 1862 he is now liable to pay in cash for these shares, there being admittedly no filed contract in existence. Now, so far as I know, there has been no case in which an allottee of shares has been allowed to escape the stringency of the provisions of sect. 25 without showing that the shares were issued in pursuance of "a contract duly made in writing, and filed with the registrar of joint-stock companies at or before the issue of such shares." But I have arrived at the conclusion that in this particular case Parbury is not liable to be put on the list of contributories except as the holder of fully paid-up shares. Mr. Upjohn has called my attention to *Re Macdonald, Sons, and Co.* (*ubi sup.*) and *Carling's case* (*ubi sup.*); but I am not going to decide the present case on the basis of either of those cases. The facts of this case are these: Parbury paid 500*l.* to Wright before the incorporation of the company, and asked him to apply for 100 shares, and to use the 500*l.* for the purpose of paying the amount necessary to be paid on the shares if the shares should be allotted to him (Parbury) in pursuance of the application. If Wright had made the application, and paid the money, Parbury would have been a member of the company, and the holder of shares paid for in cash. But in truth and in fact Wright never did act on the instructions given him by Parbury, and never did apply for the shares in accordance with the instructions. What Wright in fact did was—being entitled to receive fully paid-up shares under a contract to issue fully paid-up shares to himself and his nominees—to get the company under that contract to issue fully paid-up shares to certain persons as his nominees, amongst whom was Parbury. Parbury had a certificate of title sent to him which was issued not under contract between himself and Wright, but under a contract between Wright and the company. Those facts are not in dispute. Of those shares eighty are now held by Parbury, and he has never repudiated them in any way. They were thus standing in his name at the date of the winding-up, and he now seeks to say that in respect of these shares there has been a payment in cash. It is quite true that there has not been such a payment in fact; but Parbury says he is entitled to rely on the general law of estoppel, and that the company is estopped by reason of its certificate from denying that the shares are fully paid-up. As I understand the case before the Court of Appeal of the *British Farmers' Pure Linseed Cake Company* (*ubi sup.*), it was a case in which it was sought to make a transferee of shares, on which cash had not been paid, liable, and the transferee was allowed to say, "I produce the certificate of the company stating that the shares are fully paid up, and the company cannot say that sect. 25 has not been complied with." Let us look at the case and see if that is so. James, L.J. (at p. 538 of 7 Ch. Div.) says: "I think that the section to which we have been referred" (*i.e.*, sect. 25), "and which has been so often before the court, does not in the slightest degree alter the general law of the land as to the effect of the conduct of a representation by companies, or companies acting through their officers and servants. They are still liable, as they always were, to be bound by any representation made by them or by the officers to whom they have entrusted the management of their affairs. If a person goes to a company, and finding there the proper officer to give answers, says, 'Has such money been paid to you in respect of such and such shares?' and the answer is, 'Yes;' then the company is bound by the representation so made. A joint-stock company has no statutory immunity from the consequences of its acts and representations. In this case the certificate, upon the faith of which the company got the shareholder to become registered on their books as a shareholder, says, 'We have been paid in full.' The shareholder says, 'I took the transfer, I went and registered that transfer or allowed it to be registered in your books, I allowed my name to appear in your books as a shareholder upon the faith of the representation that the shares were paid up.' It is said that if that be so the 25th section is reduced to a nullity, for that all that the directors have to do is to go to a law stationer or a printer and get a certificate nicely engraved, which says the shares are fully paid up, and then the section is made nugatory, because there is a representation, by which the company is bound, that the shares have been paid up in cash. No doubt that representation does bind the company as against any person who was not aware that it was an untrue representation and acted on the faith of it." Thesiger, L.J. took the same view, and concludes his judgment in these words: "It seems to me clear that the present case comes within the general law as to estoppel, and that he (*i.e.*, the transferee) cannot be made liable." That being so, let me apply the law of estoppel to the case before me. Has there been a representation by the company? It is not disputed that there has been, and I have only to inquire whether

Parbury was a person who was unaware of the untruth of that representation, and whether, being so unaware, he acted on the faith of this representation. There is no evidence that he was aware of the untruth of the representation, and there is evidence that he acted on the faith of it. Why should not the law of estoppel be applied in this case? I am told that it should not be because of the principle cited by Mr. Ford from Buckley on the Companies Acts (*ubi sup.*), that "the original allottee and . . . every subsequent transferee with notice holds the shares as unpaid." I am asked to say that, therefore, the original allottee is to be made liable because he is an allottee. If I held that, I should not be applying the "general law of the land," and giving effect to the judgment of James, L.J. to which I have just referred. Sect. 25 of the Act of 1867 does not alter the law of the land as to estoppel. All Mr. Buckley means in the passage cited from his book is that as a general rule the allottee has notice. In the present case it seems to me that Parbury in truth was misled. He believed that the shares had been issued under a contract with himself, and that cash had been paid for them. In these circumstances is he prevented from relying on the estoppel arising from the statement in this certificate? In my opinion he is not. He had no knowledge of the circumstances under which the certificate was issued. It is said that, if he did not know the truth, he was put upon inquiry and might have learned it, and that he deliberately abstained from so doing, and is not, therefore, in a position to take advantage of this estoppel. But what is meant by saying that a person is put upon inquiry, and therefore unable to rely on the truth of a representation? That cannot be said, unless the person in question consciously abstains from doing that which, as a matter of business, he would naturally do, because he would rather not know the truth. I see no evidence of that kind here. It is not argued that the general law of the land does not apply. The only reason that can be given for not allowing the applicant to take advantage of the estoppel is that there is something in the mere fact of his being an allottee. Generally speaking, that may be so, because an allottee is a person to whom the original allotment is made, and he is therefore likely to be aware of the circumstances. That is not so in the present case, and I can see nothing to prevent Parbury from relying on the truth of the statement on the certificate.

Solicitors: *Bonner, Thompson, Burnie,* and *Co.*; *Phelps, Sidgwick,* and *Biddle.*

Nov. 6 and 7.

(Before WILLIAMS, J. sitting as an additional Judge of the Chancery Division.)

Re AMBITION INVESTMENT BUILDING SOCIETY. (*a*)

Building society—Notice of withdrawal—Dissolution—Insolvency—Knowledge of—Stoppage of business—Determination of right to withdraw—Priority—Building Societies Act 1874 (37 & 38 *Vict. c.* 42), *s.* 32.

Where the rules of a building society provide that members shall be entitled to withdraw their shares upon giving a certain notice the rules cease to operate not upon the insolvency of the society, but upon a stoppage of its business, or upon it becoming recognised that such a stoppage must take place.

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

SUMMONS.

The Ambition Investment Building Society was established in 1886, and was registered under the Building Societies Act 1874.

The rules of the society provided (rule 3) that an annual general meeting should be held in February, at which a balance-sheet, with a report from the directors, should be laid before the members; (rule 16) that holders of shares, on which not less than six months subscription had been paid, and in respect of which no advance had been made should be "investing members," and the holders of shares on which an advance had been made should be "borrowing members."

Rule 21 was as follows:

WITHDRAWAL.—Any member may withdraw all or any of his shares upon giving one month's notice in writing to the secretary, when such member shall be entitled to receive back his nett monthly subscriptions, with such portion of the profits realised as may have been posted to his credit, together with such interest as the directors, in their opinion, consider the state of the society's business will allow, such interest to be calculated up to the end of the month preceding the date of such notice. If more than one member shall give notice to withdraw, they shall be paid in rotation according to priority of notice; provided always that widows and children of deceased members shall have precedence.

Rule 30 provided for the dissolution of the society, on the resolution of three-quarters of the members present at a special general meeting convened for that purpose.

On the 28th Jan. 1891 the directors issued a balance-sheet which showed a surplus of 203*l.* 16*s.* 3*d.*, and a report which stated that during 1890 the society had done no new business; that in their opinion it ought to be dissolved; and that a meeting would be called to discuss the question.

The principal asset shown by the balance-sheet was a sum of 9000*l.* odd outstanding on loans to borrowing members on the security of leasehold property in respect of which a loss considerably exceeding the sum of 203*l.* 16*s.* 3*d.* had been sustained.

On the 5th Feb. 1891 a circular was issued by the secretary, under the direction of the directors, convening a special meeting for the 12th Feb. following immediately after the conclusion of the annual general meeting, at which resolutions would be proposed to dissolve the society and to appoint liquidators.

On the 12th Feb. 1891 the special meeting was held, and resolutions dissolving the society and appointing liquidators were passed. The liquidators carried on the business of the society, realised the assets, and paid the outside creditors.

In May 1895 an order was made to continue the voluntary winding-up under the supervision of the court.

Meanwhile, on the 10th Jan. 1891, Mrs. Lark, a non-borrowing member of the society, had given notice of withdrawal which matured between the issue of the circular and the passing of the resolutions to wind-up.

On the 5th Feb. 1891 Miss Abrey had given notice of withdrawal. On the 6th and 12th Feb. 1891 nine other members had given a similar notice.

This was a summons taken out by the liquidators for the determination by the court of the priorities of the members in respect of the surplus assets.

It appeared from the evidence that at the date of the circular the sum of 9000*l.* odd due from the borrowing members was worth about 1000*l.* less than the nominal amount..

J. Henderson for Mrs. Lark.—Mrs. Lark's notice of withdrawal matured either on the 7th or the 10th. Feb. according as the word "month" in rule 21 is to be construed as a lunar or a calendar month. In the early part of 1891 there was no question as to the insolvency of the society. "Insolvency" means an inability to pay debts and liabilities. The company carried on its business in the usual way down to the end of 1890. [WILLIAMS, J.—What do you say is the materiality of the insolvency?] The cases show that there can be no withdrawal after there is a notorious insolvency which must end in a winding-up:

Re Sunderland Thirty-sixth Universal Building Society, 62 L. L. Rep. 293; 24 Q. B. Div. 394.

I submit that at the date of Mrs. Lark's notice of withdrawal there was no notorious insolveney. The circular shows that the society intended to continue to carry on its business. The balance-sheet not only shows solvency, but a surplus which is certified by the auditors of the society. [WILLIAMS. J.—According to my understanding of the *Sunderland* case (*ubi sup.*) it establishes no proposition of law whatever.] That being so, I rely on rule 21. *Walton* v. *Edge* (52 L. T. Rep. 666; 10 App. Cas. 33) throws some light on the question as to how a rule of this kind is to be construed. A dissolution of a society under the Building Societies Act 1874 is merely a dissolution of partnership, and does not presuppose insolvency. [WILLIAMS, J.—I do not think insolvency as a principle of law has anything to do with the case.]

Chester Jones for Miss Abrey.—Miss Abrey gave notice of withdrawal on the 5th Feb., the day on which the circular was issued by the directors. [WILLIAMS, J.—If the affidavit of the liquidator suggests that she did not know of the circular, and she does not answer it, I must take it that she did know of it.] At that date there was a balance of 203*l.* 16*s.* 3*d.* after providing for all the liabilities of the society, including the amounts due to unadvanced members. The winding-up was simply a dissolution of the society in accordance with its rules. Apart from the cases, any member was entitled to withdraw under the rules, notwithstanding the circular and the resolutions. There is no power under the Building Societies Act 1874 to wind-up a building society otherwise than under the supervision of the court:

Building Societies Act 1874, s. 32;
Palmer's Winding-up Forms, p. 558.

There was, therefore, I submit, on the 12th Feb. 1891 a dissolution of the society, but not in the ordinary acceptation of the term a winding-up. [WILLIAMS, J.—Mr. Buckley in his book on Companies (6th edit.), p. 176, lays it down that, "After winding-up commenced the right to withdraw is no doubt at an end. The assets must be administered according to the rights of the parties at a moment not later than that at which the winding-up commences. But the right to withdraw may cease at an earlier date, as at the moment when the society has become notoriously unable to meet its liabilities and notices of withdrawal given or maturing after that time may not entitle the withdrawal member to payment in priority to other members."] I accept that statement unreservedly. The words "notoriously unable to meet its liabilities" there mean unable to meet its liabilities to the knowledge of the members and persons interested in the society, not to the knowledge of the officers of the society. There is no evidence here that at the date of Miss Abrey's notice of withdrawal anyone knew of the insolvency of the society. It is essential that the liquidator, in order to bar Mrs. Abrey's right of priority, should show that it was known that the society was insolvent. This is a statutory association which is dependent on its rules and the Act of 1874 only, and under rule 21, where a member has given notice of withdrawal, and a month has expired, he is entitled to be paid, whatever may subsequently happen:

Re Blackburn and District Benefit Building Society, 49 L. T. Rep. 730; 24 Ch. Div. 421;
Walton v. *Edge* (*ubi sup.*).

If the insolvency, to put an end to the right of withdrawal, must be known to the officers of the society, there is here no evidence that the officers knew of the insolvency of the society. So far from that being the case, they issued a balance-sheet which showed a balance in favour of the society.

Hansell for members who had given notice after the issue of the circular.—I submit that the fund ought to be distributed *pari passu*, and I rely on the fact that the insolvency was known to the officers of the society. I admit that the rules of the society are to be looked at to see what was the contract between the members, but in construing them the court must consider whether they were intended to be applicable when the society ceased to be a going concern. That explains the decision in

Re Sunderland Thirty-sixth Universal Building Society (*ubi sup.*).

It is not necessary that the shutters should be put up in order that a society should cease to be a going concern. It is clear that at the end of 1890 the society was in the fullest sense of the term insolvent. The true construction of the contract between the members was that when there should be losses there should be equality. It was never intended that one member should escape liability by giving notice. Assuming that knowledge of insolvency is necessary I submit that it is the knowledge of the officers of the society. Under rule 21 no right can accrue until after the notice of withdrawal has matured. There is no right to withdraw until after the expiration of a month, and the expiration of such month is a condition precedent to the right to withdraw.

Fawcus for the liquidators and for members who had given no notice of withdrawal.—I adopt Mr. Hansell's argument. All the notices of withdrawal with the exception of Mrs. Lark's matured after the dissolution. The cases show that not

only must the notices of withdrawal have been given, but that they must have matured before the dissolution:

Walton v. *Edge* (*ubi sup.*).

In that case all the rights had matured. The liquidation commenced with the dissolution, and therefore notices which had not matured till after that date conferred no priority:

Carrick v. *North British Building Society*, 24 Sc. L. Rep. 600;

Re Sunderland Thirty-sixth Universal Building Society (*ubi sup.*);

Barnard v. *Tomson*, 70 L. T. Rep. 306; (1894) 1 Ch. 374.

[WILLIAMS, J., referred to *Brownlie* v. *Russell* (48 L. T. Rep. 881; 8 App. Cas. 235).]

[WILLIAMS, J.—I agree that the rights of parties could not be altered after the dissolution, and for this purpose a dissolution is the same as a winding-up.]

J. Henderson replied.

WILLIAMS, J.—This is a case which raises questions as to the priorities of the non-borrowing members of the Ambition Investment Building Society. The society has dissolved and has paid all its outside creditors in full, and there is a surplus left, and the question is as to the priorities of these non-borrowing members *inter se*. It may be taken that the material dates are these: On the 28th Jan. 1891 a report and balance-sheet were issued by the directors of the society, and upon the 5th Feb. a circular was issued by the secretary by the direction of the officers of the society, convening a special meeting to take place on the 12th Feb., immediately after the conclusion of the annual general meeting, to consider resolutions to the effect that the society should be dissolved; and upon the 12th Feb. the special meeting was held, and the society was dissolved. Now there are various classes of non-borrowing members who are represented before me. A certain number of non-borrowing members had given notice of withdrawal, and they say that the giving of their notices under the circumstances of this case gave them a right of priority in the distribution of the assets of the society amongst the members *inter se* remaining after payment in full of the outside creditors of the society. One of these claimants is a lady named Mrs. Lark. It appears that she gave a notice of withdrawal which matured on the 7th or the 10th Feb. (it does not matter in the least which), that is, on some day between the issue of the circular convening the meeting and the holding of the meeting itself. In the case of all the other members claiming priority their notices did not mature until after the resolutions for dissolution had been passed on the 12th Feb. For the judgment which I am about to deliver it is immaterial to consider the particular dates of their notices as in the case of Mrs. Lark. Sometimes it is not an assistance to me to have a number of cases cited because unfortunately it is difficult to reconcile them, but in the present case it is not so. It seems to me that the cases which have been cited to me form a continuous and uninterrupted current of authority, no one of them in any way contradicting or conflicting with the others. The last of these cases was *Barnard* v. *Tomson* (*ubi sup.*). I do not propose to go into the facts of that case at any length, because when one comes to look at the judgment of North, J., it is clear that he is only recognising and carrying out the principles which were laid down in the judgment delivered by Mathew, J. in *Re Sunderland Thirty-sixth Universal Building Society* (*ubi sup.*). The view taken by North, J. is that the line ought to be drawn at the time when a stoppage of the business has actually taken place, or it is recognised that the business must be stopped. In the case before him a report had been made by the accountants which had been rendered necessary by reason of certain defalcations of an officer of the society. It was a case in which undoubtedly the society had sustained great losses, and in which it might very well be a question whether the society ought not to dissolve and stop business. But the officers of the society in their report to the members had not recognised the necessity of stopping business; on the contrary, they showed that, after consideration, they thought on the whole the society had better go on. The final clause of their report stated that "There is no reason why the society should not with careful, judicious, and economical management, have a good future before it." This being a society in which a question had obviously been raised as to the desirability of stopping business, and the officers having reported against it, North, J. says this, "The result is, that I can find nothing whatever prior to the instrument of dissolution, to indicate such a state of things as would put an end to the operation of the existing rules upon the principles laid down in the cases to which I have referred. I have no materials for drawing a line earlier than the date of the instrument of dissolution. It seems to me, therefore, that the notices to withdraw are good down to that time." What were the materials for which North, J. looked, and which he says he could not find? I understand from his judgment that there had neither been a stoppage of business in fact, nor a recognition by the officers of the society that there must be a stoppage of business. He does not confine himself to the question whether the society was solvent or insolvent. That is not the question he put to himself. It seems to me plain that the question he put to himself was this, "has there been a stoppage in fact, or a recognition by the officers of the fact that there must be a stoppage?" There had not been a stoppage, and as to recognition by the officers of the fact that there must be a stoppage, they, although they considered the financial position of the society sufficiently grave, after they had considered the question, in the result reported against an immediate dissolution. North, J. in saying that follows another decision—that of Coleridge, C.J. and Mathew, J. in *Re Sunderland Thirty-sixth Universal Building Society* (*ubi sup.*). Let us see what the judges decided in that case. After stating that the persons who had given notice of withdrawal claimed that until a winding-up order had been actually made they were entitled to withdraw, and so to constitute themselves creditors of the societies, and that the liquidator on the other hand insisted that the societies were known to be insolvent on the 17th Feb., and that the right which members would otherwise have had of quitting the societies was then at an end, and after referring to the rule as to withdrawal, they say, "We are of opinion that this rule" (*i.e.*, the rule as to withdrawing members) "was not in-

tended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose that it was intended in the event of insolvency to permit one set of members to escape liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of its business, and, therefore, only to provide for a withdrawal from the society when it was, or was believed to be, solvent." There has been a good deal of argument before me as to what is the meaning of that judgment. In particular a question has been raised and necessarily raised as to what the judges meant when they spoke of the society being no longer able to carry on its business, and of its being notorious that it could not meet its liabilities. I do not think the judges had the slightest intention in that portion of their judgment of defining what were the conditions the happening of which would bring to an end the right of withdrawal. All that they meant to do by their judgment was to hold that in the particular case before them these conditions were present; that there was in fact a society unable to carry on its business, and that it had become notorious that the society could not meet its liabilities. I do not understand them to lay down any such rule as that the right to withdraw is dependent on the knowledge either of the person giving notice of withdrawal or of the officers of the society of the insolvent condition of the society. I only understand them to say that those conditions were present in that case, and that being present the society must be considered as having stopped business or resolved to stop business at that date which they were then dealing with. And when I look at the case of *Walton* v. *Edge* (*ubi sup.*), in the House of Lords, and the case of *Carrick* v. *North British Building Society* (*ubi sup.*), the case on which Coleridge, C.J. and Mathew, J. say their judgment is based, I find in them both that the real question propounded by the judges to themselves was "had there been a stoppage of business or anything that was equivalent to a stoppage of business," and they held that wherever there had been a stoppage of business, or anything equivalent to it, the right of withdrawal is determined. But it does not seem to me that insolvency, or even insolvency known to the officers of the society, is equivalent to a stoppage of business, and I propose to deal with the present case on that basis. Lord Shand, in *Carrick* v. *North British Building Society* (22 Sc. L. Rep. 833), when he is dealing with it says, at p. 840, "In the case of *Tennent* v. *The City of Glasgow Bank* (40 L. T. Rep. 694; 4 App. Cas. 615), in which a number of authorities were cited and considered as to the effect of a stoppage of a business on the declared insolvency of a company, it was held that no change could thereafter be made in reference to the rights or status of the members of the company, so that at least the rights of creditors might be preserved." That seems to me to show that he recognised that the condition which would determine the right to withdraw was the stoppage of business or its equivalent. I asked Mr. Hansell whether he would look at rule 21, and tell me what were the words he would introduce in order to give to the rule the construction which he says it ought to bear. The words he suggested were these: "Provided that this rule shall have no application when the state of the finances and business of the society is such that it cannot continue as a going concern, *i.e.*, is no longer commercially solvent." I do not accept that proviso. I am not bound to invent a proviso for myself; but, if I had to do so I should be more inclined to insert this: "Provided that this rule shall have no application where the society has stopped business, or it is recognised by its officers that it must stop business." When it is considered who are the persons for the regulation of whose mutual rights rule 21 was passed, it seems plain that stoppage of business or recognition of the fact that stoppage of business is inevitable is the proper point at which to draw the line, and not insolvency. Let us remember what are the relations of these persons. They have in common put their capital into an adventure or concern which it was hoped would yield a profit. There is a proviso for withdrawal of capital. How long is the right to withdraw capital to continue? It must continue as long as the adventure continues, or its continuance is contemplated. But from the moment the adventure has come to an end, or it is recognised by the adventurers themselves or their officers that it must come to an end, every principle of justice requires that all who have joined in the common adventure shall in common bear the loss. That is the moment at which the rule ought to cease to operate—when the common adventure has come to an end, or it is recognised either by the members personally or by their officers that it must come to an end. From that time there ought to be no applications for withdrawal. I have only further to ask myself the question, Had that point been arrived at in any of these cases? To my mind it clearly had been arrived at at the date of the resolution for dissolution, the 12th Feb.; it does not seem arguable that the right of withdrawal continued after that. But when had it arrived prior to that date? It did not arrive simply because the society was insolvent. A company which is insolvent may still in the hands of sanguine adventurers carry on its business. It did not arrive when the directors published their report on the 28th Jan., because, although the directors did not in this case, as in the case before North, J. positively recommend the continuance of the business, they do clearly put it before the members as a matter in which it was perfectly reasonable for the members either to go on or to dissolve. Therefore, there was no recognition by that report of the necessity of stopping business. That being so, the next point is the issue of the circular. The issue of the circular carries it no further than the report. The report contemplated that the members would be called together to decide this question in one way or another, and the fact that the meeting was convened to consider it leaves the matter exactly where the report left it. Under these circumstances, the conclusion I have come to is, that in Mrs. Lark's case there was not before the maturing of her notice on the 7th or 10th Feb. either a stoppage of business or a recognition of the necessity for it, and she is entitled to be paid in full before the other non-borrowing members, and they must be paid *pari passu* without any priorities. I regard this society much as a

partnership. An outgoing partner would be entitled to his costs out of the funds. These proceedings are the necessary complement of the dissolution, and the costs of all parties will come out of the funds.

Solicitors: *Lewis* and *Son*; *P. Rutland.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 18 *and* 19.

(Before the PRESIDENT (Sir Francis Jeune.)

THE PONGOLA. (a)

Co-ownership action—Claim against managing owners — Re-opening accounts — Statute of Limitations.

The relations between co-owners of a vessel engaged in foreign voyages and her managing owners are, in the absence of any evidence to show that each voyage is a separate trading transaction, to be treated, in relation to the profit and loss on her voyages, as a continuous partnership or agency, as the case may be. Consequently the rule as to partnership accounts applies, the accounts may be gone into without any limit as to time, and the Statute of Limitations does not apply so long as the partnership or agency is continuous.

THIS was a motion by the defendants in objection to a preliminary report made by the registrar in an action *in personam*, in which the plaintiffs as owners of certain shares in the steamship *Pongola*, of which the defendants were managing owners, claimed to have an account taken of certain brokerage moneys, commissions, rebates, discounts, and other moneys alleged to have been received and improperly detained by them during the period from 1879 to the present day.

The matters in dispute were referred to the registrar. In his report he stated that the first question was, whether the plaintiffs were entitled to have the accounts re-opened from the dates at which they had respectively become part-owners, or were limited to the six years preceding the commencement of the action. The registrar found that, without imputing fraud to the defendants, the fact of their having retained undisclosed commissions and discounts was a sufficient ground for re-opening the accounts for the period extending beyond the statutory limit of six years.

The ship was employed in voyages to South Africa out and home, and voyage accounts were rendered at the end of each voyage.

The defendants now moved the court for an order that the registrar's report be rejected and set aside.

Aspinall, Q.C. and *Butler Aspinall*, for the defendants, in support of the motion.—Each voyage must be treated as a separate adventure. The relations between the co-owners form a partnership *quâ* each voyage. When the voyage is ended the partnership is ended, and the Statute of Limitations is applicable:

Lindley on Partnership, 6th edit., pp. 25, 34;
Green v. *Briggs*, 6 Hare, 395;
Helme v. *Smith*, 7 Bing. 709;
Knox v. *Gye*, L. Rep. 5 H. of L. Cas. 656.

But, if not partners for the voyage, the defendants are agents, and the accounts in the circumstances cannot be re-opened. The relation of principal and agent does not constitute an express trust. Given fiduciary relations, it does not necessarily follow that the Statute of Limitations is not applicable:

The Metropolitan Bank v. *Heiron*, 43 L. T. Rep. 676; 5 Ex. Div. 319.

The accounts were closed and settled at the end of each voyage, and the statute runs from the date of the closing of the accounts. Where a person standing in a fiduciary position receives a bribe or otherwise makes a profit by way of commission for which, upon the principles of equity, he would have to account if action were taken in time, the sum received does not form part of the trust estate until it has been so declared by the court; and therefore the Statute of Limitations is a bar:

The Metropolitan Bank v. *Heiron* (*ubi sup.*);
Lister and Co. v. *Stubbs*, 63 L. T. Rep. 75; 45 Ch. Div. 1.

They also cited

Robinson v. *Alexander*, 2 Cl. & F. 717;
Inglis v. *Haigh*, 8 M. & W. 769.

Bucknill, Q.C. and *Boyd*, for the plaintiffs, *contrà*.—Whether each voyage is or is not a separate adventure depends on the facts, which here do not bear out the defendants' contention. There were fiduciary relations between the parties, and the accounts can be re-opened:

Williamson v. *Barbour*, 37 L. T. Rep. 698; 9 Ch. Div. 529.

But even supposing a succession of voyage partnerships, and each partnership ended, the accounts were continuous and the agency was continuous, and hence the Statute of Limitations cannot be pleaded:

Betjemann v. *Betjemann*, 73 L. T. Rep. 2; (1895) 2 Ch. 474.

As a fact there was a continuous agency throughout; but, assuming there was not, the Court of Chancery on error shown could re-open the accounts. The case of *Knox* v. *Gye* (*ubi sup.*) can be distinguished on the ground that there *quâ* the executor the partnership was at an end. In *The Albion* (6 L. T. Rep. 164; 1 Mar. Law Cas. O. S, 206), which was the first case in the Admiralty Court under the Admiralty Court Act 1861 (24 Vict. c. 10), the court ordered the re-opening of accounts for eight years. The defendants really acted as agents in a fiduciary relationship, and errors have been admitted of such magnitude as entitle us to have the accounts re-opened. No case in Chancery can be cited where under such circumstances the court has refused to re-open accounts. The case of *Noyes* v. *Crawley* (37 L. T. Rep. 267; 10 Ch. Div. 31) is not in point.

Aspinall, Q.C. in reply.—The arrangement was not a continuing one, and the carrying over from account to account was a mere matter of convenience. He referred to

The Admiralty Court Act 1861:
The Great Western Insurance Company v. *Cunliffe*, 30 L. T. Rep. 661; 2 Asp. Mar. Law Cas. 298; L. Rep. 9 Ch. 255;
Baring v. *Stanton*, 35 L. T. Rep. 622; 3 Asp. Mar. Law Cas. 294; 3 Ch. Div. 502.

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The PRESIDENT.—I think the point which Mr. Aspinall has just been arguing is the real question in this case. It is whether or no, in the case of a vessel engaged not in home voyages, but in foreign voyages, each of her voyages is to be treated as a separate adventure, so that the arrangements and relations between the co-owners, so far as these are relations of partnership, terminate at the end of each successive voyage, or, if regarded as a matter of agency, whether the managing owners cease to be agents on each occasion at the end of the voyage. In this case it appears to have been an undoubted fact that since 1879 there have been thirty-three voyages of this vessel. During the course of that time accounts have been rendered voyage by voyage in almost every case—though I think in some cases voyages were put together—by the managing owners to the other co-owners, showing a balance one way or the other. In those accounts it is found by the registrar sufficiently for the purposes of this case that there are omitted items which the co-owners, who are the plaintiffs, say ought to have been brought in, and which, putting them very generally, are items of commissions received or retained by the managing co-owners, which they have no right to receive or retain, which they have not brought into their account, and which, if the accounts were strictly taken, were items for which they ought to give credit. Now I have, I confess, no doubt myself, if you look at this as a matter either of partnership or agency, that the Statute of Limitations applies if the partnership came to an end more than six years ago, or if the agency was terminated more than six years ago. I do not say it is necessary to hold that co-owners in ships are in every sense of the word partners, but they are partners in this way, that, as Lindley, L.J. says in the passage which has been cited in regard to co-ownership in chattels, "where a ship is employed by all the part-owners, or by some of them, but not against the will of the others, they all share her gross earnings, and contribute to the expenses incurred in obtaining them; and in such a case there is little, if any, difference between the account which is taken between the part-owners and that which would be taken if they were actual partners" (Lindley on Partnership, 6th edit., p. 34). So that for the purpose of taking accounts they must be treated as partners. Can there be any real doubt that, as the law stands, after a partnership has terminated, in the absence of fraud, or, it may be, in the absence of circumstances which do not arise in this case—can it be doubted that the statute applies? I do not think it can. There is, it is said, no distinct authority to show it. There appears to me to be very considerable authority to that effect. In the first place, we have the statement in the text-book, to which I have already referred (Lindley on Partnership, 6th edit., p. 512): "So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the Statute of Limitations has, it is conceived, no application at all; but, as soon as the partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run." An authority before the Act of 1890 is quoted, and also the authority of *Barton* v. *The North Staffordshire Railway Company* (58 L. T. Rep. 549; 38 Ch. Div. 458), which is a decision by Kay, J., in which he states, "it is settled that, after a partnership has ceased, any claim on simple contract by one former partner against the others in respect thereof is, *primâ facie*, subject to be barred after the expiration of six years." Then is quoted the case of *Knox* v. *Gye* (*ubi sup.*) and *Noyes* v. *Crawley* (*ubi sup.*), which appears to me to be a clear authority that before the Act of 1890 accounts could not be re-opened as between partners where the partnership had come to an end more than six years before. The Partnership Act of 1890 would not seem to lay down a new principle; it seems to recognise what was the law—what, at any rate, seems to be the law now—that at the end of a partnership, whether it be the total end of it as regards the partners, or whether it be the end as regards a particular person who is excluded or who dies and has representatives, there is a debt, and that it is subject to the statutory limitations as to its recovery. If the matter be looked upon as one of agency, it appears to me that the same termination arises, although, if indeed it can be shown that the agent is clothed with an express trust, a totally different series of considerations ensue. The partner is the agent for the other partners, as Jessel, L.J. said in the case of *Williamson* v. *Barbour* (*ubi sup.*), but an agent may be, of course, very much more than that. He may be an actual trustee, and there are cases which run rather fine as to when he is or when he is not. For example, the well-known case where a solicitor was acting as the general representative of a person, doing all his affairs for him, it was held that he was a trustee, and that as against him the accounts might be opened after the expiration of six years. But that is a different case to this, and I do not think it can be said that in this case there is any such express trust, though there are such fiduciary relations as would make a co-owner a trustee for his partners in that sense. But if this case is to be treated as a case like those of *The Metropolitan Bank* v. *Heiron* (*ubi sup.*) and *Lister* v. *Stubbs* (*ubi sup.*), then the principle of those cases applies, and you would have to claim the particular items as items of debt, and they would, therefore, be barred by the Statute of Limitations. The matter, therefore, whichever way you look at it, appears to me to come to this: whether there are such continuing relations between the co-owners and the managing owners as constitute what is like a partnership between the parties or a continuing agency. That is a question of mixed fact and law. Mr. Aspinall puts it nearly as high as a question of law. What Mr. Aspinall said is that in practice each voyage is a separate adventure, and ought so to be treated for all purposes relevant to this case. He admits that in the case of vessels employed on home or coasting voyages the same principle cannot be applied, because there it would be ridiculous to talk of each sailing as being a separate venture. Take the case of a steamer plying between two ports, or the extreme case of a channel steamer crossing the channel three or four times a day; it would be ridiculous to say that each voyage is a separate adventure, and it is admitted that in such cases there is a continued relation between the co-owners and the managing owners. Mr. Aspinall has also pointed out that there are peculiarities in regard to the relations of co-owners of ships

differentiating them from the ordinary relations of other partners. No doubt that is so. Any co-owner has the peculiar right of withdrawing himself from any particular voyage; and of requiring bail to be given. That is a peculiarity, no doubt, in the relations of co-owners as regards a ship; and similarly, again, a co-owner may sell one or more of his shares and place somebody else in his position. All those things, no doubt, constitute peculiar matters in regard to the ownership of ships and the relations of co-owners. But what seems to be the case is, that although any one of the circumstances which have been alluded to may give rise to a question whether a partnership such as this continues to exist, or an agency continues to exist, in the long run it must come back to this, that in any particular case we must see whether or not there has been a continued partnership or a continued agency. It may or may not be that if one of the co-owners put somebody else in his place, or one had died, it would not be a continuous partnership. But in the particular case with which we have to deal nothing of that kind has taken place. I think it has been said that somebody has gone out, and, if that is so, a different question arises; but, speaking generally, there have been the same co-owners from first to last, and the same managing partners, and they have been dealing with this ship, voyage after voyage, admittedly in exactly the same way. Is there anything to show that between them the relations were broken up into parts, or into different periods? I do not think there is. I was at one time a little impressed by observing that at the end of the twelfth voyage there seems to have been a kind of settling, but that after that the accounts have run on. I do not think that that ought to interfere with what appears to me to have been the general current of business between these parties. Whatever they could have done, what they did do was to treat the whole matter as one. The case of *Betjemann* v. *Betjemann* (*ubi sup.*), which was decided in the Chancery Division during the present year, may be referred to as showing that where one partner goes out and the other partners continue, as between them there is a continuing partnership. And in this case, in analogy to that, I should say that, whether one partner may have gone out or not, and whether some shares may have been sold out or not, still, taking it as a whole, there have in this case from first to last been continuing relations between the co-owners and the managing owners. I am unable to say that in this case there has been such a breaking up as would constitute thirty-three different voyages, which is what I am asked to say. I have felt some little difficulty about this case, because unfortunately this point does not seem to have been taken before the learned registrar. It seems to have been admitted there that the matter was a continuous one, and it has been raised now by the ingenuity—I do not say it in any objectionable sense—but by the ingenuity of the counsel from whom it has come. He was acute enough to see that ships may be placed in a different position from ordinary partnerships as regards the law. That has prevented one from getting some of the information which perhaps one might otherwise have obtained as to the rendering of the accounts, which might have thrown some light on this matter. But I do not think it has been made out in this case that there has been a series of separate adventures. On the contrary, I regard this as one long continuing transaction. If that is so, then I think the case of *Williamson* v. *Barbour* does apply. I have no doubt that since the statute of 1861, and the Judicature Act of 1873, the court will proceed on the same principle as the Court of Equity would proceed in taking accounts. I do not, however, say that this court will be bound by the practice of the Court of Chancery as to surcharging, &c.; but I should think that this court would leave the matter to the registrar to deal with in the way which he would think best. I do not cite *Williamson* v. *Barbour* as an authority for more than this, that the Court of Equity will re-open an account which goes beyond the Statute of Limitations, where there is an existing agency continuing over a number of years, when it is pointed out that there can be shown sufficiently grave errors to justify the re-opening of the accounts. As regards this court, there does not appear to be any authority bearing directly on this question. I was referred to a case directly after the statute of 1861, a very short case, decided by consent, and the learned registrar has referred to another; but for this purpose I think it is sufficient to say that there is no authority, so far as I know, in this court contrary to what I take to be the practice of the Court of Equity in this matter. I think, therefore, that the report of the learned registrar must be confirmed, and that the matter must go before him again for further investigation. I do not give any directions to the learned registrar as to what items are to be gone into. It is only necessary to decide what is in dispute. I think that way of putting it is a better way than giving detailed instructions, which I do not feel able to give. Nor do I say anything about the question of fraud. The learned registrar has not found any, nor has he been asked to say that there was any fraud. Of course, if fraud were shown, it would re-open any account; but I think, in this case, that at the present stage fraud has neither been alleged or shown.

Solicitors for the plaintiff, *Ince, Colt,* and *Ince.*
Solicitors for the defendants, *F. W.* and *H. Hilbery.*

House of Lords.

June 25, 27, 28, *and Dec.* 5.

(Before the LORD CHANCELLOR (Herschell), Lords ASHBOURNE, MACNAGHTEN, and DAVEY.)

TREGO AND ANOTHER *v.* HUNT. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Partnership—Retiring partner—Sale of goodwill—Competing business—Soliciting customers of old firm.

When the goodwill of a business is sold the vendor does not, by reason of that sale only, in the absence of any covenant, impose upon himself any obligation not to carry on a competing business. But, as the connection formed with

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

customers constitutes the goodwill of a business, a man who has parted with the goodwill must not avail himself of his special knowledge of the old customers to attract them to his competing business.

The appellants and the respondent carried on a business in partnership on the terms that, on the expiration of the partnership by effluxion of time, the goodwill of the business should belong to the appellants.

Held (reversing the judgment of the court below), that the appellants were entitled to an injunction restraining the respondent from canvassing in any way by himself or his agents any person who had been, prior to the dissolution of the partnership, a customer of the firm, with a view of inducing such person to deal with him after such dissolution.

Pearson *v.* Pearson (51 *L. T. Rep.* 311; 27 *Ch. Div.* 145) *overruled.*

Labouchere *v.* Dawson (25 *L. T. Rep.* 894; *L. Rep.* 13 *Eq.* 322) *approved and followed.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Halsbury, Lindley and Smith, L.JJ.), who had affirmed a decision of Stirling, J.

The case is reported in 72 L. T. Rep. 269; and (1895) 1 Ch. 462.

The appellants and the respondent had carried on business in partnership since the 1st Jan. 1889, upon the terms that on the expiration of the partnership the goodwill of the business should belong to the appellants alone. The partnership would expire by effluxion of time on the 1st Jan. 1896.

In Dec. 1894 the appellants became aware that the respondent was copying the names and addresses of the customers of the firm from the entries in the books of the firm, with the avowed object of using the information, after the determination of the partnership, to assist him in carrying on a competing business.

The appellants moved for an injunction to restrain him, but the injunction was refused by Stirling, J., on the authority of *Pearson* v. *Pearson* (51 L. T. Rep. 311; 27 Ch. Div. 145), and his decision was affirmed by the Court of Appeal, as above mentioned.

Graham Hastings, Q.C., *Cozens-Hardy*, Q.C., and *Clare* appeared for the appellants.

Sir *R. Webster*, Q.C., *Buckley*, Q.C., and *G. Henderson* for the respondent.

In addition to the cases referred to in the judgments the following were also cited in the arguments:

Shackle v. *Baker*, 14 Ves. 468;
Kennedy v. *Lee*, 3 Mer. 441;
Mogford v. *Courtenay*, 45 L. T. Rep. 303;
Vernon v. *Hallam*, 55 L. T. Rep. 676; 34 Ch. Div. 748.

Cozens-Hardy, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 5.—Their Lordships gave judgment as follows:—

Lord HERSCHELL. (*a*)—My Lords: A very important question, which has given rise to much difference of judicial opinion, presents itself for decision in the present case. For some years prior to 1876 William Henry Trego, the husband of the appellant Anna Trego, had carried on business as a varnish and japan manufacturer, at Bow and in London, under the name of Tabor, Trego, and Co. In that year he took the respondent into partnership, but upon the terms that the goodwill of the business should be and remain the sole property of William Henry Trego. The partnership continued until his death. In Feb. 1889 a partnership agreement was made between the appellants and the respondent that they should carry on the business under the old style of Tabor, Trego, and Co. for a term of seven years. The agreement provided that the goodwill should nevertheless be and remain the sole property of Anna Trego. In December of last year the appellants found that the respondent had employed a clerk of the firm, out of office hours, to copy for him the names, addresses, and businesses of all the firm's customers. The respondent admits that his object in having the copy made was to acquire information which would enable him, when the partnership comes to an end, to canvass these persons and to endeavour to obtain their custom for himself. The appellants accordingly brought this action, and moved for an injunction to restrain the respondent from making copies of or extracts from the partnership books for any purposes other than the business of the partnership. Stirling, J., in the course of his judgment, said: "It has been admitted in the argument, and for the purposes of it, that the defendant intends, in the event of the partnership coming to an end at the beginning of next year, to use this list for the purpose of soliciting the customers of the present firm. He proposes then to engage in a business of a similar nature to that carried on by the firm, and the question which I have to decide is whether he is entitled to make such use of the list." It seems clear, therefore, that the point in contest before the learned judge who heard this motion was whether the respondent was entitled to make use of the list of the customers of the firm which he had obtained in order to canvass them when he started business on his own account. I mention this because it may have been open to contention on behalf of the respondent that he was at all events entitled, whilst he remained a partner, to make copies of the partnership books, and that it was premature to come to the court to restrain the use of these copies even if he were not entitled when he ceased to be a partner to canvass the customers of the firm; but, in view of the fact that the respondent threatened to use the list for the purpose of canvassing the persons named therein, and having regard to the course taken before the learned judge, I think it would have been open to him to grant an injunction, though not in the terms prayed for, if the canvassing of those customers would be a wrongful act on the part of the respondent. Stirling, J. and the Court of Appeal had, I think, no alternative but to refuse to grant any injunction. They were bound by the decision of the Court of Appeal, in the case of *Pearson* v. *Pearson* (51 L. T. Rep. 311; 27 Ch. Div. 145), that even though the goodwill belongs to one of the partners, it is lawful for the other, on the termination of the partnership, to canvass

(*a*) Between the argument of the case and the judgment Lord Herschell resigned the office of Lord Chancellor.

the customers of the firm. Consistently with that decision, I think it would have been impossible to hold that the appellants were entitled to an injunction; that case is, however, open to review by your Lordships, and the real question in the present case is whether it was well decided. The question whether a person who had sold the goodwill of his business was entitled afterwards to canvass the customers of that business came first before the courts for decision in the case of *Labouchere* v. *Dawson* (25 L. T. Rep. 894; L. Rep. 13 Eq. 322). Lord Romilly, M.R. answered in the negative. He was of opinion that the principles of equity must prevail, and that persons are not at liberty to depreciate the thing which they have sold. He considered that the defendant was not entitled personally, or by letter, or by his agent or traveller, to go to anyone who was a customer of the firm, and to solicit him not to continue business with the old firm, but to transfer it to him—that this was not a fair and reasonable thing to do after he had sold the goodwill. He accordingly granted an injunction to restrain the defendant, his partners, servants, or agents, from applying to any person who was a customer of the old firm prior to the date of the sale, privately, by letter, personally, or by a traveller, asking such customer to continue to deal with the defendant and not to deal with the plaintiffs. In the case of *Ginesi* v. *Cooper* (42 L. T. Rep. 751; 14 Ch. Div. 596) Jessel, M.R. followed the decision in *Labouchere* v. *Dawson*, and expressed in very strong terms his concurrence with it. He granted an injunction restraining the defendants, their clerks, servants, agents, workmen, or others, from soliciting or in any way endeavouring to obtain the custon of or orders for goods similar in character to those dealt in by the old firm from such of the customers as were customers of the old firm, or from attempting to take away any portion of the business bought by the plaintiff. This was all the plaintiff in that case asked for, but the learned judge went further, and expressed a strong opinion that a man who sold the goodwill of his business must not only refrain from soliciting the old customers to deal with him, but must not deal with them. It was not, he said, necessary to decide it on that occasion, but he stated it because he thought what the meaning of selling the goodwill of a trade or business is should be thoroughly understood. In the case of *Leggott* v. *Barrett* (43 L. T. Rep. 641; 15 Ch. Div. 306), which came before the same learned judge shortly afterwards, he acted upon the same view, and extended the injunction to restrain the defendant from dealing with the customers of the old firm. From this judgment there was an appeal; but the appellant confined his appeal to that part of the order which restrained him from dealing with the customers of the old firm. He made no objection to the injunction so far as it restrained him from canvassing those customers. The Court of Appeal dissolved that part of the injunction of which the appellant complained. They thought they could not on any just principle prevent the defendant from supplying a man with goods if he applied to him; that there was no implied obligation upon him either legal or moral to shut his door against a customer who came to him of his own free will; that a sale of goodwill did not involve an implied contract not to deal with any customers of the old business, the goodwill of which was sold. The case is chiefly important for present purposes, in so far as it discloses the view taken by the learned judges who on that occasion constituted the Court of Appeal on the point now under consideration. In the case of *Pearson* v. *Pearson* (*ubi sup.*), to which I shall have occasion to refer immediately, Cotton, L.J. stated that the decision in *Labouchere* v. *Dawson* was doubted in *Leggott* v. *Barrett* by James, L.J. and himself. This is no doubt correct so far as Cotton, L.J. is concerned; but I am unable to find any very clear indication that this was the view of James, L.J. It is quite true that in an early part of his judgment he said, "I do not like going much into the case because what I should say might, perhaps, be considered to mean that the injunction which is submitted to is too wide." But in a latter part of the judgment he says, "At first it did appear to me that we might, from the equity view of the case, say that the defendant should be prevented from dealing with any customer or customers whom he had so solicited; but it appears to me that was too vague and too wide." He pointed out that a man might give the order afterwards without any reference to previous solicitation. Further on, when discussing the effect of the agreement, and showing that there was no implied obligation not to deal with the customer, he says, "It means that you are not to solicit customers." The impression produced upon my mind by the whole of the judgment is that the learned judge had not arrived at the conclusion that *Labouchere* v. *Dawson* (*ubi sup.*) was wrong. Brett, L.J. expressed a decided approval of that decision. He was of opinion that on the sale of a goodwill for a valuable consideration there was an implied contract that the vendor would not solicit former customers who were really the people who formed the goodwill. The next case in which the matter was brought under consideration of the Court of Appeal was that of *Walker* v. *Mottram* (45 L. T. Rep. 659; 19 Ch. Div. 355). In that case the goodwill of the business carried on by a bankrupt had been sold by his trustees in bankruptcy. It was sought afterwards to restrain the bankrupt from soliciting the customers of that business. Jessel, M.R. refused to grant an injunction on the ground that the doctrine laid down in *Labouchere* v. *Dawson* did not apply to the case of a bankrupt whose business had been sold by his trustees. This judgment was affirmed by the Court of Appeal. Of the Lords Justices who then constituted the court, Baggallay, L.J. expressed a strong doubt as to the correctness of the decision in *Labouchere* v. *Dawson*. He said that it appeared to him as at present advised that it went far beyond what any of the previous decisions would have sanctioned. Lush and Lindley, L.JJ., the other members of the court, said that the rule laid down in *Labouchere* v. *Dawson* had, it was believed, been recognised and acted upon in practice, and whatever else might be said of it the rule was in accordance with the general opinion of what was fair and right, and was easily applied in practice. In the case of *Pearson* v. *Pearson* (51 L. T. Rep. 311; 27 Ch. Div. 145) the question came again before the Court of Appeal. The facts were there less favourable to the plaintiff than in the case of *Labouchere* v. *Dawson*, and Baggallay and Lindley, L.JJ. both considered that, even if *Labouchere* v. *Dawson*

was rightly decided, the case then before them was not governed by it. Baggallay and Cotton, L.JJ., however, distinctly rested their judgments on the ground that the decision in *Labouchere* v. *Dawson* was wrong, and ought to be overruled. Lindley, L.J., on the other hand, was of opinion that it was rightly decided. The reason of Baggallay, L.J. for dissenting from *Labouchere* v. *Dawson*, so far as it is disclosed by the report of his judgment, appears to be that it went beyond a number of decisions of a higher court, and, as he thought, without sufficient reason. Even assuming that the decision in *Labouchere* v. *Dawson* went beyond previous decisions, this does not seem to me to afford any indication that it was wrong, unless it can be shown that it was in conflict with the principles involved in those earlier decisions. Cotton, L.J. examined the earlier decisions, and arrived at the conclusion that Lord Eldon was against the notion that the vendor of the goodwill of a business was, in the absence of express contract, to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the goodwill. The learned Lord Justice pointed out that Lord Romilly, M.R. rested his decision in *Labouchere* v. *Dawson* on the principle that a man could not derogate from his grant. "But," he said, "it is admitted that a person who has sold the goodwill of his business may set up a similar business next door, and say that he is the person who carried on the old business, yet such proceedings manifestly tend to prevent the old customer from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'goodwill' as would give a right to such an injunction as has been granted in the present case." I propose now to examine the older authorities. I may state at once, however, that I can find nothing in them inconsistent with the decision in *Labouchere* v. *Dawson*. It no doubt went beyond them, inasmuch as it dealt with a question not determined by them, but this seems to me to be no demerit, nor to afford any indication that it was wrong. The earliest case which has any bearing upon the point is that of *Cruttwell* v. *Lye* (17 Ves. 335), before Lord Eldon. The business of a bankrupt, who was a carrier between Bristol and London, had been sold by his assignees in bankruptcy. He afterwards commenced carrying on the trade of a carrier between Bristol, Bath, and London, but though the termini were the same the route employed was different. He addressed direct solicitation to the public for the carriage of their goods, stating that he had been reinstated in his business, and there was further, in the opinion of the Lord Chancellor, so much probability of direct solicitation to the customers of the old concern, in some few instances, that the fact might fairly be assumed. Under these circumstances the purchaser of the bankrupt's business applied for an injunction. The case was therefore the same as *Walker* v. *Mottram*, where Jessel, M.R., than whom no one has more strongly insisted upon the propriety of the decision in *Labouchere* v. *Dawson*, was of opinion that no injunction should be granted. The bankrupt was no party to the contract of sale; there could, therefore, be no implied contract on his part to be derived from it. It is most material also to observe what was the nature of the injunction then in question. It was whether the bankrupt was to be restrained from carrying on the trade which he was pursuing of carrying goods between Bristol, Bath, and London. The Lord Chancellor held that he could not be so restrained, and I think it must now be taken as settled that the sale of the goodwill of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. But Lord Eldon certainly did not decide that such a vendor was entitled to solicit the customers of the old firm. He was not asked for an injunction to restrain the defendant from so doing. It was sufficient for the decision of that case that, in the opinion of the Lord Chancellor, there was no principle arising out of the provisions of the bankruptcy law upon which the court could hold that the bankrupt ought not to engage in the same trade and by the same road as before, though I think that, so far, the opinion of the Lord Chancellor would have been the same if the sale of the business had been effected by the bankrupt himself, and not by his assignees. The importance of the case consists in the definition which Lord Eldon gave of the goodwill there sold. He said: "The goodwill which has been the subject of the sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration, but if that effect was prevented by no other means than those which belong to the fair course of improving a trade in which it was lawful to engage I should, in imposing it, carry the effect of my injunction to a much greater length than any decision has authorised or imagination suggested." These observations were much relied on by Cotton, L.J. in *Pearson* v. *Pearson*. If the language of Lord Eldon is to be taken as a definition of goodwill of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon as an exhaustive definition. "Goodwill," I apprehend," said Wood, V.C., in *Churton* v. *Douglas* (33 L. T. Rep. O.S. 57; Johns. 174), "must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." The learned Vice-Chancellor pointed out in this connection that it would be absurd to say that when a large wholesale business is conducted, the public are mindful whether it is carried on in Fleet-street or in the Strand. The question, what is meant by "goodwill," is, no doubt, a critical one. Jessel, M.R., discussing in *Ginesi* v. *Cooper* the language of Wood, V.C., which I have just quoted, said: "Attracting customers to the business is a matter connected with the carrying on of it. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill." He pointed out that, in

the case before him, the connection had been formed by years of work. The members of the firm knew where to sell the stone, and he asks, "Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the goodwill thereof?" The present Master of the Rolls took much the same view as to what constitutes the goodwill of a business. I cannot myself doubt that they were right. It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made. He knows what members of the community are purchasers of the articles in which he deals, and are not attached by custom to any other establishment. What obligations, then, does the sale of the goodwill of a business impose upon the vendor? I do not think that they would necessarily be the same under all circumstances. In the case of *Cook* v. *Collingridge* (1 Jac. 607; 27 Beav. 456, n.) Eldon, L.C. had to determine what orders were to be given where a partnership had expired by effluxion of time, and where the goodwill had to be valued. He declared that there existed no obligation upon the partners to restrain them from carrying on the same trade, or any of them wanting to do so; that a claim to have an estimated value put upon any subject that could be considered as described by the term "goodwill" could not be supported upon the same grounds or principles as those on which a value was received from a partner buying the share of the partner going out of the business and retiring from the trade altogether. He thought that all that could be valued was the chance of the customers adhering to the old establishment, notwithstanding that the previous partners or any of them carried on a similar business elsewhere. In *Johnson* v. *Hellely* (2 De G. J. & Sm. 446) a bill was filed by the surviving partner to wind-up the business of the partnership. The usual decree was made. The chief clerk certified that it was most beneficial that the business should be sold as a going concern. The Master of the Rolls ordered it to be stated in the advertisement and particulars that the surviving partner would be at liberty to continue carrying on the business of a wine merchant in the same town and place. This judgment was affirmed by the Lords Justices. In *Hall* v. *Barrow*: (4 De G. J. & Sm. 150) Lord Westbury, L.C. said: "I think the direction to value the goodwill should be accompanied by a declaration defining what is meant by it, at least negatively: that is to say, that a declaration that the goodwill is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business." In cases of this description, where a partnership has been dissolved by effluxion of time or death, the goodwill is regarded as a part of the assets, and subject, therefore, to realisation on winding-up the partnership; but it would obviously be absurd that, because a partnership becomes thus dissolved, those who formerly constituted the firm, or the survivors thereof where the dissolution has been due to death, should thereafter be restrained from carrying on what trade they pleased. Whatever restriction the sale of the goodwill may impose, it is clear that in this class of cases it could not extend to prevent the former partners carrying on a similar trade to that in which they were previously engaged. It is noteworthy that in *Johnson* v. *Hellely* it was thought necessary to warn intending purchasers that, though the goodwill was being sold, one of the persons who had previously carried on the business might continue to trade in the same town, and Lord Westbury thought it necessary to give the same warning to the person who was to value the goodwill in *Hall* v. *Barrow*. These circumstances appear to me to afford an indication that the courts recognised that their view of what was meant by "goodwill" and the effect of a sale of it differed from the popular conception. Where the goodwill of a business is not sold under circumstances such as I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that whenever the goodwill of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business. This is really the strong point in the position of those who maintain that *Labouchere* v. *Dawson* was wrongly decided. Cotton, L.J. says: "It is admitted that a person who has sold the goodwill of his business may set up a similar business next door, and say that he is the person who carried on the old business. Yet such proceedings manifestly tend to prevent the old customers from going to the old premises. I cannot see where to draw the line; if he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so." I quite feel the force of this argument, but it does not strike me as conclusive. It is often impossible to draw the line and yet possible to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the goodwill, and an endeavour to destroy it. If a person who has previously been partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do,

and that which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may, of their own accord, transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold, and to restore it to himself. It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a continuation of their business; but this, in many cases, appears to me of little importance, and of small practical advantage if canvassing the customers of the old firm were allowed without restraint. I do not think that in cases where an injunction was granted in the terms employed in *Labouchere* v. *Dawson* there would be any real difficulty in drawing the line and determining whether there had been a breach of it or not. In several cases such injunctions were granted, and there is nothing to show that any practical difficulty arose in enforcing them. It is not material to consider whether, on the sale of a goodwill, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity. I have, so far, dealt with the case as if the goodwill had been sold, but I think that the rights and obligations must be precisely the same, for present purposes, when, on the creation of a partnership, it has been agreed that the goodwill shall belong exclusively to one of the partners. For these reasons I think the judgment must be reversed, and that an injunction should be granted in the form adopted in *Labouchere* v. *Dawson*, with the modification rendered necessary by the circumstance that here the partnership has not yet expired. The respondent must repay to the appellants the costs which the Court of Appeal ordered them to pay to him. Lord Ashbourne, who is unable to be present to-day, concurs in the judgment which I propose to your Lordships.

Lord MACNAGHTEN.—My Lords: The question for the House to determine is this: Is a person who has sold the goodwill of his business, or one in the position of the respondent, who has been taken into partnership upon the terms that, on the expiration of the partnership, the goodwill shall belong solely to his partner, at liberty to solicit the old customers of the business to give their custom in preference to him? In 1872 Lord Romilly, M.R. decided the question in the negative in *Labouchere* v. *Dawson* (25 L. T. Rep. 894; L. Rep. 13 Eq. 322). In 1884 the question was determined the other way by the Court of Appeal in *Pearson* v. *Pearson* (51 L. T. Rep. 311; 27 Ch. Div. 145); and *Labouchere* v. *Dawson* was overruled by Baggallay and Cotton, L.JJ., differing from Lindley, L.J, who thought Lord Romilly's decision right. In *Labouchere* v. *Dawson* the question arose out of a sale of goodwill. In the present case there is a subsisting partnership between the appellants and the respondent in the business of varnish manufacturers. One of the terms of the partnership is that the goodwill "shall be and remain the sole property" of the appellant Anna Trego. The partnership will expire on the 1st Jan. 1896. The business is extremely lucrative, the connection very large. The respondent is, or was when this action was commenced, employing one of the clerks in copying out the names and addresses of the customers of the firm, with the avowed intention of soliciting their custom as soon as the partnership expires. The object of the action was to obtain an injunction to restrain this proceeding on the part of the respondent. It is not necessary to consider whether the action at the outset was or was not open to objection on technical or other grounds. For this much, at least, is to be said in favour of the respondent—that he met the case fairly and frankly from the very first, without any attempt to embarrass the plaintiff or to conceal his own object. His case was, "The law allows it." There was, indeed, or there seemed to be at the last moment, if I am not doing an injustice to the respondent, an attempt on his part to recede from the position which up to that time he had maintained, and to suggest difficulties in the way of any judgment in favour of the appellants. But I am quite sure that your Lordships will not for a moment listen to such a suggestion after the case has been fought out in all the courts on the real issue between the parties. After the observations of my noble and learned friend on the woolsack I do not think it necessary to deal with the question at any length. The arguments on the one side and on the other are summed up in *Labouchere* v. *Dawson* and *Pearson* v. *Pearson*, and little remains but to choose between the conflicting views of very eminent lawyers. Nor do I think it necessary to do more than allude to the case in which Jessel, M.R. held that a person who had sold the goodwill of his business could not even deal with his former customers: (*Leggott* v. *Barrett*, 43 L. T. Rep. 641; 15 Ch. Div. 306.) There I think the Master of the Rolls went too far. The decision trenched on the rights of the public. On the other hand, the Master of the Rolls was, I think, clearly right in refusing to extend the principle of *Labouchere* v. *Dawson* to a sale in bankruptcy: (*Walker* v. *Mottram*, 45 L. T. Rep. 659; 19 Ch. Div. 355.) There is, I think, all the difference in the world between the case of a man who sells what belongs to himself and receives the consideration and a man whose property is sold without his consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee. "A person not a lawyer," said Plumer, V.C., in *Harrison* v. *Gardner* (2 Mad. 198) in 1817, "could not imagine that when the goodwill and trade of a retail shop were sold the vendor might the next day set up a shop within a few doors and draw off all the customers. The goodwill of such a shop in good faith and honest understanding must mean all the benefit of the trade, and not merely a benefit of which the

vendor might the next day deprive the vendee. The authorities, however, are strong to show that the sale of a goodwill does not import restraint, and that a person selling the goodwill of a business for however large a consideration is not prevented setting up the trade." I agree, in substance, with the Vice-Chancellor's observations. What "goodwill" means must depend on the character and nature of the business to which it is attached. Generally speaking it means much more than what Lord Eldon took it to mean in the particular case before him, in *Cruttwell* v. *Lye* (17 Ves. 335), where he says: "The goodwill, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place." Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work, or gained by lavish expenditure of money. I do not think that "a person not a lawyer," to use the Vice-Chancellor's phrase, would suppose that a man might sell the goodwill of his business and then set to work to withdraw from the purchaser the benefit of his purchase. However, authorities, which it is now too late to question, do undoubtedly show that a man who has sold the goodwill of his business may do much to regain his former position, and yet keep on the windy side of the law. The common law has always been jealous of any interference with trade. It was a lighter matter to interfere with freedom of contract and avoid covenants under seal. And so, the common law being the final arbiter on these questions, too little attention perhaps was paid to what was fair and just between man and man. A person who has sold the goodwill of his business is under no obligation to retire altogether from the field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is common to all cases, he is free to set up in business wherever he chooses. But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage ground of his former position. He may not sell the custom and steal away the customers. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality. Is it conceivable that the respondent would ever have been taken into partnership if he had hinted at such a manœuvre while negotiations for a partnership were pending? It was said that you cannot draw the line; but I think the line may be drawn at this point. It is quite true that you cannot protect the purchaser completely. With Lindley, L.J. I regret it. It is quite true that it would be better that he should protect himself by taking apt covenants from the person with whom he is dealing. But this, I think, is rather a counsel of perfection than a reason for leaving the purchaser entirely at the mercy of the vendor. The principle on which *Labouchere* v. *Dawson* rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant on the sale of goodwill that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price, and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own. I am of opinion that the appellants are entitled to judgment.

Lord DAVEY.—My Lords: This appeal comes before your Lordships in a somewhat unsatisfactory form. The plaintiffs and the defendant are partners together for a term which will expire on the 1st Jan. 1896. On the expiration of the partnership the goodwill of the trade or business will be the sole property of the plaintiff, Anna Trego. The notice of motion asked that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the partnership. In my opinion, the relief asked was misconceived. As well under the general law as under the express provision of the articles of partnership the defendant was entitled during the partnership to have access to the books and to make copies thereof or extracts therefrom. It is conceivable that, if the defendant proposed to use such extracts for purposes injurious or hostile to the interests of his firm, he might be restrained from so doing. But in such case it would not be the obtaining of the information, but the use the partner proposed to make of it when obtained, which would be restrained. In my opinion, the plaintiffs have no right to prevent the defendant from making any extracts from the books he thinks fit. Indeed, in the present case, as was observed at the bar, the list of the creditors of the firm would be of service to the defendant if the law as laid down in *Labouchere* v. *Dawson* be maintained, in order to enable him to know whom he may not solicit, and to keep himself within the law. It was, however, admitted that the defendant intends after the expiration of the partnership to set up a business on his own account similar to that carried on by his firm, and he claims the right, if he thinks fit to do so, to solicit custom for his own business from the customers of his present firm. The question which has been argued before your Lordships is whether he has any such right. Upon this question there has been a remarkable difference of judicial opinion. The defendant has contracted for valuable consideration that, at the expiration of the partnership, the goodwill shall belong to the plaintiff, Anna Trego. To the lay mind it would undoubtedly seem a remarkable state of the law that a person who has entered into such a contract should be at liberty to go to the customers of the old firm and solicit them

not to deal with the plaintiff, but to deal with him, and thus endeavour to secure for himself the business connection which he has contracted shall belong to the plaintiff. But it would probably seem to the lay mind equally remarkable that a man who has sold a business and goodwill to another should be at liberty to set up a similar business on his own account in the same street next door, or opposite to the premises on which the business he has sold was and is carried on; nay, more, that he may advertise himself as having been a partner in or the founder or the manager of the business which he has sold, provided that he does not represent that the business which he is carrying on is the same identical business with that which he has sold. Yet it is well settled that he may do all this. It has been established by a series of cases that in the sale of a goodwill or business no covenant is implied that the vendor will not start a new business in opposition to the purchaser of the old business. It is enough to refer to *Cruttwell* v. *Lye* (17 Ves. 335), *Churton* v. *Douglas* (33 L. T. Rep. O. S. 57; Johns. 174), *Johnson* v. *Hellely* (2 De G. J. & Sm. 446), and the dicta in *Hookham* v. *Pottage* (27 L. T. Rep. 595; L. Rep. 8 Ch. 91). An express covenant not to carry on business would be incapable of being enforced as a restraint of trade if it was larger than the necessity of the case, having regard to the particular character of the business, demanded, or perhaps unless it was restricted in some way either in time or space. It seems to follow that a general covenant not to carry on business in competition with the purchaser, which would be invalid if expressed, cannot be implied. I think it is to be gathered from dicta and expressions used by learned judges in the Court of Chancery that the idea of goodwill and of what is comprised in the sale of a business has silently been developed and grown since the days of Lord Eldon, who, in one passage of his judgment in *Cruttwell* v. *Lye*, seemed to regard goodwill as only the habit of customers to resort to the old premises. In *Labouchere* v. *Dawson* (1872) Lord Romilly, M.R. granted an injunction against the vendor of the goodwill of a brewery from applying to any person who was a customer of the old firm prior to the date of the sale "privately by letter, personally, or by a traveller, asking such customer to continue to deal with the vendor, or not to deal with the purchasers." The judgment was based on the principle that a man cannot derogate from his own grant; that he cannot sell a thing and destroy the value of it. It was admitted in the judgment that a man may solicit customers in any public manner he pleased. It is agreed on all hands that the decision in *Labouchere* v. *Dawson* went considerably beyond the cases relating to goodwill decided before that time. In *Ginesi* v. *Cooper* (42 L. T. Rep. 751; 14 Ch. Div. 596) Jessel M.R. expressed himself as prepared to extend the injunction so as to prohibit the vendor from dealing with the customers; and in *Leggott* v. *Barrett* (43 L. T. Rep. 641; 15 Ch. Div. 306) he granted an injunction to that effect, but that part of the order was reversed in the Court of Appeal, and I understand that no such order is now asked for at the bar. I may remark, in passing, that the injunction in *Ginesi* v. *Cooper* went far beyond the order in *Labouchere* v. *Dawson*, and to an extent which, in my opinion, cannot in any event be supported. It restrained the defendant "from in any way endeavouring to obtain the custom of such of the customers of the petitioner as were customers of the old firm, or from attempting to take away any portion of the business bought by the petitioner." This form of order would prevent the defendant from issuing public advertisements or carrying on business in competition with the petitioner, as it is admitted he may do. In the case of *Leggott* v. *Barrett* there was no appeal against that part of the order, which simply followed *Labouchere* v. *Dawson*. It was therefore unnecessary for the court to express any opinion upon it. The present Master of the Rolls, however, expressed his approval of the doctrine. James and Cotton, L.JJ. did not express any approval of it, and I think it may be inferred from the judgments that Cotton, L.J. certainly and James, L.J. possibly were not prepared to do so. In *Pearson* v. *Pearson* (51 L. T. Rep. 311; 27 Ch. Div. 145) Baggallay and Cotton, L.JJ. expressed their dissent from *Labouchere* v. *Dawson*, and overruled it, while Lindley, L.J. expressed his approval of it. This is in substance an appeal from *Pearson* v. *Pearson*. On the argument of this case at your Lordships' bar it certainly appeared to me that the logical result of the principle upon which I understand the case of *Labouchere* v. *Dawson* to be founded would be to restrain the vendor of the goodwill of a business from carrying on business in competition with the purchaser at all. Your Lordships were not asked to take that course. And, having regard to the well-established doctrine against restraint of trade, it would be impossible, as I have already said, to imply such a general covenant. I doubted whether it was right, if you allowed the vendor to trade in competition, to impose fetters upon him which might prevent his doing so effectually or successfully. I was also struck with the vagueness and difficulty of applying the injunction as granted in *Labouchere* v. *Dawson*. Questions may arise as to the persons to be comprised under the designation of customers. The injunction also may operate most unequally. In a business of a special character it might practically prevent the defendant from carrying on business at all, whereas, in a business of a different character, it might have very little effect. Further consideration, however, has satisfied me that the decision in *Labouchere* v. *Dawson*, although it does not go so far as I think would be abstractedly just, is founded on a right principle, and the difficulty of doing complete justice should not prevent us from meting out such scanty measure of protection to the purchaser of a goodwill as the circumstances permit of; and although the difficulties I have pointed out exist they are not insuperable or (probably) formidable in practice. The question whether any person is a customer within the meaning of the injunction is one of fact to be ascertained when it arises. I have had the opportunity of reading the judgment which has been delivered by Lord Herschell, and I desire to express my concurrence in the reasoning upon which it is founded. In particular I think that the principle on which the injunction asked for may be supported is that the defendant is availing himself of the knowledge of the connection formed by his old firm to take away or to depreciate the value of the goodwill and connection

which he has contracted shall belong to the plaintiff. I agree as to the form of the injunction, and also as to the costs.

Judgment appealed from reversed, and declared that the appellants are entitled to an injunction restraining the defendant, his partners, servants, or agents, from applying privately by letter, personally, or by a traveller, to any person who was, prior to the dissolution of the partnership of Tabor, Trego, and Co., a customer of that firm asking such customer to continue, after the dissolution, to deal with him (the defendant) or not to deal with the plaintiffs, and that the respondent do repay to the appellants the costs in the Court of Appeal which have been paid to him, and the costs of this appeal.

Solicitors for the appellants, *Miller, Wiggins,* and *Naylor.*

Solicitor for the respondent, *H. J. Mannings.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Nov. 20.

(Before SMITH and RIGBY, L.JJ.)

Re EMMA JANE HINCHLIFFE. (*a*)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunacy—Practice—Action in name of lunatic—Leave to bring—Jurisdiction of master in lunacy—Lunacy Act 1891 (54 *&* 55 *Vict. c.* 65), *s.* 27, *sub-sect.* 1.

Under sect. 27, *sub-sect.* 1, *of the Lunacy Act* 1891 *a master in lunacy has jurisdiction to authorise the committee of a lunatic to bring an action in the name of the lunatic, in respect of an alleged breach of trust by the trustees of a will under which the lunatic is a beneficiary, without any confirmation of his order by the judge in lunacy.*

MRS. HINCHLIFFE was a person of unsound mind, and her sister, Mrs. Fereday, was her committee.

Mrs. Hinchliffe was entitled under the will of her father, James Roberts, to one-fifth of certain property, and Mrs. Fereday and another sister were entitled to other two-fifths.

Mrs. Fereday and the other sister, not being satisfied with the administration of the trust funds, desired to commence proceedings against the trustee of the will for breach of trust and to obtain the administration of the trusts of the will. On the 21st Jan. 1891 Mrs. Fereday, as committee, obtained the leave of a master in lunacy to join Mrs. Hinchliffe as a co-plaintiff. This application was supported by an affidavit made by Mrs. Fereday, which exhibited cases laid before counsel and their opinions thereon.

The writ in the action was issued on the 26th Jan. 1891. Mrs. Hinchliffe was made one of the original plaintiffs, the other two being her sisters, and the trustee of the will was defendant.

Mrs. Hinchliffe died in 1893, leaving a will, made during her sanity, by which she appointed Edward Roberts Smith her executor, and he was added as a defendant to the action by an order of the 15th Feb. 1894.

At the trial of the action on the 30th Nov. 1892 the charges of breach of trust against the defendant were withdrawn, accounts were ordered, and all costs were reserved. The defendant asked for an order that the plaintiffs should pay the whole of the costs, or at least those caused by the improper charges of breach of trust. Smith desired to have Mrs. Hinchliffe's estate freed from all liability in respect of the action.

Ultimately an order was made that the defendant's costs should be paid out of the trust property.

Smith then objected to any part of the costs occasioned by the improper charges of breach of trust coming out of Mrs. Hinchliffe's estate.

He also raised the question whether the master in lunacy had jurisdiction to authorise the proceedings in the name of the lunatic without any confirmation of his order by the judge in lunacy.

It was also objected that the facts upon which the leave of the master had been obtained were untrue and misleading with regard to the alleged breach of trust; and that therefore the leave was wrongly obtained.

He applied to Lindley, L.J., who referred the matter to the court.

Sub-sect. (1) of sect. 27 of the Lunacy Act 1891 enacts that:

Subject to rules in lunacy the jurisdiction of the judge in lunacy as regards administration and management may be exercised by the masters, and every order of a master in that behalf shall take effect unless annulled or varied by the judge in lunacy.

Henry Terrell for the applicant.—The joinder of the lunatic as a co-plaintiff in the action was improper, and no part of the costs occasioned by the charges of breach of trust against the trustee of the will ought to be paid out of the estate of the lunatic. First, I say that the master in lunacy had no jurisdiction to give leave to bring the action at all. Such leave could only be given by a judge in lunacy. Under the old practice all applications in lunacy came before the judge in lunacy: (Pope on Lunacy, 2nd edit., p. 34.) The practice has been altered, but even under the present system the committee of a lunatic must not commence an action until the leave of a judge in lunacy has been obtained. [RIGBY, L.J.—What do you say to sub-sect. 1 of sect. 27 of the Lunacy Act of 1891? Is not the order made in this case an order "as regards administration and management" of the lunatic's estate? SMITH, L.J.—Rule 10 of the Rules in Lunacy of 1892 is substantially to the same effect.] The Lunacy Act of 1891 was passed subsequently to the order made in the present case. That provision would apply to proceedings commenced subsequently to the Act. Then, as to the merits of this case, the true facts were not disclosed to the master. The facts stated were misleading with regard to the alleged breach of trust. And if leave to bring the action was obtained by a misstatement of facts, that leave was wrongly obtained and cannot be relied upon.

Vernon R. Smith, Q.C. and *Willis Bund,* for the respondent, were not called upon to argue.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

The Court (Smith and Rigby, L.JJ.) refused the application, their Lordships being of opinion that there was no hard and fast rule that the committee of a lunatic should take directions. When real occasion arose for confirming what a master in lunacy had done, an application for that purpose was made under the old practice. The new practice, having regard to sub-sect. 1 of sect. 27 of the Lunacy Act 1891, made the proceedings as regarded administration and management before a master in lunacy effective, unless they were overruled by the judge. Formerly they were ineffective until confirmed by the judge. The learned Lords Justices, therefore, held that the objection failed, and were also of opinion that the objection founded on the merits of the case likewise failed.

Application dismissed.

Solicitor for the applicant, *Frith Needham.*

Solicitors for the respondent, *Kennedy, Hughes,* and *Kennedy,* agents for *Colmore* and *Monckton,* Birmingham.

Wednesday, Dec. 4.

(Before Lindley, Smith, and Rigby, L.JJ.)

The Badische Anilin und Soda Fabrik *v.* Henry Johnson and Co. and the Basle Chemical Works, Bindschedler. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Service out of the jurisdiction—Notice of writ of summons—Action for infringement of patent — Injunction — Rules of Court 1883, *Order* XI., *r.* 1 (*f*).

Under rule 1 (*f*) *of Order XI., service out of the jurisdiction will be allowed of notice of a writ of summons in an action seeking an injunction to restrain the importation into England and sale here of articles manufactured abroad according to the specification of an English patent.*

The plaintiffs were the owners of a valuable English patent (No. 9858, of 1885) for dyes, and by their writ they claimed an injunction to restrain the defendants, their servants and agents, from importing into England, and from manufacturing, selling, supplying, and using in England dyes manufactured according to the plaintiffs' patent, or in any manner only colourably differing from the same, and generally from infringing the plaintiffs' rights under their patent. They also claimed damages and other consequential relief.

The plaintiffs alleged that the defendants, the Basle Company, manufactured at their works at Basle a dye which was an infringement of the plaintiffs' patent, the dye being known in the trade as "Yellow T."

On the 7th June 1895 the defendants, Henry Johnson and Co., drysalters in London, sent to the Basle Company an order for "5lb. Yellow T for wool 109."

On the 11th June the Basle Company replied, sending an invoice addressed to Henry Johnson and Co. for the 5lb. Yellow T ordered, and asking to be credited for the amount, 16*s.* 6*d.* They added:

In order to induce you to further orders, we are willing to reduce our price for this product (as mentioned), and we hope we shall be favoured with your more important commands.

The invoice described the goods as "bought of" the Basle Company, and it stated that the package was "sent to Messrs. Niebelgall and Goth, Basle, to be held by them at your disposal."

The defendants, Henry Johnson and Co., were served with the writ, and stated that they did not intend to enter an appearance, but were willing to submit to a perpetual injunction.

Rule 1 of Order XI. of the Rules of Court 1883 provides that:

Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever (*inter alia*) (*f*) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof.

An *ex parte* motion was made on behalf of the plaintiffs, under Order XI., r. 1 (*f*), for leave to issue a concurrent writ in the action, and to serve notice thereof on the defendants, the Basle Company, out of the jurisdiction of the court—viz., at Basle.

North, J., sitting at chambers, refused the application.

The plaintiffs now appealed.

Moulton, Q.C. (with him *W. N. Lawson*) for the appellants.—I submit that the plaintiffs are entitled to the leave asked for on two grounds: first, that the defendants, the Basle Company, are proper parties to the action; secondly, that the plaintiffs seek an injunction to restrain something which is to be done within the jurisdiction (Order XI., r. 1 (*f*), (*g*). The letter sent by the defendants, the Basle Company, to the defendants, Henry Johnson and Co., contained a plain threat of an intention of selling "Yellow T" in this country. The plaintiffs have an exclusive right to sell the article manufactured under their patent in this country, and they desire to have the question tried before the court here whether or not what the defendants, the Basle Company, are doing is an infringement. Rule 1 (*f*) of Order XI. says whenever any injunction is "sought." The plaintiffs are *bonâ fide* seeking to obtain an injunction to restrain the defendants from selling within the jurisdiction. I do not ask the court to express any opinion now whether or not there has been an infringement, whatever it may do when the full facts are known. But it is a matter of enormous importance to the plaintiffs that the leave asked for should be granted. English patents are constantly infringed by manufacturers who carry on business in countries, such as Switzerland and Holland, in which there is no patent law, selling articles made in infringement of English patents in small quantities to retail dealers in England. When such a retail dealer is threatened with proceedings by the patentee he at once submits to an injunction. It is, however, extremely difficult to detect all these small transactions, and, if the patentee cannot sue the foreign manufacturer in this country, he is practically without remedy. [Smith, L.J.—Have you looked at *Marshall* v. *Marshall* (59 L. T. Rep. 484; 38 Ch. Div. 330)?] Yes, but I submit that that case is entirely distinguishable from the present. The importation and sale in England of articles manufactured abroad accord-

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

ing to the specification of an English patent is an infringement:

Elmslie v. *Boursier*, L. Rep. 9 Eq. 217; 39 L. J. 328, Ch.

That decision was followed in

Von Heyden v. *Neustadt*, 42 L. T. Rep. 300; 14 Ch. Div. 230, 233.

LINDLEY, L.J.—This is a case which is no doubt one of very considerable importance. We all agree that a *primâ facie* case has been made out for giving leave for service out of the jurisdiction of notice of the writ of summons under Order XI., r. 1 (*f*). I say nothing about rule 1 (*g*). This is a case in which the plaintiffs are seeking—and obviously *bonâ fide* seeking—to restrain the defendants from selling goods in this country in infringement of the plaintiffs' patent. I think that such *primâ facie* case is made out in this way: The invoice which was sent by the defendants, the Basle Company, to the defendants, Henry Johnson and Co., contains a clause which *primâ facie* the defendants the Basle Company had no right to insert in it—viz., the clause which states that the package had been sent to Messrs. Niebelgall and Goth to be held by them at the disposal of the defendants Henry Johnson and Co. The defendants the Basle Company had not been requested to do that, and *primâ facie* Messrs. Niebelgall and Goth were the agents of the vendors. If so, that was merely a colourable evasion. Of course, the present application is only made *ex parte*, and if the defendants the Basle Company should come hereafter and ask that the order giving leave to serve them may be discharged, nothing which the court has now said will prejudice them. I think, therefore, that the decision of North, J. must be reversed and the appeal allowed.

SMITH and RIGBY, L.JJ. concurred.

Appeal allowed.

Solicitors, *J. H.* and *J. Y. Johnson.*

Wednesday, Nov. 19.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

WATSON (Surveyor of Taxes) *v.* THE ROYAL INSURANCE COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Revenue—Income tax—Profits or gains—Deductions—Expenditure for the purposes of a trade—Discharge of servant—Commutation of salary—Income Tax Act 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 100 *and* 159—*Income Tax Act* 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *sched. D.*

By the first of the rules applicable to the two first cases of sched. D. in sect. 100 *of the Income Tax Act* 1842, *it is provided that, in estimating the balance of the profits or gains of a trade, which under those two cases are liable to income tax, no deduction shall be allowed for any disbursement or expenses, "not being money wholly and exclusively laid out or expended for the purposes of such trade."*

Held, that a disbursement not made wholly and exclusively for the purpose of earning a profit in a trade cannot be deducted under this rule.

An insurance company purchased the entire business of another insurance company. It was a term in the agreement of purchase that the purchasers should take into their employ the manager of the vendors at a certain agreed salary, and that if they dismissed him they should pay him a gross sum, in commutation of his salary, which was to be calculated in a certain agreed way, upon the condition that he should not afterwards enter into the service of any other insurance company. Upon the transfer of the business being carried out, the purchasers took the manager of the vendors into their employ. Subsequently they dismissed him and paid him, in commutation of his salary, a gross sum as had been agreed.

Held, that, in estimating the average profits or gains of their trade upon an average of three preceding years for the purpose of being assessed to income tax under sched. D., no deduction could be made from the gross earnings of the company in respect of the gross sum which had been paid by them to the manager in commutation of his salary.

THIS was an appeal from a judgment of the Queen's Bench Division (Williams and Wright, JJ.) upon the following case stated by the Commissioners of the General Purposes of the Income Tax for the Division of Liverpool, for the opinion of the court under the Taxes Management Act 1880 (43 & 44 Vict. c. 19), s. 59.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of Liverpool, on Thursday, the 27th April 1893, the Royal Insurance Company appealed against an assessment made upon them under schedule D. of the Act 16 & 17 Vict. c. 34, for the year ending the 5th April 1893, and claimed an allowance by way of deduction in respect of a sum of 55,846*l.* 8*s.* 5*d.* paid under the circumstances following.

2. By the Royal Insurance Company's Act 1891 (54 & 55 Vict. c. lxxxi.), a copy of which is annexed, and is to be taken as forming part of this case, the Royal Insurance Company were invested with powers to acquire the whole of the undertaking of the Queen Insurance Company, and in pursuance of this Act the transfer of the business of the Queen Insurance Company to the Royal Insurance Company took place on the 19th Aug. 1891.

3. By art. 6 of the agreement between the two companies aforesaid, embodied in the schedule forming part of the Royal Insurance Company's Act 1891, it is provided that

> The services of the present manager of the Queen Insurance Company shall be retained by them until the transfer of the business is completed at a salary at the rate of 4000*l.* per annum, and thereafter he shall be taken into the service of the Royal Insurance Company, at the same rate, with liberty nevertheless for the Royal Insurance Company to commute the same by payment to him of a gross sum on the basis of the Queen Insurance Company's annuity tables, applicable to his then age on condition that he shall not at any time accept office or employment of any description under or in connection with any other fire or life insurance company. The remainder of the staff of the Queen Insurance Company shall also be taken over by the Royal Insurance Company.

4. On the transfer of the business the manager of the Queen Insurance Company was taken into the service of the Royal Insurance Company at

(*a*) Reported by E. MANLEY SMITH, Esq. Barrister-at-Law.

the salary of 4000*l.* per annum, and shortly afterwards, in pursuance of the powers conferred on them by the 6th article of the agreement, and in accordance with its terms, the Royal Insurance Company paid him the sum of 55,846*l.* 8*s.* 5*d.* in commutation of his annual salary.

5. The Royal Insurance Company contended that, in arriving at the amount of their liability for assessment for the year ending the 5th April 1893, under the provisions of the Income Tax Acts, the said sum of 55,846*l.* 8*s.* 5*d.* was a proper deduction to make from the profits of their business for the year 1891-2 (the year in which the commuted payment was made), and that if they had elected to continue the annual payment of 4000*l.* that amount would have been charged in their Revenue account yearly, and so have reduced the profits assessable for taxation.

6. Mr. Edmund Watson, appellant, the surveyor of taxes, on behalf of the Crown, on the other hand, contended that the sum of 55,846*l.* 8*s.* 5*d.* could not from the very nature of the case be considered an expense necessary to earn the profits of the year against the revenue of which it was sought to be charged; that, being a payment at the option of the Royal Insurance Company, it was in reality part of the consideration paid for the business of the Queen Insurance Company, and was therefore properly a charge to capital, as an expense of acquiring the undertaking, and not against revenue; that under the agreement already quoted, the annual payment of 4000*l.* would have been for services rendered, and a legitimate charge against profits so long only as the payment lasted, but that the commutation of this annual payment involved the abandonment of all claim to service, and transformed the annual payment into a capital expense; and that therefore the deduction of 55,846*l.* 8*s.* 5*d.* from the profits of the year to the 31st Dec. 1891 was not admissible in arriving at the liability of the company for assessment under the provisions of the Income Tax Acts.

7. We the commissioners, on consideration of the foregoing facts, were of opinion that the sum of 55,846*l.* 8*s.* 5*d.* paid as aforesaid was a proper deduction from the profits chargeable to income-tax; and the surveyor, having on behalf of the Crown expressed dissatisfaction with our decision as being erroneous in point of law, demanded a case for the opinion of the High Court of Justice in accordance with the Act 43 & 44 Vict. c. 19, s. 59, which we have hereby stated and signed accordingly.

The question for the opinion of the court is—whether or not for the purposes of assessment to income tax the Royal Insurance Company are entitled to charge against their profits the sum of 55,846*l.* 8*s.* 5*d.* paid by them in the year 1891-2, in commutation of the salary of 4000*l.*, which would otherwise have been paid annually to Mr. J. K. Rumford, who was manager of the Queen Assurance Company at the time of its acquisition by the Royal Assurance Company.

The Queen's Bench Division (Williams and Wright, JJ.) remitted the case to the commissioners for amendment, in order to ascertain the circumstances under which, and the consideration in respect of which, the agreement to pay the sum of 55,846*l.* 8*s.* 5*d.* to the manager as set out in the case was arrived at.

The Surveyor of Taxes appealed.

By the Income Tax Act 1853 (16 & 17 Vict. c. 34), s. 2, income tax is payable under schedule D. "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom . . . from any profession, trade," &c.

By the Income Tax Act 1842 (5 & 6 Vict. c. 35), s. 100, it is provided by the first rule applicable to the first case of schedule D., that the profits or gains of a trade are to be computed upon an average of three years; and by the first of the rules applicable to the two first cases of schedule D. it is provided as follows:

> In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade.

The *Solicitor-General* (Sir Robert Finlay, Q.C.) and *Danckwerts* for the surveyor of taxes.—The question really depends upon the true meaning of the words "profits or gains." Those words are not used in the Income Tax Acts in the same sense as a tradesman would use them, as has been pointed out by Lindley, L.J.:

The Gresham Life Assurance Society v. *Styles*, 63 L. T. Rep. 411; 25 Q. B. Div. 351.

That case was reversed in the House of Lords, but on a matter not touching this point. By sect. 159 of the Income Tax Act 1842, no deduction is to be made, in arriving at a person's "profits or gains" which are liable to income tax, except those deductions which are expressly enumerated in that Act. The only question therefore is whether this sum of 55,846*l.* is a deduction coming within the provisions of the first of the rules applicable to the first two cases of schedule D. This payment, it is submitted, was a capital payment. It was part of the purchase of the business of the Queen Insurance Company. It was as much part of the price as if it had been paid to that company, that they might with it compensate their late manager. If this were deducted, and the salary of the new manager also deducted, as it properly would be, then the company would really be deducting their manager's salary twice over. This payment was not made in order to earn receipts, and that is what is required by this rule:

The City of London Contract Corporation v. *Styles*, 2 Tax. Cas. 239.

Joseph Walton, Q.C. (*Horsfall* and *A. Hyslop Maxwell* with him) for the Royal Insurance Company.—This is not a case of merely pensioning off an old servant. This manager came into the company's service upon the condition that he should be compensated in this way if he were dismissed. The company was obliged to agree to that in order to get the business of the Queen Insurance Company. The bargain for the purchase of the business was made by the defendants with the object of earning profit in their trade. Therefore the payment was made "for the purposes of" their trade within the meaning of the Act. The payment was part of the price paid for the manager's services, and for this reason it ought to be deducted. It is true that it was paid not in respect of any one year, but in respect of several years. But in

estimating the profits of the trade, that consideration is immaterial.

The *Solicitor-General* replied.—This money was paid not in order thereby to earn money, but in order to enable the defendants to enter upon a trade in which they hoped to earn profits. The difference between those two things is pointed out by Charles, J. in

Dillon v. *The Corporation of Haverfordwest*, 64 L. T. Rep. 202; (1891) 1 Q. B. 575.

Lord ESHER, M.R.—We have in this case to construe a certain phrase in an Act of Parliament as applicable to certain facts before us. The Act imposes a tax which is to be paid upon the average profits and gains of a business for the three years previous to the payment of the tax. How are we to ascertain the amount of the profits and gains which are to be taxed? Not in the manner in which a tradesman would calculate for his convenience what his profits have been, nor in the manner in which partners would calculate their profits for the purpose of dividing it among themselves, but according to rules laid down in the Act of Parliament. The amount is to be calculated by putting the earnings of the business upon one side of the computation and on the other certain deductions which are to be made from the earnings. The first rule which applies to the first two cases in schedule D. provides that no deduction shall be made "for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade." Therefore, disbursements or expenses which are "wholly and exclusively" so laid out are to be deducted. But what do those words mean? It seems to me that they mean wholly and exclusively laid out for the purpose of earning those profits of the trade which are to be the subject of taxation, that is, the average profit for the three years preceding the payment of the tax. Now, in the present case it has been argued that the disbursement in question was part of the purchase money of the business of the Queen Insurance Company. I am not sure whether that is so or not; I doubt it. That which perhaps might be said to be part of the purchase of the business is the undertaking by the Royal Insurance Company to employ the manager of the Queen Insurance Company at 4000*l.* a year and to pay him a certain lump sum if they dismissed him. But they not only undertook with the Queen Insurance Company to enter into that contract with the manager, but they have fulfilled their agreement by engaging him as their manager on those terms. Therefore, I think we must consider this case as if the Queen Insurance Company had never existed. We must consider it as if the Royal Insurance Company had simply engaged this manager at 4000*l.* a year for an indefinite time, upon the terms that if they dismissed him they would pay him down a lump sum of 55,846*l.* So long as they paid him 4000*l.* a year for his services to them, the 4000*l.* would be paid for services which went to earn the profits which would be the subject of taxation, and would, therefore be properly deducted from the gross earnings in order to arrive at the taxable profits. But the company after a time dismissed him from their service. It cannot be said that anything paid by them to him after that is a disbursement or expenditure made for services which went to earn the profits which are to be taxed. It is a payment to him for not serving them; it is a payment made to prevent him from serving them. Therefore I think that, upon the true construction of this rule in the Act, the money paid by the company to the manager on dismissing him cannot be taken into account in computing the profits which are subject to taxation under the Act. We must, therefore, allow the appeal.

LOPES, L.J.—I am of the same opinion. The question raised in this case is, whether the Royal Insurance Company are entitled to deduct a sum of 55,846*l.* from their profits which are assessable to income tax under schedule D. This sum was paid by them to a manager who had passed into their service on the occasion of their purchasing the business of the Queen Insurance Company. By clause 5 of the agreement of this purchase they had incurred certain obligations towards this manager. [His Lordship read the clause.] On the transfer of the business the manager was accordingly taken into the service of the Royal Insurance Company at the salary of 4000*l.* a year, but shortly after, in pursuance of their powers, the company dismissed him and paid him the compensation, calculated in the manner they had agreed to, which amounted to 55,846*l.* The question is, whether they are entitled to deduct that sum in order to arrive at their profits for the last three years. The first rule of the rules applying to the first two cases in schedule D. provides for the deductions which are to be allowed. [His Lordship read the rule.] Therefore, the company must show that this sum was expended wholly and exclusively "for the purposes of" their trade. Those purposes I understand to mean purposes enabling profits to be made, or purposes contributing to the earning of profits, and the expenses contemplated must be expenses properly incurred in producing the profit which is to be assessed. Now, applying that rule to this case, can it be said that this payment contributed to the profits, or was in any way properly incurred in producing them? It appears to me that it cannot be said. The money was paid for getting rid of the manager. It in no way contributed to the earning of profits. I think that that is a complete answer to this case, and quite sufficient ground for holding that this deduction cannot be made. Speaking for myself, I am very much inclined to think that it might be successfully contended that this 55,846*l.* was really part of the price for the acquisition of the business of the Queen Insurance Company. It cannot be said that it was money which was expended for the purpose of carrying on the concern. I think that it might with good reason be said to be part of the consideration of the sale of the business. However, the former ground is the one upon which I base my judgment. That appears to me to be a complete answer to the case, and therefore this deduction cannot be made.

KAY, L.J.—There is no need for me to repeat the facts of this case: but I will just refer to one matter that has not been alluded to in the judgments. Part of the agreement between the two insurance companies was not merely that the Royal Insurance Company should employ the manager of the Queen Insurance Company at a certain salary, and should pay him compensation, if they dismissed him, computed in a certain way,

but also that the manager was to be bound not to act for any other insurance company. I think that that is a matter worthy of consideration in deciding this case. The real question is whether this sum of 55,846*l.* is a sum which comes within any of the deductions which the Act of Parliament allows. As was pointed out by Lindley, L.J., in *The Gresham Life Assurance Company* v. *Styles* (*ubi sup.*), this Act of Parliament does not use the words "profits or gains" in schedule D. precisely in the way in which a tradesman would use the words in estimating for his own purposes his profits for a year. It may be that partners, for the purpose of deciding how much they should divide among themselves for their year's profit, would take such a sum as this into consideration. In the same case in the House of Lords (67 L. T. Rep. 479; (1892) A. C. 309) Lord Herschell, following what had been said by Lindley, L.J., used these words: "When we come to the third rule, and the first of the rules 'applying to both the preceding cases,' it must be admitted that the words 'profits or gains' are not always used in their proper or ordinary sense. The third rule for example provides that, in estimating the balance of profits and gains chargeable under schedule D., 'no sum shall be set against, or deducted from or allowed to be set against or deducted from, such profits or gains' on account of any sum expended for the repairs of trade premises, or for the supply, repairs, or alterations of trade implements beyond the sum usually expended for such purposes on an average of three years. Here it is obvious that the 'profits or gains' against which the cost of repairs is not to be set, or from which it is not to be deducted, cannot be profits or gains of the business properly so called." The truth is, that the Act allows certain deductions to be made, and then enacts by sect. 159 that in the computation of duty to be made under this Act in any of the cases before mentioned, either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act." Now, in order to justify this deduction, it must be brought within the first rule of the rules which apply to the first two cases in schedule D. [His Lordship read the rule.] It is admitted that this is the only rule which applies to the present case. Therefore the question is, whether this money was wholly and exclusively laid out or expended for the purposes of this particular trade or business. It was in fact expended for the purpose of enabling the company to dispense with the future services of this manager. Whether they thought that their staff was too large, and for that reason did not want him any longer, or whether they thought they could replace him by some other person whom they preferred to have in his place, does not appear, and to my mind it does not matter. Was this lump sum paid in those three years "for the purpose of" this trade within the meaning of the Act? Now, I will not attempt to lay down any definition of these words. I will simply deal with the case before me. The actual purpose for which this money was paid was to get rid of the manager and prevent the necessity of having to pay him 4000*l.* a year for the future. Now, it is admitted, and I think rightly, that so long as he remained the company's manager his salary of 4000*l.* was properly paid for the purposes of the trade, and ought to be deducted under this rule in order to estimate the profits and gains on which income tax should be paid. But he was paid a lump sum in order to get rid of him, in commutation of the salary which he would otherwise have been paid for his services. How can that be said to have been paid for the purposes of the trade within the meaning of this Act of Parliament? Now suppose this case, which seems to me to be a good test. Suppose the company had dismissed this manager because they were not satisfied with the way in which he did his work, and had put some one else in his place. Then they would be entitled to deduct the salary of the new manager in estimating the profits and gains for the purposes of this Act. But then, if they also deducted this lump sum of 55,846*l.*, they would practically be deducting the salary of their manager twice over. I do not think that that would be allowed. Let us take another test. Suppose that they had never employed him at all, but, the moment that the transfer to them of the business of the Queen Insurance Company had taken place, had paid him the lump sum which would have then been due in commutation of his salary. How could it possibly be said that that sum, so paid, could be in any respect on account of his services? I am assuming of course that in this case he would not have rendered any service at all to the Royal Insurance Company. There is one more point that I must refer to. It was argued, and rightly so, that this lump sum was paid to some extent in respect of the obligation which the manager had entered into, never to do business for any other insurance company. No doubt that was a distinct advantage to the Royal Insurance Company, because the manager might otherwise have taken away from them business which had come to them through their purchase of the business of the Queen Insurance Company. To that extent it was argued that the payment of this lump sum was for the purposes of the business. But that argument goes far beyond this case. Suppose that the company had in their service a manager under no such obligation as there was in the present case, and whom the company were not bound to compensate on their dismissing him. Suppose that he left their service and intended to go into the service of some other insurance company, but to prevent his doing so the Royal Insurance Company offered him a sum of money as compensation for the salary which he might otherwise have obtained as manager to another company. It seems to me that in such a case as that the money could not possibly be said to be paid for the purposes of the business within the meaning of the Act. In answer to that it was argued that the money was in this case paid under an antecedent bargain with the manager when the business of the Queen Insurance Company was bought, and that, because it was paid under this antecedent bargain, it was therefore paid for the purposes of the business. I confess that that point is too fine for me, and I cannot see the difference between the two cases. I cannot see how an antecedent bargain can make a payment to be made "for the purposes of the business," which would not be made for the purposes of the business if there had been no antecedent bargain. It arises from the company's dismissal of the manager. That is the proximate

cause of the payment, and as that occurred entirely at their option (because the company need not have dismissed him unless they liked), it seems to me impossible to say that the antecedent bargain makes any difference at all. I, therefore, agree that this deduction ought not to be made in estimating the company's profits and gains for the purposes of this Act.

Appeal allowed.

Solicitor for the surveyor of taxes, *Solicitor of Inland Revenue.*

Solicitors for the company, *G. L. P. Eyre* and *Co.*, agents for *Garnett, Tarbet,* and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 9 *and* 18.

(Before NORTH, J.)

CHOLDITCH *v.* JONES. (*a*)

Costs—Taxation—Sale by auction — Auctioneer's commission paid by client—Scale fee for conducting sale—General Order in pursuance of the Solicitors' Remuneration Act 1881 (*44 & 45 Vict. c. 44*), *sched.* 1, *part* 1, *r.* 11.

Property was put up for sale by auction in four lots, subject to reserve prices, under conditions of sale which provided (inter alia) *that the respective purchasers should pay the auctioneer certain specified fees in respect of the lots purchased by them. Three lots only were sold, the reserve price on the fourth not being reached. The vendors were mortgagees selling under a power of sale; and their solicitors charged them and they paid scale fees for deducing title in respect of the three lots sold, and also scale fees for conducting the sale in respect of the four lots. The taxing master disallowed the scale fees charged for conducting the sale on the ground* (inter alia) *that the auctioneer's commission was paid by the client within the meaning of rule* 11, *part* 1, *schedule* 1, *of the General Order in pursuance of the Solicitors' Remuneration Act* 1881.

Held, that, to enable the solicitors to charge the scale fees for conducting the sale, it was not necessary that they should do the auctioneer's work, provided that their clients did not pay the auctioneer's commission; but that, when the auctioneer's commission was thrown on the purchasers by the conditions of sale, the burden of the commission fell ultimately on the vendors, and was paid by the client within the meaning of the rule above mentioned; and therefore the solicitors could not charge the scale fees for conducting the sale.

JOHN CHOLDITCH and William Barling, as mortgagees, put up for sale by public auction property mortgaged to them by P. Jones and C. M. Jones. The property was offered for sale in four lots, the first three lots comprising real estate, and the fourth a policy of assurance on the joint lives of P. Jones and C. M. Jones, payable on the dropping of the first life.

One of the conditions of sale was:

The respective purchasers shall pay to the auctioneer his fee as under:—Lots 1 and 2, 11*l.* 1*s.* each; lot 3, 5*l.* 5*s.*; lot 4, 3*l.* 3*s.*

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

The auctioneer received the bids and knocked down the lots to the respective purchasers at the sale, but the vendors' solicitors, Messrs. James Wintle and Son, did all the rest of the work both before and after the sale and in the auction-room.

Lot 1 sold for 12*l.* 10*s.*, lot 2 for 80*l.*, and lot 3 for 320*l.*; but lot 4 was unsold, as the reserved price, 507*l.* 10*s.*, was not reached.

The several purchases were completed, and Messrs. James Wintle and Son then delivered to, and were paid by, the vendors, a bill of costs made up as follows:

Four minimum charges for conducting a sale by public auction—see the N.B. to schedule 1 to part 1 of the Solicitors' Remuneration Act 1881, 20*l.*; Three minimum charges for deducing title and completing in respect of the three lots sold, 11*l.* 5*s.*; plus expenses, 5*l.* 8*s.*; total, 36*l.* 13*s.*

The vendors afterwards brought foreclosure proceedings in respect of lot 4, and the usual foreclosure order *nisi* was made. They then carried in their account, which included the 36*l.* 13*s.* paid for costs. The amount was referred by the chief clerk to the taxing master, who disallowed the charge of 20*l.* on the grounds that, as an auctioneer was employed, the solicitors had not done all the work covered by the fee for conducting the sale, and that the auctioneer was indirectly paid by the vendors; and stated in his answers that he was "of opinion that 7*l.* 7*s.* paid to the auctioneer by the purchasers was a commission within the meaning of rule 11, and was in effect paid by the client [the vendors], for it would be taken into account by the purchaser when bidding, and would *pro tanto* reduce the purchase money, and so come out of the clients' [the vendors'] pocket." He however, in lieu of the charge of 20*l.* for conducting the sale, allowed 3*l.* 3*s.* for the work done by the solicitors in connection with the sale.

This was a summons taken out by the vendors for review of the taxation. The summons was served on P. Jones and C. M. Jones, but they did not appear.

Rule 11 of schedule 1, part 1, of the General Order made in pursuance of the Solicitors' Remuneration Act 1881, provides:

The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer.

R. F. Norton for the summons.—The vendors' solicitors are entitled to the scale fee for conducting the sale by auction. They did all the work both before and after the sale and in the auction-room, except take the bids and knock down the lots to the purchasers. If the taxing master is right in his first reason, viz., that the scale fee is never payable when an auctioneer is employed, the scale is useless, as a solicitor, not being a licensed auctioneer, cannot act as such. The vendors did not pay the auctioneer's fee, which was paid by the several purchasers according to the conditions of sale, which are common conditions in the West of England. I admit that, if the auctioneer's fee had been paid by the vendors, the solicitors would not be entitled to the scale fee:

Drielsma v. *Manifold*, 71 L. T. Rep. 62; (1894) 3 Ch. 100.

But in this case the fee is not paid by the vendors at all. At any rate, as regards lot 4, the vendors have not paid the auctioneer any fee.

He has, in fact, been paid by no one, as the fees he received were specifically paid in respect of the three lots sold, so that the scale fee ought to be allowed in respect of lot 4. With respect to the costs of the summons, the vendors, as mortgagees, ought to be allowed to add the costs to their security even if they do not succeed, for the taxing master states that the case is an important one, and the mortgagees had a right to obtain the opinion of the court on the point:

Re Watts; Smith v. *Watts*, 48 L. T. Rep. 167; 22 Ch. Div. 5;

Bird v. *Wenn*, 54 L. T. Rep. 933; 33 Ch. Div. 215;

Stone v. *Lickorish*, 64 L. T. Rep. 79; (1891) 2 Ch. 363.

Nov. 18.—NORTH, J. delivered the following written judgment:—The question in this case is as to the proper charge to be made by solicitors on a sale by mortgagees under a power of sale. The mortgaged property was put up to auction in four lots. Lots 1, 2, and 3 were sold to different purchasers: lot 1 for 12*l.* 10*s.*; lot 2 for 80*l.*; and lot 3 for 320*l.*; and these sales were subsequently completed. Lot 4 was not sold, as the reserve price of 507*l.* 10*s.* was not reached. It is the subject of foreclosure proceedings. For their services the solicitors claimed 31*l.* 5*s.* as scale fees made up as follows: They charged a fee for conducting the sale for each lot sold. As the scale percentage on the purchase money of each separate lot was less than 5*l.*, they claimed the minimum charge of 5*l.* for each lot; and as the scale percentage of 10*s.* per 100*l.* on the reserved price of lot 4 came to 2*l.* 15*s.* only, they claimed the minimum charge of 5*l.* for that lot also, making 20*l.* for conducting fees. They also charged, under rule 8, for deducing title to the three lots sold the sums of 3*l.*, 3*l.*, and 5*l.* respectively, thus claiming 8*l.* as the solicitors' scale fees on lot 1, the entire purchase money of which was 12*l.* 10*s.*, a sufficiently startling demand. The taxing master allowed the 11*l.* 5*s.* for deducing title, and no objection is made to that. He disallowed the 20*l.* for conducting fees, holding that the scale did not apply; but he allowed three guineas to the solicitors as a *quantum meruit* for their work. That this is sufficient in itself is not disputed, in case the scale fee is not exigible. Even if the scale fees did apply, the charge of 20*l.* for conducting fees is most excessive. The proper mode of ascertaining the conducting fee would have been to add together the purchase moneys of the three lots sold, making 412*l.* 10*s.*, the scale percentage on which would, having regard to rule 7, have been 4*l.* 10*s.*, and to add also the scale percentage of 2*l.* 15*s.* on the reserved price of the unsold lot. This would have brought the conducting fee up to 7*l.* 5*s.* instead of 20*l.*, and as that sum is more than 5*l.* no question as to a minimum charge could have arisen. To treat the sale of each lot as a separate sale and charge a separate minimum fee in each case was wholly unjustifiable. It was not authorised by the rules, and was in direct opposition to the decision of the Queen's Bench in *Re The Onward Building Society* (68 L. T. Rep. 443; (1893) 1 Q. B. 16.) The material facts which have to be added are very few. The vendor's solicitors desired to be paid the full scale charge for conducting the sale. They could do and did much of the work; but, as they were not licensed auctioneers, they could not conduct the sale in the sale-room; and had to employ an auctioneer for that purpose, who, of course, had to be paid. The solicitors wished to avoid paying him commission out of their own pockets. They could not claim it against their clients, if they were to be paid by scale. They accordingly adopted what seemed to them the ingenious device of throwing it on the purchasers, and inserted as a special condition of sale: "The respective purchasers shall pay to the auctioneer his fees, as under: Lots 1 and 2, 1*l.* 1*s.* each; lot 3, 5*l.* 5*s.*; lot 4, 3*l.* 3*s.*," thus escaping, as they thought, the necessity of paying the auctioneer his ten guineas, and appropriating the whole scale fee. Of course they were not bound to pay the auctioneer unless they liked; they might have left the clients to pay the auctioneer's commission in the usual way; but then they could have only charged for the work they did, and would not have had the scale fee. The taxing master refused to allow the conducting fee upon two distinct grounds. The first was, that it was well settled by *Re Lacey and Son* (49 L. T. Rep. 755; 25 Ch. Div. 301); *Re Wilson* (53 L. T. Rep. 406; 29 Ch. Div. 790); and other cases, that a solicitor can only be paid the scale charge for conducting the sale when he does all the work; that, according to Lindley, L.J. in *Drielsma* v. *Manifold* (*ubi sup.*), "one of the important parts of conducting a sale by auction is taking the bidding and conducting what goes on in the auction-room"; that this was not and could not be done by the solicitors; and that they could not therefore be paid by scale. I do not agree with this conclusion. I think that a solicitor can properly be said to do all the work within the rule and cases referred to, if he does it either himself or by proper agents whom he employs for the purpose; whether such agents are his own clerks or other persons retained for the occasion. The use of the words "by the client" in that portion of rule 11 which provides that "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer" seems to me to recognise the applicability of the rule to a case where commission is paid to the auctioneer, so long as it is not paid by the client. In *Re Wilson* (*ubi sup.*) Cotton, L.J. says: "The property may have been in such a state that the solicitor could not alone do all things that were necessary for the sale; but in such a case, if he claims the *ad valorem* remuneration he must get them done by a person paid by himself." The cases of *Re Faulkner* (57 L. T. Rep. 342; 36 Ch. Div. 566), *Re Peace and Ellis* (57 L. T. Rep. 753), and *Drielsma* v. *Manifold* (*ubi sup.*), and many others, all point out that, even when an auctioneer is employed there is no objection to the solicitor being paid by scale if he pays the auctioneer's charges out of his own pocket so that they do not fall upon the client. If the view of the taxing master were correct, I do not see how any solicitor, acting for a vendor selling by auction, could ever be paid by scale at all unless he was himself also a licensed auctioneer. The second ground taken by the taxing master was, that the scale could not be resorted to in the present case because the autioneer's commission is paid by the clients. That is a question of fact, and I agree with the taxing master. No doubt the clients are not charged directly with such commission. The auctioneer is not their

creditor for the amount. But, in my opinion, if the burden of such commission falls ultimately on the clients—if it is not provided for by the solicitor out of the scale fee, but comes even indirectly upon the clients, and has thus to be borne by them — it is paid by the client within the meaning of the rule. If on a sale by a vendor in lots it was arranged that the auctioneer should be allowed to take a conveyance of one of the lots at a nominal price instead of charging a commission for his services, could it be said that the scale applied, although the solicitors had not paid the auctioneer and the purchase money had been reduced by the amount of the auctioneer's remuneration? I think such a case would clearly fall within rule 11. If the scale is to be applied the solicitor must himself do, or pay for the doing of the work covered by the scale charge; and the client must not be charged directly or indirectly with any part of such expense. In *Re Wilson* (*ubi sup.*) Cotton, L.J. says: "The Act and Rules were not intended to give the solicitor remuneration according to scale where he does not do the whole of the work for which remuneration is provided, but somebody else does, and is paid by the client for, part of the work." In *Drielsma* v. *Manifold* (*ubi sup.*) Lindley, L.J. says: "The real object of rule 11 is not to draw a distinction between a charge and commission, but to draw a distinction between what is to fall on the client and what is not." Again, Lord Davey says: "The substance of the rule appears to me to be this, that the scale fee to the solicitor is intended to include all the expenses of conducting the sale, including the auctioneer's commission; understanding by the auctioneer's commission the remuneration which is paid to the auctioneer, whether for merely taking the bids or for doing the work as well." Lopes, L.J. also pointed out that, unless the solicitor receiving the scale fee pays the auctioneer's remuneration, the client has to pay it twice over, as that remuneration is one of the expenses intended to be covered by the scale fee. It is beyond all question that, even if the auctioneer's fee is paid in the first instance by the purchaser, it does ultimately fall on the vendor, because the purchase money is diminished by a corresponding amount. If the whole sum a purchaser pays does not go to the vendor, but part of it has to go to some other person, it is obvious that what the vendor receives is so much less. If a purchaser buys an equity of redemption the purchase money he would have paid for the property, if unincumbered, is reduced by the amount of the mortgage upon it. A purchaser who is willing to pay a vendor 1000*l.* for a piece of land, if freehold, will only pay him 900*l.* if the land is copyhold, and the fines and fees of the lord amount to 100*l.* Lot 1 in the present case affords a good illustration. It was sold for 12*l.* 10*s.*, the purchaser paying the auctioneers a fee of 1*l.* 1*s.* Can anyone doubt that the purchase money would have been more if no fee had been payable by the purchaser to the auctioneer? Let me put it in another way: A fee of 1*l.* 1*s.* on a purchase for 12*l.* 10*s.* is equal to a commission of eight guineas per 100*l.* Can it be doubted that a condition on a sale that each purchaser should, in addition to his purchase money, pay to the auctioneer a commission at the rate of eight guineas for each 100*l.* would materially diminish the price he would have been willing to give if there had been no such condition? and so as to the other lots, though the proportion of the auctioneer's commission to the purchase money is much smaller. A purchaser does consider what the purchase would cost him, and regulates his biddings accordingly. For these reasons it is, in my opinion, quite clear that a vendor's solicitor on a sale by auction who does not himself do the auctioneer's work, or pay the fees of the person who does it, cannot charge the scale fee for conducting. To justify such a charge the auctioneer's commission must not be paid by the client, either in meal or in malt; the burden of it must not fall upon him, either directly or indirectly. I have gone fully into the matter because the taxing master says that such cases as the present are not uncommon. They appear to me to fall within the letter as well as the spirit of rule 11, which cannot be evaded or reduced to a dead letter by the trick of inserting a condition of sale throwing the auctioneer's remuneration upon the purchaser. Where that is done the scale fee cannot be charged. As no one appears on the other side the summons will be dismissed without costs. The applicants must pay their own costs, which must not be added to their security.

Solicitors: *Field, Roscoe*, and *Co.*, for *James Wintle* and *Son*, Newnham, Gloucestershire.

Nov. 2 *and* 9.

(Before STIRLING, J.)

MILLER *v.* COLLINS. (*a*)

Married woman—Interest in land—Reversionary interest in settled property invested on mortgage of real estate—Fines and Recoveries Act (3 *&* 4 *Will.* 4, *c.* 74), *s.* 77.

By a settlement dated Oct. 31, 1855, *certain real estate was conveyed to trustees upon trust for W. C. C. for life, and after his death upon trust for E. C., his wife, for life or widowhood, with remainders over, with power to the trustee to sell the property and invest the proceeds of sale upon mortgage of freehold, copyhold, and leasehold premises, but no power to invest in land was given. On the* 21*st July* 1869 *the trust property consisted, and still consisted, of* 1100*l. invested on mortgage securities. By a deed of that date W. C. C. and E. C. purported to assign to E. H. all their right and interest in the dividends, income, and produce arising from the trust fund, the deed being acknowledged by E. C. under the Fines and Recoveries Act* 1833.

Held, by Stirling, J. (*following the decisions of Chitty, J. in* Re Newton's Trusts, 23 *Ch. Div.* 181, *supported to some extent by that of Pearson, J. in* Re Watts; Cornford *v.* Elliott, 51 *L. T. Rep.* 85; 27 *Ch. Div.* 318, *reported on appeal on certain points at* 53 *L. T. Rep.* 426; 29 *Ch. Div.* 947, *and notwithstanding the possible doubts cast upon these decisions of courts of first instance by the judgments of the Court of Appeal in* Re Watts; Cornford *v.* Elliot (ubi sup.), *that the interest of E. C. in the trust fund was not an interest in land but in personalty, and the deed of the* 21*st July* 1869 *did not effectually pass such interest.*

ACTION by purchaser claiming return of money

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

paid as deposit on the ground that the vendor had not shown a good title.

By an agreement in writing dated the 7th July 1894, and made between the defendant of the one part and the plaintiff of the other part, the defendant agreed to sell and the plaintiff agreed to purchase the life interest of Emma Clayton, the widow of William Charles Clayton, determinable on her re-marriage in a sum of 1100*l.*, the proceeds of real estate comprised in an indenture of settlement dated the 31st Oct. 1855, and invested in real securities for the sum of 210*l.*, of which 21*l.* was to be paid as a deposit.

On the date of this agreement 21*l.* was paid by the plaintiff to the defendant as such deposit and in part payment of the purchase money.

From the abstract of title delivered by the defendant to the plaintiff, it appeared that by an indenture dated the 31st Oct. 1855, and made between W. C. Clayton of the one part and R. A. Dufty of the other part, certain real estate was conveyed unto and to the use of R. A. Dufty and his heirs upon trust to pay the rents thereof to W. C. Clayton for life, and after his death upon trust for Emma Clayton during her life or widowhood with remainders over. And it was thereby declared that it should be lawful for R. A. Dufty to sell the said premises and to invest the moneys produced by any such sale in any of the public stocks or upon mortgages of freehold, copyhold, or leasehold premises. The settlement did not authorise the proceeds of sale to be invested in the purchase of land.

Prior to the 21st July 1869, the said R. A. Dufty, in pursuance of the power contained in the indenture of settlement, sold the whole of the real estate comprised therein, and on the 21st July 1869 the whole of the trust funds consisted and were still consisting of the sum of 1100*l.* invested on mortgage securities.

By an indenture dated the 21st July 1869, and made between John Preston, the mortgagee of the life interest of W. C. Clayton, of the first part, W. C. Clayton and Emma Clayton of the second part, and Edward Hardy of the third part, the said W. C. Clayton and Emma Clayton purported to assign to Edward Hardy all the right and interest of them respectively in and to the dividends, interest, or annual produce arising from the said trust fund of 1100*l.* This indenture was duly acknowledged by Emma Clayton under the Fines and Recoveries Act 1833. The defendant derived his title from Edward Hardy.

The plaintiff objected to the title shown by the defendant on the ground that the indenture of the 21st July 1869 was invalid and ineffectual to pass the reversionary life interest of the said Emma Clayton in the said mortgage moneys, inasmuch as the settlement under which she claimed such life interest was made prior to the date of the commencement of Malins' Act.

The defendant maintained that Mrs. Clayton's interest was an interest in land within the meaning of sect. 77 of the Fines and Recoveries Act, and that the assignment, having been acknowledged under that Act, was valid.

This was an action by the purchaser claiming the return of the deposit money paid by him on the ground that the vendor had not shown a good title.

Graham Hastings, Q.C. and *T. Douglas* for the purchaser.—Malins' Act came into operation on the 1st Jan. 1858. So that it is inapplicable to the present case, the settlement under which Mrs. Clayton derived title being prior to that date:

Re Elcom; Layborn v. *Grover Wright*, 70 L. T. Rep. 54; (1894) 1 Ch. 303.

The first question is, whether the married woman could assign under sect. 77 of the Fines and Recoveries Act. *Briggs* v. *Chamberlain* (21 L. T. Rep. O. S. 218; 11 Ha. 69; 18 Jur. 56) decided that where there was a trust for sale and the land remained unsold, the interest of the married woman in such real estate was an interest in land, but it does not decide that where a sale has taken place the conversion is not complete. Any dealing with the property after sale must be made upon the footing of the state in which it is:

Re Newton's Trusts, 23 Ch. Div. 181.

The trustees of a will, a tenant for life, and a wife with a reversionary interest in one-third of the testator's residuary estate, and her husband and a person entitled to a reversionary interest in another third assigned two mortgage debts forming part of the residuary estate, but the administrator of the person entitled to the reversionary interest in the remaining third was not a party. It was held that the wife's share of the two mortgage debts did not pass. The argument in favour of the validity of the assignment by a married woman in *Tuer* v. *Turner* (25 L. T. Rep. O. S. 252; 20 Beav. 560) puts the matter no higher than this, that so long as the land was unsold the Fines and Recoveries Act applied. The exact point which occurs in the present case was decided in *Re Algeo* (Ir. Rep. 2 Eq. 485). This was a decision on the Irish Fines and Recoveries Act, but the provision is identical with that of the English Act (3 & 4 Will. 4, c. 74, s. 77), and is on the general principle in our favour. We submit that it is plain, both on principle and upon these authorities that directly the property was sold under the power Mrs. Clayton from that time could not deal with her reversionary interest in the money fund. In *Re Newton's Trusts* Chitty, J. said (at p. 185): "The case is not within the 77th section, because one of the persons interested in the mortgage debt is not a party to the deed. It, therefore, in my opinion, failed to operate as an effectual mortgage of the share of Sarah Todd or of the share which she took as one of the next of kin in these two mortgages."

Willis Bund for the vendor.—We have made out a good title. *Briggs* v. *Chamberlain* shows that so long as the property remains unsold by the trustees a married woman can dispose of her interest notwithstanding the trustees' power of sale. The married woman's interest in the present case could have been passed by a fine and recovery before the statute 3 & 4 Will. 4, c. 74:

May v. *Roper*, 4 Sim. 360.

The Irish case of *Re Algeo* is merely a decision on the Irish Fines and Recoveries Act and is not binding. The case before Chitty, J. (*Re Newton's Trusts*) is in my favour, as it recognises that *Williams* v. *Cooke* was rightly decided. The question is, whether Mrs. Clayton could deal with her life interest. The case here is similar to *Williams* v. *Cooke* (8 L. T. Rep. 145; 4 Giff. 343) where the married woman was absolutely entitled to the debt secured by equitable mortgage. Mrs. Clayton had an interest in the interest and annual

produce arising from the trust funds invested on mortgage of real estate. That was an estate in lands within the meaning of sect. 77 of the Fines and Recoveries Act 1833. These sums being invested on mortgage and she having an equitable interest in them she could pass that equitable interest under the Fines and Recoveries Act. If she had tried to sell without her husband it would probably have come within *Re Newton's Trusts*; but she and her husband joined to sell her interest. It would be a very striking construction to put on the section to say that so long as the trust fund remains invested on mortgage she cannot deal with her interest in it, and as soon as the necessary steps are taken for enforcing the mortgage she can. The object of Malins' Act and of the Fines and Recoveries Act was to give greater latitude to married women in dealing with their property; not to tie up property in the way it is now desired to tie it up.

Hastings in reply.—No authority has been cited which is against our first point. Mr. Willis Bund is compelled to say that there is nothing in the judgment of Stuart, V.C. in *Williams* v. *Cooke* to show that the Vice-Chancellor relies upon the absolute interest. What the Vice-Chancellor stated was that the lady was the owner of the debt, and on marriage her husband had acquired the property in it. As to *Williams* v. *Cooke*—here Mrs. Clayton had only a reversionary life interest. In *Williams* v. *Cooke* the married woman was entitled to a reversionary share in the corpus of the property. It is said that that makes a distinction between that case and this, but there does not appear to be any distinction for this purpose. It was further suggested that if the trustee had foreclosed the mortgage, the mortgage security would have become land. Chitty, J. deals with that argument in *Re Newton's Trusts*, and says: "It is said . . . at the date of the deed, Sarah Todd as being entitled to a share in the mortgage debts 'might have' on default in payment of the mortgage debts an estate or interest in the land on which they were secured; but that is not the true construction of the section. The section refers to the actual state of things at the time the deed is executed by the married woman." [STIRLING, J.—I do not at present see any distinction between this case and *Re Newton's Trusts*, but I should like to look a little more closely into the cases, for they seem to disclose anomalies.]

Cur. adv. vult.

Nov. 9.—STIRLING, J. gave judgment, and after stating the facts of the case, continued:—The question is whether Mrs. Clayton, being a married woman, could by the deed of the 21st July 1869 convey her interest. Now, it was common ground that, inasmuch as the deed of the 31st Oct. 1855 was executed before the period fixed for the commencement of the operation of Malins' Act that Act has no application. What was said on behalf of the purchaser is that the interest of Mrs. Clayton was an interest in real estate, and that she was entitled to dispose of it under the provisions of the Fines and Recoveries Act. Sect. 77 of the Fines and Recoveries Act says that "It shall be lawful for every married woman in every case except that of being tenant in tail, for which provision is already made by this Act, by deed to dispose of lands of any tenure and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure." By the definition clause, sect. 1, it is provided that "The word 'estate' shall extend to any estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance, in, upon, or affecting lands either at law or in equity." Now, upon the meaning of that clause decisions have already been given, and they appear to me to lay down this rule, that in ascertaining whether or not the interest purported to be conveyed or disposed of by a deed acknowledged by a married woman is or is not an interest in real estate, the critical moment to be considered is the execution of the deed, and you are to ascertain whether at the time of the execution of that deed the married woman was or was not in fact entitled to a life interest in real estate. If she was so entitled, then the provisions of the Act would enable her to deal with it. If she was not so entitled then the provisions of the Act do not apply. No clearer and better illustration of the rule cited can be found than that contained in the decision of the Court of Appeal in *Re Durrant and Stoner* (or *Stainer*) (45 L. T. Rep. 363; 18 Ch. Div. 106). There the trustees of a personalty settlement had in breach of their trust invested part of the trust fund which was pure personalty in the purchase of land, and two married ladies were entitled to reversionary interests in that fund. By a deed which was acknowledged by these ladies the persons interested in the fund conveyed the real estate in which the trust funds had been invested, and it was held that, although a breach of trust had been committed, and although in accordance with the provisions of the trusts of the settlement the fund ought to have been invested in pure personalty, still the married ladies were at the date of the deed entitled *de facto* to an interest in land, and that therefore they had power to convey that estate. The late Master of the Rolls says: "The daughters could by acknowledged deed dispose of whatever interest they had in the house; the terms of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74, s. 77), having regard to the fact that the definition of 'estate' in the interpretation clause being of the widest possible description. What is there to prevent the daughters from so disposing of their interests? There is no stipulation in the settlement disabling them from disposing of their reveversionary interests in the settled fund. Their inability to do so arose only from the rules of law, not from contract, and this legal disability did not exist as to their interest in the land purchased." Accordingly it has been held in a series of cases (*Briggs* v. *Chamberlain*, 11 Hare, 69; and *Tuer* v. *Turner*, 20 Beav. 560; and *Re Jakeman's Trusts*, 23 Ch. Div. 344; 52 L. J. 363, Ch.) that a married woman can convey her interest in real estate which is vested in trustees upon trust for sale so long as a sale has not been made and the trust fund remains in the shape of real estate. That I take to be well-established law, although in an early case of *Hobby* v. *Collins* (17 L. T. Rep. O. S. 2; 4 De G. & Sm. 289) Knight Bruce, V.C. expressed a different opinion, which, however, has not been followed in subsequent cases. On the other hand, it has been decided in the case of *Re Algeo* before the Master of the

Rolls in Ireland (Ir. Rep. 2 Eq. 485) that, where lands are vested in trustees for sale and after a sale has taken place and the proceeds of sale have been invested in what I may term for this purpose pure personalty, as, for example, consols, then the married woman has ceased to have an interest in real estate within the meaning of the Fines and Recoveries Act and cannot convey. It was suggested that this was a decision on the Irish Fines and Recoveries Act, and in any case was not binding on me and ought not to be followed. But, in the first place, the Irish Fines and Recoveries Act is identical, I may say, for this purpose with the English Act; and, in the second place, that the decision is quite right and in accordance with principle, and that I ought to follow it. I may add that it is supported by the weighty opinion of Lord St. Leonards in his treatise on the Real Property Statutes, 2nd edition, at p. 233, where he says this, after speaking of the case of *Hobby* v. *Collins*: "Even if the estate had remained unsold it would seem that the Act would have enabled the legatee and her husband during the life of the tenant for life to dispose of, release, or extinguish her reversionary interest in the legacy charged on the land. It would be a different question, where the legacy having been raised has become property severed from the general trust fund, and forms a separate personal fund altogether discharged from its character as a charge upon real estate." That then being the general rule, I have to consider how it is to be applied in the present case in which the proceeds of sale have not been invested in a pure personal investment such as consols, but upon a mortgage of a real estate. Now, on that again there is authority. In the case of *Williams* v. *Cooke*, before Stuart, V.C. (8 L. T, Rep. 145; 4 Giff. 343) it was held that where a married woman, who prior to her marriage was entitled under a will to a debt payable after the death of her sister secured on land by the deposit of title deeds, by deed acknowledged joined her husband in assigning her share and interest in the debt and the real security in order to secure moneys due by her husband, that the assignment was effectual, and she was not entitled to a settlement out of the proceeds of the real estate. The Vice-Chancellor said: "Where a debt is secured by deposit of title deeds of real estate, being the subject of an equitable mortgage, the owner of the debt has an interest in the real estate. By the marriage, the debt, together with the title deeds which were deposited for the purpose of securing the debt became the property of the husband. The wife concurred in assigning the debt and title deeds by way of security to the bankers," and it was held that the bankers were entitled, the married woman having acknowledged the deed in accordance with the provisions of the Fines and Recoveries Act, and by that proceeding having concurred in assigning her estate. On the other hand it has been decided by Chitty, J. in *Re Newton's Trusts* (23 Ch. Div. 181) that where under the will of a testator a married woman was entitled to one-third of his residuary estate subject to the life interest of his widow, and she, this married woman, and the widow who was tenant for life concurred in executing a deed which was acknowledged by the married woman under the Fines and Recoveries Act and assigning two mortgage debts secured to his trustees and real estate forming part of the residuary estate by way of mortgage, yet that the deed was not effectual to pass the married woman's share of the two mortgage debts. Chitty, J. refers (at p. 187) to *Williams* v. *Cooke*, and says this: "The decision in *Williams* v. *Cooke*, which, if I may say so, seems perfectly right, established that a married woman who, with her husband, is entitled to a mortgage debt has a charge or incumbrance within the meaning of the 77th section taken in connection with the interpretation clause; but in the present case the point is different. Here the married woman together with other beneficiaries had an interest in the mortgage debt so that she and her husband could not have disposed of it, and moreover there was another party interested, namely, the administrator of Thomas Newton who was not a party to the deed. Then it is said the present case falls within the 77th section of the Fines and Recoveries Act because it includes any estate which the married woman 'may have' in land, and at the date of the deed Sarah Todd as being entitled to a share in the mortgage debts 'might have' on default in payment of the mortgage debts an estate or interest in the land on which they were secured; but that is not the true construction of the section. The section refers to the actual state of things at the time the deed is executed by the married woman. It appears to me that the case is not within sect. 77, because one of the persons interested in the mortgage debts was not a party to the deed." Therefore, Chitty, J. was of opinion that, unless all parties who were beneficially interested in the mortgage debt concurred in the deed, it was not effectual. Now, it appears to me that if that case is well decided it covers the present. No distinction can be drawn between a life interest and an interest in the corpus, as it appears to me. If any distinction is to be drawn it would be rather more favourable to the interest in the corpus, than the interest during life, which is the present case. I must, however, call attention to a case which was not cited in the argument, but which appears to me to have a bearing on the present question. It is a case which arises not under the Fines and Recoveries Act, but under the Act of Geo. 2, commonly called the Mortmain Act, by which, as we all know, certain gifts of real estate and interests in real estate were prohibited. The words are, "All gifts of any lands, tenements, hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments," shall be null and void unless made in the prescribed way. It has often been the duty of the courts to consider the question whether an interest given to a charity by will was or was not an interest in land within the meaning of that Act. Now, it so happened that a case arose under the Mortmain Act which gave rise to questions very similar to that which have arisen before me under the Fines and Recoveries Act. I refer to the case of *Re Watts; Cornford* v. *Elliott*, which is reported in the first instance in 27 Ch. Div. 318, and in the Court of Appeal in 29 Ch. Div. 947 (51 L. T. Rep. 85; 53 L. T. Rep. 426). There a testator gave the residue of his personal estate for charitable purposes. At the time of his death the estate comprised three mortgages. One was a sum of

100*l.* due to him on the security of the mortgage of the life interest of a lady under the will of her father in the sum of 3000*l.*, and the 3000*l.* was invested in the names of the trustees of the father's will on a mortgage of real estate. So that case is as close as a case could be to the question before me. The other two were sums due to the testator on mortgages of a life interest of a tenant for life and of the vested reversionary interest of one of her daughters in a moiety of those funds, and the greater part of those trust funds was invested in the names of the trustees of the settlement on a mortgage of real estate. So that in the one case it had to be considered whether the life interest of the lady in funds invested on a mortgage of real estate was an interest in land, and in the other whether the reversionary interest of the lady entitled to a share of the corpus of funds similarly invested was also real estate. Pearson, J. decided that the former—the life interest—was not an interest in real estate, but he decided that the latter—the interest in the corpus—was such an interest. The ground on which he proceeded was this: that, as regards the first, the testator, he says, did not take any real interest in the original mortgage; he had simply the right to take the income arising from the investment. He could not by any foreclosure or otherwise acquire any interest in the real estate itself. But as to the second, he says: "It appears to me that by virtue of these two mortgages the testator had the control over the whole of the trust funds; he might have foreclosed both mortgages, and thus have acquired the property in the state in which it was actually invested." There was an appeal from the second decision, that is to say, as to the share of the corpus, but there was no appeal from the decision as to the life interest. The judgments which were delivered in the Court of Appeal appear to me to require consideration. Cotton, L.J., after stating the facts, says this: "Whether all persons interested in the trust funds were parties to the mortgages I do not think material." So then he considered it an immaterial circumstance that a share only was given. He says: "We must first look at the statute. It is often argued that a case is not within the mischief indicated by the preamble, and therefore it must be considered to be out of the Act. This is not sound reasoning—the preamble may be usefully called in where the enacting words are ambiguous, but where they are clear they cannot be cut down by reference to the preamble." Then he reads the statute: "To say that under the gift now in question the charity could never obtain possession of the land is attempting to draw us aside from the consideration of the real question, which is whether an interest in land is attempted to be given. Part of the property held upon the trusts of Mrs. Smith's marriage settlement was invested on mortgage of land. It is, therefore, impossible to say that the *cestuis que trust* had not an interest in land." Fry, L.J. said: "The first question appears to me to be settled by simple reference to the words of the 3rd section of the Act. I do not see anything in the preamble which requires us to restrict their meaning, and the question then is whether these mortgage debts are or are not charges on real estate. They were charged on the interests of *cestuis que trust* under a settlement, the funds held upon the trusts of which were partly invested on mortgage of real estate, and, in my opinion, were therefore charged on real estate. It was contended that in order to make the statute apply the charge must be direct, but I decline to interpolate that into the Act." Now notwithstanding the great weight which is due to a decision, first, by Pearson, J., and secondly, by Chitty, J., I confess that the reasons given in the Court of Appeal for the decision in this case of *Re Watts*; *Cornford* v. *Elliott*, have created great doubts in my mind which are not entirely removed, as to whether the two decisions in *Re Newton's Trusts* and the first decision in *Re Watts*; *Cornford* v. *Elliott*, can be reconciled with the grounds put forward by the Court of Appeal as the basis of their decision in the second case in *Re Watts*. As regards Pearson, J.'s decision my doubt is whether, if the test which was applied by Cotton, L.J. particularly in *Re Watts* were applied to this case, the result ought not to be that the tenant for life has an interest in land under the circumstances there arising as well as the remainderman. Cotton, L.J. says: "Part of the property held on the trusts of Mrs. Smith's marriage settlement was invested on mortgage of land. It is, therefore, impossible to say that the *cestuis que trust* had not an interest in land. Secondly, with regard to Chitty, J.'s decision it is to be observed that Cotton, L.J. treated it as immaterial in that case whether all the parties interested in the trust fund were parties to the mortgages, and Fry, L.J. expressly negatives the notion that an indirect interest in real estate is not an interest within the meaning of the Mortmain Act. Now, it seems to me that there is no reason for giving a narrower interpretation to the words interest in land in the Fines and Recoveries Act than was given by the Court of Appeal to similar words in the Mortmain Act. But it appears to me that the weight of authority in courts of first instance is in favour of the contention of the plaintiff, and I do not think it would be right for me to depart from those authorities. Of course, it would be open, if the doubts which suggest themselves to me appear to be weighty to the advisers of the defendant, to take the case further and to get a further opinion upon the subject, but in my judgment I think I ought to follow the decision of Chitty, J., which appears to me to be upheld, supported as it is to a certain extent by the decision of Pearson, J. in the first case of *Re Watts*; *Cornford* v. *Elliott*.

Solicitors: for the plaintiff, *Atkinson* and *Dresser*, for *Percy Phillip Truman*, Nottingham; for the defendant, *Kennedy*, *Hughes*, and *Kennedy*, for *John Allington Hughes*, Wrexham.

Nov. 18, 19, 20, *and* 28.

(Before ROMER, J.)

TIBBATTS *v.* BOULTER. (*a*)

Vendor and purchaser—Sale of public-house—Misrepresentation—Laches—Rescission.

When a purchaser discovers that a representation made to him by a vendor is untrue, if the vendor suggests that, if time be given him, the representation may be cured, and the purchaser put in as good

(*a*) Reported by G. MACAN, Esq., Barrister-at-Law.

a position as if the representation had been true; the purchaser, by giving the vendor time, does not lose his right to rely on the misrepresentation and determine the contract, if, at the end of the time, the vendor fails to make good his suggestion.

BY an agreement of the 10th Dec. 1894, made between the plaintiff, Henry James Tibbatts, and the defendant, James Boulter, the plaintiff agreed to sell to the defendant for 1800*l.* the lease of a public-house called "The Citizen Tavern," at Houndsditch, the sale to be completed on the 1st Jan. 1895. By an agreement of even date between the same parties, after acknowledging the payment of 50*l.* as a deposit, the plaintiff agreed that in the event of the parties being unable to obtain an increase of the then existing loans from 1250*l.* to 1400*l.*, made by the brewers or distillers, the plaintiff would advance the deficiency of 150*l.*, it being the intention of the parties that the defendant should only find the sum of 400*l.* cash to complete the purchase.

The defendant alleged that immediately before these agreements the plaintiff verbally represented to the defendant that the mortgages on the property amounted to 1250*l.* (1000*l.* due to Messrs. Courage and Co., and 250*l.* to certain distillers), and that the mortgagees were willing to advance the further sum of 150*l.*, and to allow the whole 1400*l.* to remain on mortgage for a considerable time without requiring repayment.

As a fact the defendant discovered on the 12th Dec. 1894 that the amount on mortgage was considerably less than 1250*l.*, and the mortgagees were not willing to allow the money to remain. The plaintiff suggested that loans might be obtained from other firms, and negotiations were entered into, but fell through, as the terms were such that the defendant could not consent to them. The defendant then repudiated the contract.

The plaintiff brought his action on the 11th Jan. 1895, and claimed specific performance of the contract.

The defendant pleaded the misrepresentations, and counter-claimed for rescission of the contract and a return of the deposit.

Oswald, Q.C. and *Arthur Young* for the plaintiff.—If there was an inaccurate representation the defendant did not rely on it, but went on with the negotiations.

Eve, Q.C. and *Martelli* for the defendant.—The misrepresentation is admitted, and is material; and the defendant, by giving time to the vendor, has not lost his right to rely upon that misrepresentation and rescind the contract.

Oswald, Q.C.—An objection to a contract such as this must be insisted upon at once, and there has been such laches here on the part of the defendant as disentitles him to any relief.

Reference was made to the cases of

Flint v. *Woodin*, 9 Hare, 618;
McMurray v *Spicer*, 18 L. T. Rep. 116; L. Rep. 5 Eq. 527.

ROMER, J.—The first and most important question is, did the plaintiff, in fact, on the 10th Dec. 1894, make misrepresentations to the defendant with a view of inducing the defendant to enter into the contract? Undoubtedly he did. He informed the defendant that the loan from the brewers, Messrs. Courage and Co., was 1000*l.*, and that the loan from the distillers was 250*l.* Whereas in fact, to the plaintiff's knowledge, the loans were 875*l.* and 175*l.* respectively. [His Lordship then considered at length the evidence as to the representations, and the question as to whether they were relied upon by the defendant and were material, and came to the conclusion that they were.] But the question of the delay on the part of the defendant has caused me some doubt. Undoubtedly, on the 12th Dec. 1894, the defendant found out the untruth of the statements of the plaintiff, and yet he did not on this ground at once seek to be relieved of his bargain. It is true that, when a person wishes to escape from his contract on the ground of misrepresentation, he must come immediately. But it appears to me that when a purchaser discovers that a representation made to him by a vendor is untrue, if the vendor in effect suggests that if time be given him the misrepresentation may be cured, and the purchaser put in as good a position as if the representation had been true; then the purchaser, by giving the vendor time, does not lose his right at the end of that time, if the vendor fails to make good his suggestion, to rely on the misrepresentation as a ground for determining the contract, and determining it accordingly. Now, in the present case, I have come to the conclusion that in substance what took place on the 12th Dec. 1894, immediately on the discovery of the true state of Messrs. Courage's loans, was this: I think it was represented that the loan might be obtained from other firms, so as to satisfy the defendant, and put him in the same position as if no misrepresentation had been made. I think it was with this object that he consented to the applications being made to other firms, but he reserved to himself the right to approve or object to the terms of the loans. [His Lordship then reviewed the evidence on this point, and came to the conclusion that the defendant was entitled to have the contract rescinded, and the action dismissed with costs.] There will be an order for the repayment of the deposit, and the defendant must have the costs of the counter-claim.

Solicitor for the plaintiff, *David A. Romain.*
Solicitors for the defendant, *Ransom* and *Williams.*

QUEEN'S BENCH DIVISION.

Nov. 11 *and Dec.* 7.

(Before Lord RUSSELL, C.J., GRANTHAM and WILLIAMS, JJ.)

HART (app.) *v.* BEARD (resp.). (*a*)

Registration of electors—Borough—Freemen entitled to vote at parliamentary elections—Parliamentary register relating to parish—Register of parochial electors—Parliamentary Registration Act 1843 (6 *&* 7 *Vict. c.* 18), *ss.* 47 *and* 48—*Local Government Act* 1894 (56 *&* 57 *Vict. c.* 73), *ss.* 2 (1) *and* 44 (1).

Freemen of a borough entitled to vote at parliamentary elections for the borough, but having neither occupation nor ownership qualifications, are not entitled to be placed on the register of parochial electors for any parish of the borough, even though their place of abode is within a parish.

(*a*) Reported by J. A. STRAHAN, Esq., Barrister-at-Law.

A. was a freeman entitled to vote at parliamentary elections for the borough of B. He resided in the parish of C. in that borough. He claimed to be put on the register of parochial electors for C. on the grounds that (1) *his place of abode being after his name on the list of freemen made that such a portion of the parliamentary register as relates to the parish of C. within sects.* 2 (1) *and* 44 (1) *of the Local Government Act* 1894 (56 *&* 57 *Vict. c.* 73), *and* (2) *the town clerk was bound, under sects.* 47 *and* 48 *of the Parliamentary Registration Act* 1843 (6 *&* 7 *Vict. c.* 18), *to put all parliamentary electors on the list for some parish. The revising barrister rejected the claim.*

Held, that the claim was rightly rejected.

APPEAL from the revising barrister at Coventry.

Hart was a freeman of the city, and entitled to vote at the election of members of Parliament for the city. He had his place of abode within one of the parishes of the constituency, and he claimed to be put on the parochial register of electors for that parish. The revising barrister held that those and no others were entitled to be placed on the parochial register of a parish who were already on the portion of the parliamentary register or the local government register as relates to the parish, and that the claimant's qualification as freeman did not entitle him to be placed on either of these, but only on the list of freemen entitled to vote at parliamentary elections, and he therefore rejected the claim. The claimant appealed. The town clerk of Coventry was made the respondent.

The following were the statutes cited in the course of the argument or judgment:—

The Reform Act 1832 (2 & 3 Will. 4, c. 45):

Sect. 32. Every person who would have been entitled to vote in the election of a member or members to serve in any future Parliament for any city or borough . . . either as a burgess or a freeman . . . if this Act had not been passed, shall be entitled to vote in such election, provided such shall be duly registered according to the provisions hereinafter contained, but no such person shall be so registered in any year . . . unless where he shall be a burgess or freeman . . . of any city or borough he shall have resided for six calendar months next previous to the last day of July in such year within such city or borough, or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken.

Parliamentary Registration Act 1843 (6 & 7 Vict. c. 18):

Sect. 13. The overseers of every such parish or township shall, on or before the last day of July in every year, make out or cause to be made out . . . an alphabetical list of all persons who may be entitled to vote in the election of a member or members to serve in Parliament for such city or borough, in respect of the occupation of premises . . . situate wholly or in part within such parish or township, and another alphabetical list . . . of all other persons (except freemen) who may be entitled to vote in the election of such city or borough by virtue of any other right whatsoever.

Sect. 14. The town clerk of every city or borough shall, on or before the last day of July . . . make out . . . an alphabetical list of all the freemen of such city or borough who may be entitled to vote in the election of a member or members to serve in any future Parliament for such city or borough, together with the respective places of their abode.

Sect. 47. The said list of voters for each county, signed as aforesaid, shall be forthwith transmitted by the revising barrister to the clerk of the peace of the same county, and the clerk of the peace . . . shall forthwith cause the said lists to be copied and printed in a book or books, arranged with the names in each parish or township in strict alphabetical order, according to the surnames, and with every polling district in alphabetical order, and with every parish or township within such polling district likewise in the same order, and shall, after the last list for each polling district, insert a list in like alphabetical order of all persons whose names shall not appear in any of the said lists for such polling district, but who shall in manner hereinbefore mentioned have been registered by the revising barrister to vote at the voting place at such last-mentioned district.

Sect. 48. The lists of voters for each city or borough, signed as aforesaid, shall be forthwith delivered by the revising barrister to the town clerk of the same city or borough; and the said town clerk shall forthwith cause the said lists to be copied and printed in a book; and in the said book the said lists shall be arranged, and every name numbered according to the directions aforesaid, with regard to the county lists, so far as the same are applicable.

The Redistribution of Seats Act 1885 (48 & 49 Vict. c. 23):

Sect. 14.—(1.) In a parliamentary borough divided into divisions persons registered as freemen shall be entitled to vote: (*a*) if their place of abode is in the borough, then in the division in which such place of abode is situate; and (*b*) if their place of abode is not in the borough, then in the division to which such persons (in this section referred to as non-resident freemen) are allotted by the revising barrister, and shall not be entitled in respect of the qualification of freemen to vote elsewhere than in such division, and the registration of voters shall be conducted, and the register of voters arranged, so as to give effect to this enactment.

The Local Government Act 1894 (56 & 57 Vict. c. 73):

Sect. 2.—(1.) The parish meeting for a rural parish shall consist of the following persons, in the Act referred to as parochial electors, and no others: the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish.

Sect. 20.—(3.) The parochial electors of a parish shall be the electors of the guardians for the parish, and if the parish is divided into wards for the election of guardians, the electors of the guardians for each ward shall be such of the parochial electors as are registered in respect of qualifications within the ward.

Sect. 44.—(1.) The local government register of electors and the parliamentary register of electors, so far as they relate to a parish, shall, together, form the register of the parochial electors of the parish; and any person whose name is not in that register shall not be entitled to attend a meeting or vote as a parochial elector, and any person whose name is in that register shall be entitled to attend a meeting and vote as a parochial elector unless prohibited from voting by this or any other Act of Parliament.

Sect. 75.—(2.) The expression "parochial elector," when used with reference to a parish in an urban district, or in the county of London, or any county borough, means any person who would be a parochial elector of the parish if it were a rural parish.

T. W. Chitty for the appellant.—The short point here is, whether freemen having their place of abode in a parish of a borough, and being on the parliamentary register of the borough, are entitled to be placed on the parochial register of the parish in which they live. This depends primarily on sects. 2 (1) and 44 (1) of the Local

Government Act 1894. [Lord RUSSELL, C.J.—Your case depends on the construction put upon the words in those sections "as relate to the parish."] Precisely. Sect. 32 of the Reform Act of 1832 preserves the right of freemen to vote at parliamentary elections. Sect. 14 of the Parliamentary Registration Act of 1843 entitles me to be put on the parliamentary list. Then I contend that the effect of sects. 47 and 48 of the same Act is to entitle every elector on the parliamentary list to be put upon a parish list. [Lord RUSSELL, C.J.—Then what is the meaning of the words "as relates to the parish" in sect. 2 of the Local Government Act 1894? GRANTHAM, J.—Sect. 13 of the Parliamentary Registration Act 1843 seems to except freemen from the ordinary list, while sect. 14 provides a separate list for them.] Even if this be so, those of them with places of abode within certain parishes may be held to be on such portion of the parliamentary list as relates to the parish: (see sect. 44 (2) of Local Government Act 1894.)

T. G. Carver for the respondent.—The argument for the appellant depends entirely on the effect of sects. 47 and 48 of the Parliamentary Registration Act of 1843 being to necessitate every elector being put under a parish. Since the first Reform Act a different practice has been followed without question. The register is now made up of two lists—the parish list prepared by the overseers, and the list of freemen prepared by the town clerk: (sect. 14 Parliamentary Registration Act 1843.) The argument of the other side is, that the town clerk is bound to amalgamate these. But this is an appeal against the decision of the revising barrister in which the town clerk is not concerned. Moreover, it would be impossible to put all freemen under parishes, since some of them may live far from any parish in the borough: (Reform Act 1832, s. 32.) If this arrangement had been intended by the Legislature it would have provided some mode of allotting non-resident freemen among the parishes, as it has done in the case of a borough being divided up into various constituencies: (sect. 14, Redistribution of Seats Acts 1885.) [Lord RUSSELL, C.J.—There is a provision there that non-resident freemen are to be allotted by the revising barrister.] Yes; that is inconsistent with the appellant's argument that the town clerk is bound to do so under sects. 47 and 48 of the Parliamentary Registration Act 1843. There are provisions in the Local Government Act 1894 for the allotment of parochial electors where the parish is divided (sect. 60). Finally, if the freeman is entitled to vote in any parish he is entitled to vote in all.

Chitty, in reply, referred to sect. 14, Parliamentary Registration Act 1843. [GRANTHAM, J. referred to sect. 20 (3) of the Local Government Act 1894.] I am prepared, if necessary, to contend that a freeman residing within a ward has a qualification within that ward within sect. 20 (3).

Cur. adv. vult.

Dec. 5.—Lord RUSSELL, C.J. read the following judgment:—This is an appeal from the revising barrister at Coventry, who rejected the claim of the appellant to have his name entered on the list of parochial electors for the parish of Holy Trinity Within. The appellant is a freeman of the city of Coventry, and by virtue of his being a freeman entitled to exercise the parliamentary franchise for the borough, but he has no other qualification. The names of the freemen are entered on the parliamentary register, but not, as those of other voters are, under the heading of a parish. These are placed in a separate list simply with the name of the polling district to which they have been allotted. The difficulty then arises under sect. 2 (1) and sect. 44 (1) of the Local Government Act 1894, by which "parochial electors" and "register of parochial electors" respectively are defined. Sect. 2 (1) is as follows: "The parish meeting for a rural parish shall consist of the following persons, in this Act referred to as parochial electors, and no others—namely, the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish." The material part of sect. 44 (1) is as follows: "The local government register of electors and the parliamentary register of electors, so far as they relate to a parish, shall, together, form the register of the parochial electors of the parish." The appellant and others are admittedly not on the local government register of electors, and the question is whether, not being registered in a portion of the parliamentary register which relates to the parish, they are entitled to be placed on the register of parochial electors. It is agreed on both sides that this method of dealing with the names of freemen has been the practice for a long time, and it seems to me that the Legislature must be taken to have had cognisance of this practice. I find it, therefore, impossible to get over the plain words of both sections, and I think the revising barrister was right, and that he could not, having regard to the words "no others" in sect. 2 (1), have properly placed these freemen on the parochial register. But the appellant's counsel contended, even if the revising barrister were right, that by reason of sects. 47 and 48 of 6 Vict. c. 18 (the Parliamentary Registration Act 1843), the name of the appellant ought to have been placed by the town clerk under a parish in the parliamentary register—in other words, that by virtue of those sections it is the duty of the town clerk to put every name under a parish. In my judgment, this question is not properly raised in the case before us. I think the revising barrister had no power to do what it is now contended ought to have been done by the town clerk. But, as the question of the right of freemen to be placed on the parliamentary register under a parish has been fully argued before us, I think it proper to express my judgment upon that point. The sections relied on are sects. 47 and 48 of 6 & 7 Vict. c. 18. I do not read these sections in the sense contended for. The duty imposed on the town clerk, when the list of voters is received from the revising barrister, is, I think, merely to have the names which appear as belonging to a parish or township printed or arranged in alphabetical order. I cannot find any direction to place every name under some parish, which is the appellant's contention. The difficulty would arise as to the parish to which a freeman should properly be allotted. Upon what principle is the town clerk to proceed? It is suggested that he ought to allot to the parish in which the freeman lives. I find no such principle laid down in the Act. And what is to be done with freemen residing outside the parliamentary limits? As to these the learned counsel suggested

that there was a difference between these outside residents and inside residents, but I can see no grounds for this suggestion. If freemen, *quâ* freemen, are entitled to be put on the parliamentary register in a manner to give them parochial franchises, I do not see that they can properly be divided into resident and non-resident classes. By such residence as the resident freemen have, they have no parochial rights of franchise. In my judgment, therefore, the contention of the appellant fails on both grounds. It is clear, to my mind, that the Legislature intended by its definition of parochial electors to include only those persons who had the qualification either of ownership or of occupation of land or houses within the parish. This the freemen may or may not have, but, if the appellant's contentions are correct, they would all have to be treated on the same footing. Their franchise is a purely personal one in no way dependent on ownership or occupation, and I think that, in the absence of any other qualification, they are rightly excluded from the parochial electors. It seems to me, moreover, that, if the mere fact of being on the parliamentary register as a freeman were a sufficient qualification, then the freemen would, under sect. 44 (4) of the Local Government Act (56 & 57 Vict. c. 73), be equally qualified as parochial electors in all the parishes in the borough, there being no reason why they should belong to one more than another. The appeal will therefore be dismissed.

Grantham, J.—In my judgment the revising barrister was right, and this appeal must be dismissed. From the statements made in the course of the argument, it is evident that, since the Reform Act of 1832, freemen have been put in a separate list in the poll-books for the boroughs of England where freemen have votes. Practically from that time the freemen's franchise, though an ancient one, became an anomaly in our electoral system, and the vote being often in respect of personal qualifications such as birth and parentage, it was very desirable to keep the list of freemen voters separate from the parish list of those who voted for qualifications existing in the parish in which their names were entered. Many of the freemen did not live in the borough at all, so that there was of necessity a separate list for them apart from the list of the ordinary voters who lived in and voted for qualifications in the various parishes of the borough. By sects. 13 and 14 of the Registration Act of 1843 it is clear that separate lists were to be made out by the overseers and town clerk respectively, and I can see nothing in the 47th and 48th sections to show that these lists were ever to be amalgamated or mixed up; and it would be strange indeed, if that had been the intention of the Legislature, that that intention had never had effect given to it. As the Local Government Act of 1894 admittedly would not apply to freemen, or rather freemen as such would not be included in the term parochial electors as defined by that Act, because they did not appear in the list of parochial electors as relates to the parish, it is a most unusual request to ask us to treat them as if they had been in such list, because, as they were not in the list, we must assume that it was not intended to include them as parochial electors, as they were not mentioned, and I do not see how under any circumstances the revising barrister could have included them. The clerk of the peace and town clerk respectively prepare the lists for the revising barrister, and he does not alter the way in which the lists are made up. If the appellant wishes to succeed, he must therefore get the lists altered by them, though how he is to do that unless by *mandamus* I do not know. At any rate that is not the application before us, and this appeal must be dismissed.

Williams, J. concurred.

Appeal dismissed.

Solicitors for the appellant, *Sharpe, Parker,* and *Co.*, agents for *Hughes* and *Masser*, Coventry.

Solicitors for the respondent, *Crowders* and *Vizard*, agents for *Lewis Beard*, Town Clerk of Coventry.

House of Lords.

Nov. 15, 18, *and Dec.* 17, 1895.

(Before the Lord Chancellor (Halsbury), Lords Watson, Shand, and Davey.)

The San Paulo (Brazilian) Railway Company *v.* Carter (Surveyor of Taxes). (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Revenue—Income tax—Company resident in the United Kingdom—Trade carried on partly in the United Kingdom and partly abroad—Profits—"Foreign possessions"—Stat. 5 & 6 Vict. c. 35, s. 100, Sched. D., cases 1 and 5.

Every interest in the profits of trade belonging to a person who is, within the meaning of the Act 5 & 6 Vict. c. 35, resident in the United Kingdom, must be charged under the first case of schedule D. if the trade is carried on either wholly or partly in the United Kingdom. The person who makes the profits by his skill and industry, however distant may be the field of his adventure, is the person who is trading.

The appellant company, whose registered office was in London, were the proprietors of a railway in Brazil, where their profits were earned and paid, but the sole right to manage and control every department of the company's affairs was vested in the directors in London.

Held (affirming the judgment of the court below), that the business of the company was partly carried on in the United Kingdom, and that they were liable to be assessed to income tax under the first case of schedule D. of 5 & 6 Vict. c. 35, s. 100, upon the whole of their profits, and not under the fifth case upon the sums actually received in this country.

Colquhoun *v.* Brooks (61 *L. T. Rep.* 518; 14 *App. Cas.* 493) *distinguished.*

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), reported in 72 L. T. Rep. 244 and (1895) 1 Q. B. 580, reversing a judgment of the Divisional Court (Williams and Wright, JJ.) upon a case stated by Commissioners of Income Tax.

The appellants were an English company formed and registered under the Joint Stock Companies Acts, and had their registered office at 111, Gresham-street, Old Broad-street, in the city of London. The actual work of the company was carried on in Brazil where the profits were

(*a*) Reported by C. E. Malden, Esq., Barrister-at-Law.

earned, but the control and direction of the company was in London and its business was carried on under the direction of the directors there. The directors entered into contracts for and purchased in England and sent to Brazil the materials for the additions, extensions, and improvements of their property, for repairs thereto, and for new plant. The accounts were kept in London, where the balance-sheets, reports, &c., were made out, all meetings were held, and dividends declared and paid. The directors appointed a superintendent, who resided in Brazil, was a salaried servant of the directors removable at their pleasure, and bound to obey and execute the orders sent out to him by the directors from London. In these circumstances the Commissioners for the Income Tax made an assessment upon the company on 370,122*l.*, the full amount of their profits and gains, against which the company appealed. In the case stated by the commissioners for the opinion of the Queen's Bench Division, it was found as a fact that, with an exception of transfer fees, amounting on an average to 128*l.* per annum, and annual interest upon money, amounting on an average to 1423*l.* a year, upon both of which particulars income tax had been paid by the appellants, the whole revenue of the company arose from moneys earned and paid to them in Brazil for the carriage of passengers, goods, &c., on the San Paulo Railway. The contention on behalf of the company was, that they were not chargeable under the first case, schedule D., sect. 100, of 5 & 6 Vict. c. 35, to income tax on 370,122*l.*, the full amount of the balance of the profits and gains of the company, but were chargeable under the fifth case, schedule D. in the same section, only upon 295,070*l.*, the full amount of the actual sums received in the United Kingdom upon an average of three years.

The Divisional Court gave judgment in their favour.

Sir *E. Clarke*, Q.C., *Bigham*, Q.C., and *Bremner*, for the appellants, contended that the case was governed by the decision of the House of Lords in the case of *Colquhoun* v. *Brooks* (61 L. T. Rep. 518; 14 App. Cas. 493), which decided that the case of a person residing in the United Kingdom, but carrying on his trade entirely abroad, falls under the fifth case of schedule D. of 5 & 6 Vict. c. 35, s. 100. The case of *The London Bank of Mexico* v. *Apthorpe* (64 L. T. Rep. 416; (1891) 1 Q. B. 383; and 65 L. T. Rep. 601; (1891) 2 Q. B. 378), upon which the Court of Appeal relied, is distinguishable, for in that case the bank carried on business in London. See also

Sulley v. *Attorney-General*, 5 H. & N. 711;
Bartholomay Brewing Company v. *Wyatt* (69 L. T. Rep. 561; (1893) 2 Q. B. 499;
Nobel Dynamite Company v. *Wyatt*, Ib.

It is really a question of fact. The whole of these profits were earned abroad, and arose from "foreign possessions" so as to bring the case within the fifth case of schedule D.

The *Attorney-General* (Sir R. Webster, Q.C.), Sir *R. T. Reid*, Q.C., and *Danckwerts*, for the respondents, argued that this was an attempt to upset the practice that had existed for thirty or forty years as to the assessment of income tax on Indian, American, and other railway companies, whose head offices were in London. *Colquhoun* v. *Brooks* did not lay down any such principle as was contended for, or overrule the earlier authorities, such as

Cesena Sulphur Company v. *Nicholson*, 35 L. T. Rep. 275; 1 Ex. Div. 428;
Calcutta Jute Mills Company v. *Nicholson*, 35 L. T. Rep. 279; 1 Ex. Div. 437;
Imperial Continental Gas Association v. *Nicholson*, 37 L. T. Rep. 717.

Colquhoun v. *Brooks* only decided that, where a man had nothing to do with the management of a business carried on abroad, he came under the fifth case. It does not depend upon where the receipts are actually received. The view taken by the Court of Appeal was the correct one.

Sir *E. Clarke*, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 17.—Their Lordships gave judgment as follows:—

The Lord Chancellor (Halsbury).—My Lords: I think that one proposition has been conclusively established by the various cases that have come under your Lordships' consideration, and that is that, where the trade is wholly or partially carried on in this country, the trader is liable to pay income tax on the profits of his trade. Now, in this case, the appellant company is an English company, residing—so far as that abstraction a corporation can reside at all—in England. It has an office in London, and I am disposed to think—though it is unnecessary for the purposes of this case to say so—that its trade, if the word "trade" is strictly construed, is wholly carried on in England. It seems to me that, as was said by Cockburn, C.J. and Crompton, J. in the case of *Sulley* v. *The Attorney-General* (5 H. & N. 711), "it is probably a question of fact where the trade is carried on," and it is probably true to say that that phrase may be understood in two different senses. It may mean where the land or goods in respect of which trading is carried on are conveyed, made, bought, or sold; or, speaking of land, where it is cultivated or used for any other purpose of profit. That makes the locality of the goods or the land which are the subjects of the trade to be in a certain sense the place where the trade is carried on, because it is the place where the things corporeally exist, or are dealt with. But there is another sense in which the conduct and management, the head and brain, of the trading adventure are situated in a place different from that in which the corporeal subjects of trading are to be found. It becomes, therefore, a question of fact, and according to the answer to be given to the question where is the trade in a strict sense carried on, will the answer be, under the Income Tax Acts there is it liable to assessment. It is therefore necessary to determine upon these principles where this appellant company carries on its business. It deals, undoubtedly, with land in the Brazils. In Brazil the payments are received, and in Brazil the passengers and goods are carried, but the form of trading can make no difference. If it were a mine, as in the *Cesena* case (35 L. T. Rep. 275; 1 Ex. Div. 428), or a jute mill (35 L. T. Rep. 279; 1 Ex. Div. 437), equally with a railway, the person who governs the whole commercial adventure, the person who decides what shall be done in respect of the adventure, what capital shall be invested in the adventure, on what terms the

adventure shall be carried on, in short, the person who, in the strictest sense, makes the profits by his skill or industry, however distant may be the field of his adventure, is the person who is trading. That person appears to me, in this case, to be the appellant company. Every one of the tests which I have applied are applicable to its proceedings. A shipowner, or indeed a shipbroker, may not have any one of the ships or the charter-parties which he negotiates in England; but by correspondence, or by agency, he may have both charter-parties and ships, not necessarily British ships, all over the globe. But, if he lives in London, and by his direction governs the whole of this commercial adventure, could it properly be said that he is not carrying on his trade in London? So it appears to me that this appellant company is carrying on the trade in London, from whence it issues its orders, and so governs and directs the whole commercial adventure that is under its superintendence. I am, therefore, of opinion that the appeal must be dismissed with costs, and I move your Lordships accordingly.

Lord WATSON.—My Lords: The decision of this appeal does not involve any new controversy upon the construction of the Income Tax Acts. It depends, in my opinion, upon the answer which ought to be given to a single issue of fact. The law which must govern the present case appears to me to be settled by the judgment of this House in *Colquhoun* v. *Brooks* (61 L. T. Rep. 518; 14 App. Cas. 493). It was held in that case that the interest of a partner, resident in England, in the profits of a trade which was exclusively carried on in Australia by the other members of the firm was chargeable with income tax, not under the first, but under the fifth, case of schedule D. The noble and learned Lords who took part in the decision were of opinion that the interest of the English partner was included in the sweeping language of the first case; but they held that it also constituted, within the meaning of the fifth case, a possession in one of Her Majesty's dominions out of the United Kingdom. The ground upon which the interest was held to be taxable in terms of the fifth case was that the Income Tax Acts contain no machinery for assessing, under the first case, profits accruing from any trade which is not wholly or in part carried on within the United Kingdom, whereas they do provide machinery for assessing, under the fifth case, all profits arising from trade exclusively carried on outside of the United Kingdom. In my opinion, the decision in *Colquhoun* v. *Brooks* directly affirms the rule that every interest in the profits of trade belonging to a person who is, within the meaning of the Acts, resident in the United Kingdom must be charged under the first case of schedule D., if the trade is carried on, either wholly or partly, within Great Britain or Ireland, and is chargeable under the fifth case if the trade is exclusively carried on in any of Her Majesty's dominions out of the United Kingdom. The considerations which are applicable to trades wholly carried on in these dominions apply with equal force to trades exclusively carried on in foreign possessions which are not subject to the British Crown; and it appears to me to be matter of necessary implication that the interest of a resident here, in profits derived from a trade of the latter description, must also be assessed for income tax under the fifth case of schedule D. When it has been ascertained that a person interested in the profits of a trade has his residence in the United Kingdom, in such sense as to bring him within the incidence of the Income Tax Acts, the only question remaining for determination is whether the measure of his liability is to be found in the first or in the fifth case of schedule D. In the one case, he is liable to pay duty in respect of the net profits accruing to him from such trade; in the other, in respect only of such part of these profits as shall have been actually received by him in this country. But he cannot, according to the rule established in *Colquhoun* v. *Brooks*, escape from liability under the first case unless he is able to show that no part of the trade is carried on within the United Kingdom, or, what comes to precisely the same thing, that it is exclusively carried on in a country or countries outside the United Kingdom, whether subject to Her Majesty or not. If he succeeds in proving that fact his liability will be under the fifth case. The appellant is an English company incorporated with limited liability under British statutes, and having its registered office in London. It is not disputed that the company has its domicile in England, and is liable to pay income tax in respect of any profits earned in the course of its trade. The complaint made is, that the amount of such profits has been assessed for duty under the first case, whereas the appellants maintain that it ought to have been assessed under the fifth case, because the trade of the company is wholly carried on beyond the limits of the United Kingdom. I have had no difficulty in rejecting that contention. It is not necessary to consider whether the whole trade of the company ought to be regarded as carried on in England. To my mind, it is perfectly clear that, in point of fact, part of its trade is carried on here, and that is sufficient to bring its profits within the first case of schedule D. It is no doubt true that the undertaking, in order to carry on which the company was incorporated, consists, as its memorandum bears, in "the making, maintaining, managing, and working" of a railway in Brazil, and in "the making, maintaining, managing, and working" of branch lines, roads, canals, and other means of communication in connection with the main lines. It is also true that the directors, as authorised by the articles of association, manage and work the railway and its connections through a superintendent in Brazil, appointed by them, and a staff of servants in Brazil who are under his immediate supervision; and that the receipts of the company, from which profits made by it are derived, are earned and paid in Brazil. But the substantial fact remains that the directors, subject to any resolutions which may be passed for their guidance by the members of the company, are vested with the sole right to manage and control every department of its affairs. Apart from the authority, express or implied, which they have from the directors, neither the superintendent nor any other servant of the company has any power to act in the carrying on of its trade. They are in no sense traders; they are merely servants, and in that capacity are remunerated for the services which they are employed to perform. The profits of the undertaking, although they are received by these servants, do not belong to them, and are not in their disposal. Their only duty, unless otherwise directed by the company, is to transmit

them to London, and the company here is the sole judge whether they ought or ought not to be distributed among its members. The only persons who can with propriety be described as carrying on the trade of the company are its directors, who, for all purposes of administration and management, are the company itself. I do not think that in such circumstances the particular localities in which debts to the company are incurred, or are paid to its agents, are of any consequence in ascertaining by whom its trade is carried on. I therefore concur in the judgment which has been moved.

Lord SHAND concurred.

Lord DAVEY.—My Lords: I may content myself in this case with saying that the business of the appellant company is not, on the facts stated in the case, entirely or exclusively carried on abroad, and, therefore, that the case of *Colquhoun* v. *Brooks* (61 L. T. Rep. 518; 14 App. Cas. 493), on which the appellants' counsel relied, is no sufficient authority for the proposition which they maintained. No doubt the profits of the company are derived from the profitable use of land in Brazil and from the business of carriers carried on in that country, and in that sense it is a Brazilian business. But it is not sufficient to say that the company are carrying on a Brazilian business as Wright, J. thought, if the company is carrying on that business wholly or partially in this country. It is clear to my mind that the direction and supreme control of the appellant company's business is vested in the board of directors in London, who appoint the agents and officials abroad, and either by general orders or by particular directions control or may control their duties, remuneration, and conduct, and to whom any question of policy or any contract or other matter may, and if deemed of sufficient importance I suppose would, be referred for their decision. The business is, therefore, in very truth carried on in and from the United Kingdom, although the actual operations of the company are in Brazil, and in that sense the business is also carried on in that country. I do not attach any importance to the fact of the railway and business belonging to a corporation and not to an individual, except that in the case of an English joint-stock company, formed for the purpose of carrying on a particular business, it is, perhaps, easier to say where is the seat of administration and direction. In my opinion, therefore, the case is outside both the decision and the reasoning of the noble learned Lords who gave judgment in the case of *Colquhoun* v. *Brooks*, because I find that every one of those noble and learned Lords confined their observations to a case in which the business was entirely carried on abroad. Whether it would be possible in any case for a sole owner of a foreign business having exclusive power of control over it, but resident in this country, successfully to maintain that he did not carry on a business here it is unnecessary to say. That question, which is probably one of fact, will be dealt with when it arises according to the circumstances of the case. I am, therefore, of opinion that the business of the San Paulo Company is not a "foreign possession" within the meaning of the fifth case of sect. 100, schedule D., as interpreted in *Colquhoun* v. *Brooks*, and, that being so, the case undoubtedly falls within the language of the first case, and it follows that the company has been rightly charged upon the whole of its profits or gains.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Clements, Williams,* and *Chapple.*

Solicitor for the respondent, *F. C. Gore,* Solicitor of Inland Revenue.

Judicial Committee of the Privy Council.

Nov. 18 *and Dec.* 7, 1895.

(Present: The Right Hons. Lords HOBHOUSE, MACNAGHTEN, and MORRIS, and Sir R. COUCH.)

HUNTER DISTRICT WATER SUPPLY BOARD *v.* NEWCASTLE WALLSEND COAL COMPANY. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Stat. 55 *Vict. No.* 27—*Rateability of lands—Water supply.*

A statute provided that a water supply board might rate "lands and tenements distant not more than sixty yards from any main constructed by or vested in the board." The respondents were the owners and occupiers of a very large quantity of land of considerable value, a very small portion of which lay within the prescribed distance from a main of the appellants.

Held (affirming the judgment of the court below), that the fact that the respondents' land was all comprised in one holding did not make that part of it which lay beyond the prescribed limit rateable.

THIS was an appeal from a judgment of the Supreme Court of New South Wales (Darley, C.J., and Innes, J., Foster, J. dissenting), dated the 17th Sept. 1894, by which a verdict in favour of the appellant board was set aside and judgment entered for the respondents in an action brought by the board against the latter to recover money due for water rates.

The action was commenced in 1893 by the appellants, who were the Water Supply and Sewerage Board for the district of Lower Hunter, New South Wales, constituted under an Act of that colony (stat. 55 Vict. No. 27). The respondents were the proprietors of a large coal-mining area of 8772 acres, situated in various boroughs, with a private connecting railway. The board contended that the property was in their water district, and was rateable for water under the provisions of the statute.

The company, on the other hand, pleaded that their land and tenements were not liable to be rated, and that the board did not, by bye-laws, duly make and establish the water rates in conformity with the Act.

The question whether the property of the company was rateable or not depended on the construction of the statute and bye-laws, and was said to be of considerable importance to the colony.

At the trial a verdict was entered by consent for the board for the amount claimed—796*l.*—

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

with leave to the company to move to enter the verdict for them or to reduce the amount. The rule *nisi* was argued before the Supreme Court, who ordered the verdict for the board to be set aside and judgment entered for the respondents, with costs.

Cozens-Hardy, Q.C., *Vaughan Hawkins*, and *W. H. Cozens-Hardy* appeared for the appellants.

J. Walton, Q.C., *Wood Hill*, and *H. G. Davies* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 7.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—The appellants are a board of water supply and sewerage for the district of the Lower Hunter, New South Wales, and incorporated as such by Act xxvii., of 1892. The respondents are owners and occupiers of a mining property within the district of the Lower Hunter, comprising 8772 acres of land, with a colliery in operation and a private railway connecting their works with the Great Northern Railway. A water main belonging to the board crosses the line of the respondents' railway, and runs through one corner of their land. It is contended by the board that, according to the true construction of the Act of 1892, the whole of the respondents' property, including their private railway, is rateable for water supply. That contention is disputed by the respondents, who use no water supplied by the board, whose land in some parts is above the level of the board's reservoir, and, if the contention of the board is well founded, would apparently be liable, in addition to the rate, to a charge of 2*s.* 6*d.* for every horse and every head of cattle kept on their property, and double that charge if they were to use any water supplied by the board. The action was brought by the board to enforce their claim. There are no facts in dispute, nor is there any question as to the amount of the rate, assuming the view of the board to be correct. A verdict was therefore taken by consent for the sum of 796*l.* 9*s.* 9*d.*, which was the full amount of the rate claimed for the year, with leave for the respondents to move the court to enter the verdict for them. On appeal to the Supreme Court the verdict was entered for the respondents. Sir Frederick Darley, C.J., with whom Innes, J. concurred, was of opinion that the language of the Act was not so clear as to compel the court to decide against the respondents, "considering the extraordinary result of upholding the contention" of the board, Foster, J., who dissented, thought that the verdict was a gross hardship on the respondents, but, after full consideration, he could not say that he had any such doubt as to the meaning of the words used by the Legislature as to enable him to agree with the rest of the court. The water supply for a district is in the first instance provided by the Government, who construct the works. When the works are passed and approved they are transferred to and vested in the board, and the cost becomes repayable by the board by means of periodical payments. For the purpose of carrying the Act into execution the board is empowered to make bye-laws (*inter alia*) "for determining, making, and levying the rate to be paid . . in respect of lands and tenements distant not more than sixty yards from any main . . . although such lands or premises are not actually connected with any main." Those are the words which seem to have given rise to so much difficulty in the court below. The enactment says that the board may rate lands within a certain distance from their main. How can that make lands outside the limit rateable? The appellants contend that lands outside the prescribed limit are rateable when they form one holding with lands within the prescribed limit. Where is that to be found in the Act? There is nothing in the Act about lands forming one holding or being held together with other lands. There is nothing to show that the Act intended lands in one occupation or "held as under one ownership," to use Foster, J.'s language, to be regarded as one indivisible unit for rating purposes. Foster, J. seems to think that the contention of the appellants is in accordance with the natural and ordinary meaning of the language used. After commenting on the expression "lands and tenements" it would be sufficient, he says, for the purposes of the case to treat the place rated as a tenement. "Two houses," he observes, "or two tenements are clearly not more than sixty yards distant from one another if the nearest parts of each are within that distance." That may be so. The leading idea in the case put by his Honour is the distance between two places, but here it is not the purpose of the enactment to define or specify the distance between two objects. The purpose is to mark out an area for taxation, which is a very different thing. For the sake of illustration, suppose there was an Act declaring that, for the purpose of maintaining a sea-wall, lands within the distance of one mile from high-water mark should be taxed, would anybody seriously contend that the whole of a man's park or demesne, containing, perhaps, a thousand acres or more, was taxable because an acre or two of it happened to lie within the area of taxation? It may, perhaps, be objected that in the case supposed the tax or cess would be at so much per acre, and that, consequently, there would be no difficulty in arriving at the amount of the tax for any given quantity of land. Here the tax imposed is according to the municipal valuation when the subject of taxation is within a municipality and included in the municipal valuation. That provision, it was argued, must create serious difficulty if the view of the respondents be adopted. Now, the first observation that occurs on that line of argument is this: If the respondents are right—if there is nothing in the section by or under which the tax is imposed authorising a charge on lands outside the prescribed limit—why should any such lands be taxed merely because otherwise there may be a difficulty in assessing some lands which are liable to taxation? Even if the difficulty is insuperable it would be more reasonable that lands declared to be liable to taxation should go scot-free than that lands outside the taxable area should be swept within the net. But the truth is, that when the Act is fairly construed the difficulties presented to their Lordships in the course of the argument, such as they are, vanish altogether. It is to be observed that the board is not "compellable to supply water to any person whomsoever." In every case of supply to private persons the supply is apparently in point of law a matter of grace or of agreement.

The Legislature may well have thought that a public board—in correspondence with and under the control of the executive, and in touch with the municipalities within their district—would hardly need the pressure of legal compulsion, and might be trusted to dispense the benefits at their disposal fairly and impartially to all concerned. It is also to be observed that the board is authorised to require every consumer of water to put up a meter, and a bye-law has been made providing that "if the meter account exceeds the assessment calculated at the rate of 2*s.* per 1000 gallons," which is the prescribed rate for water supplied by meter, "then such excess shall be charged in addition to the assessment." Now, when the water is supplied by meter, or for domestic purposes without meter, no question as to the sixty yards limit can arise. That question only arises when there is no connection with the main. In such cases, which are probably rare, all the board has to do is to assess the person who has failed to make a connection with the main, and to assess him in respect of his property lying within the prescribed limit of sixty yards. If the valuation of that property is "included" in the municipal valuation—that is, if it is to be found there as an assessment available for the purposes of assessment by the board—then the board is to adopt the municipal valuation. If it is not included in the municipal valuation, then the board is authorised to make a valuation of its own. But in all cases a minimum charge of 10*s.* is authorised, though that charge may exceed 5 per cent. on the valuation, which is the general limit. When, therefore, the valuation is under 10*l.* the precise amount is immaterial even if the premises are occupied. If the premises are vacant the rate, according to the bye-laws, is only 4*d.* in the pound, and then it is immaterial what the precise amount of the valuation is if it is under 30*l.* Their Lordships were invited to approach the Act of 1892 as a confused and puzzling mass of legislation. They think it right to say that they have not found any difficulty involved in the question which has been submitted to them on the appeal. They will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitor for the appellants, *G. M. Light.*

Solicitors for the respondents, *Fooks, Chadwick, Arnold,* and *Chadwick.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 4 *and* 5, 1895.

(Before Lindley, Smith, and Rigby, L.JJ.)

Re J. H. Jones (a Solicitor). (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor and client—Costs — Taxation—"Agreement in writing"—Signature by client only—Payment—Criminal charge — Courts of police magistrate and quarter sessions—Enforcing or setting aside agreement—Jurisdiction of High Court — Attorneys and Solicitors Act 1870 (33 *&* 34 *Vict. c.* 28), *ss.* 4, 8, 10, 15.

The expression "the court or a judge thereof," in sects. 8 *and* 10 *of the Attorneys and Solicitors Act* 1870, *refers to a court of the same kind as those in which any action at law or suit in equity could be brought, and a judge who has power to deal with such an action or suit, and does not include a police-court or a court of quarter sessions or the justices constituting such court. Consequently an application for the examination or cancellation of an agreement in respect of costs for business done in a police-court or a court of quarter sessions, and the taxation of the costs, where the amount payable under the agreement exceeds* 50*l.*, *is properly made to a judge of the High Court, and not to the police-court or to the court of quarter sessions, or the justices constituting such court.*

So held by the Court of Appeal, affirming the decision of Stirling, J.

It is not essential to the validity of an agreement for the payment of costs, under sect. 4 *of the Attorneys and Solicitors Act* 1870, *that the agreement should be signed by the solicitor; it is sufficient if it be signed by the client alone.*

So held by Stirling, J., following Re Thompson; Ex parte Baylis (70 *L. T. Rep.* 238; (1894) 1 *Q. B.* 462).

In Oct. 1893 J. A. Mordecai, together with other persons, was brought before the borough magistrate at Cardiff upon a charge of a criminal nature—namely, stealing timber — and retained J. H. Jones, a solicitor, to defend him.

On the 11th Oct. 1893 he was committed for trial at the quarter sessions.

On the 19th Oct. he paid the solicitor the sum of 25*l.* on account of costs.

On the 21st Oct., shortly before the trial, he signed the following document:

I agree your costs in the matter of my defence, you to pay counsel's fees, witnesses' fees, and all other disbursements, at 75*l.*

This document was handed to the solicitor, but was not signed by him.

On that day Mordecai was tried and acquitted. He subsequently paid the balance of the 75*l.* under protest.

Being dissatisfied with the arrangement, Mordecai took out a summons asking (1) that the respondent might be ordered to deliver to the applicant a bill of fees and disbursements in respect of the action *Reg.* v. *Mordecai*, and to deliver to the applicant all deeds, books, papers, and writings in his custody or power belonging to the applicant, and (2) that it might be referred to the taxing master to tax and settle such bill without regard to the agreement between the parties of the 21st Oct. 1893; and that the respondent might account for the sum of 75*l.* paid to him.

The summons was heard before Stirling, J. on the 21st March and the 23rd and 24th July, 1895, and judgment was reserved.

Upon the opening of the summons a preliminary objection was taken on behalf of the solicitor, that the document signed by the applicant, although not signed by the solicitor, was a good agreement within the meaning of the Attorneys and Solicitors Act 1870, and that it related to

(*a*) Reported by W. Ivimey Cook and E. A. Scratchley, Esqrs., Barristers-at-Law.

business done in the court of the magistrate at Cardiff and in the Court of Quarter Sessions, and consequently could not (regard being had to the provisions of sect. 8 of the Act) be examined or set aside by the court.

Ashton Cross for the summons.

Dunham for the respondent.—I take the preliminary objection (1) that this is not the proper court to tax the solicitor's bill of costs; and (2) assuming that it is, that the agreement, although signed by the client only, is a valid agreement.

Ashton Cross.—This is the proper court to tax the solicitor's bill of costs. The Court of Quarter Sessions is not a continuing court and has no officer who can tax bills. By sect. 23 of 2 Geo. 2, c. 23, power to tax bills of costs was given to the judges and barons of the High Courts, and under that section it has been held that the Court of Queen's Bench was the proper court to tax bills for work done at quarter sessions:

Clarke v. *Donovan*, 5 T. R. 694; 1 Esp. 137;
Ex parte Williams, 4 T. R. 496;
Sylvester v. *Webster*, 9 Bing. 388;
Pulling on Attorneys, 3rd edit., p. 345.

By the Judicature Act 1873, s. 16, the jurisdiction of the Queen's Bench was transferred to the High Court. The jurisdiction to tax bills was not changed by the Act of 1870. The whole object of the Act was to enable a solicitor to enforce an agreement in a summary manner. It made no change in the practice. Sect. 4 enables a solicitor to make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his past or future services. He cannot, however, under the section receive the amount payable under the agreement until the agreement has been examined or allowed by a taxing officer of a court having power to enforce the agreement. Sect. 8 is a continuation of sect. 4, and provides for the examination and enforcement of agreements. The word "court" in sect. 8 refers to courts in which actions at law or suits in equity can be brought. A bill of costs in respect of work done in a revising barrister's court has been held to be taxable in the Court of Chancery:

Re Andrews, 17 Beav. 510.

Sect. 8 of the Act of 1870 was intended to prevent actions to recover remuneration agreed upon in lieu of costs when work has been done, and does not apply to an action for refusing to allow an attorney to do the work and earn the remuneration:

Rees v. *Williams*, 32 L. T. Rep. 462; L. Rep. 10 Ex. 200.

The Court of Quarter Sessions has only power to tax costs in certain cases specified by statute. It has no power to tax costs as between solicitor and client. Where costs are allowed by an order of quarter sessions, and consent to taxation out of sessions is not given, no subsequent court of quarter sessions has jurisdiction to order taxation:

Midland Railway Company v. *Guardians of Edmonton Union*, 72 L. T. Rep. 811; (1895) 1 Q. B. 357.

Even if the Act of 1870 did deprive the court of the jurisdiction which it had previously exercised for more than a hundred years, the agreement in the present case is not an agreement within the Act, inasmuch as it was not signed by both solicitor and client:

Re Lewis; *Ex parte Munro*, 35 L. T. Rep. 857; 1 Q. B. Div. 724;
Re Raven; *Ex parte Pitt*, 45 L. T. Rep. 742;
Re Russell, Son, and Scott, 52 L. T. Rep. 794; 30 Ch. 114.

It is true that in *Bewley* v. *Atkinson* (41 L. T. Rep. 603; 13 Ch. Div. 283) Thesiger, L.J. expressed some doubt as to *Re Lewis* (*ubi sup.*). That, however, was not a solicitor's case. In *Re Thompson*; *Ex parte Baylis* (70 L. T. Rep. 238; (1894) 1 Q. B. 462) a doubt was thrown upon the dictum in *Re Lewis*; *Ex parte Munro* (*ubi sup.*); but that case is inconsistent with all the other reported cases on the point. I submit, therefore, that an agreement under the Act of 1870 is an agreement by which both parties are bound and which is signed by both parties. Apart from statute the court has an inherent jurisdiction to tax bills:

Storer and Co. v. *Johnson*, 62 L. T. Rep. 710; 15 App. Cas. 203.

Lastly, the preliminary objection goes only to the second branch of the summons as to taxation. It does not affect the question as to the delivery of a bill. The court has power to order the delivery of a bill, whether or not it would have power to refer it to taxation:

Duffett v. *M'Evoy*, 52 L. T. Rep. 633; 10 App. Cas. 300;
Re West, King, and Adams; *Ex parte Clough*, 67 L. T. Rep. 57; (1892) 2 Q. B. 102.

Delivery of a bill is important, because the case may be one in which the court will exercise its inherent jurisdiction to tax. He also referred to

Re Howell Thomas, 68 L. T. Rep. 759; (1893) 1 Q. B. 670;
Re Frape; *Ex parte Perrett*, 68 L. T. Rep. 558; (1893) 2 Ch. 284.

Dunham in reply.—Prior to the Act of 1870 a client could not make an agreement with a solicitor to pay him a fixed sum for costs. This the Act enabled him to do. The Act was intended to be a code regulating agreements between solicitors and their clients. Sect. 15 not only excludes taxation, but the provisions of the Solicitors Act 1843 as to delivery of bills. The court would not on a summary application order the delivery of a bill except for the purposes of taxation. I rest my case on the ground that sect. 15 of the Act was designed to exclude agreements for costs from the provisions of the Act of 1843. The jurisdiction to examine and enforce agreements is conferred by sect. 8 on the court in which the business or the greater part thereof was done, or a judge thereof. Here the business was done in part before the magistrate at Cardiff, and in part at the quarter sessions at Cardiff, but no part in the High Court. [STIRLING, J.—Could any of the justices sitting at quarter sessions be said to be judges of quarter sessions?] At least the court of the stipendiary magistrate is a continuous court. If that is so, the objection put forward by the other side is of no importance. If the construction of sect. 8 is as I contend, it would be competent for the magistrate to enforce the agreement. If not, there must have been a slip by the Legislature. [STIRLING, J.—If so, would that not be a case for the exercise by the court of its inherent jurisdiction.] The Act con-

templated that the work done should be in courts in which solicitors could act as advocates, *i.e.* in the inferior courts. Why, then, should any distinction be drawn between County Courts and police-courts? I submit that the applicant must go to the police-court to obtain taxation, and if there is no machinery there, that is an omission on the part of the Legislature. As to the inherent jurisdiction of the court, the order, if made, ought only to be made in an action and not on a summary application like the present. The equity of sect. 15 would operate to exclude the inherent as well as the statutory jurisdiction of the court. There would, however, be no inherent jurisdiction in the court to set aside an agreement. The magistrate himself would, if called upon, be bound either to set aside or enforce the agreement. *Clarke* v. *Donovan* (*ubi sup.*), and *Sylvester* v. *Webster* (*ubi sup.*) have nothing to do with the present question. All they decided was, that a solicitor could not sue without delivering a bill. *Re Andrews* (*ubi sup.*) merely decided that the court of a revising barrister was a court of registration and not a court of law or equity; that it was not a court for deciding between subject and subject or between subject and Crown. Before the Act of 1870, if the work was done in no court, or in the Court of Chancery, the Court of Chancery taxed; if in any other court the common law courts. [STIRLING, J. referred to *Re Gaitskell* (1 Ph. 576).] Further, I say that the agreement is a good agreement within the Act of 1870, notwithstanding it was signed by the client only:

Re Thompson; Ex parte Baylis (*ubi sup.*).

Cur. adv. vult.

July 27.—STIRLING, J. (after stating the facts and the nature of the preliminary objection) continued:—The first question is, whether a document, signed by the client but not by the solicitor, is an "agreement in writing" within the meaning of sect. 4 of the Act of 1870. It is not necessary for me to go through the somewhat long course of decisions on the subject, as I think I am bound by the decision in *Re Thompson; Ex parte Baylis* (*ubi sup.*), where the previous cases were considered. In that case the document was signed by the client only. Pollock, B. said, in giving judgment: "It is said, on the authority of the dictum in *Re Lewis*; *Ex parte Munro* (*ubi sup.*), that the document signed by this gentleman's client is not an agreement in writing within sect. 4 of the Attorneys and Solicitors Act 1870, because it is not signed also by him. In that case the agreement was signed by the solicitor only, and the reason given for requiring the client to sign also is, that 'otherwise it would always be possible for a solicitor to place a document signed by himself only, and containing terms favourable to him, before a client, and then to contend that the client was bound by it.' This observation has plainly no bearing on the present case. It is said that the dictum has been assented to in subsequent decisions; but I do not find this to be the case. It has been quoted, not unnaturally, in judgments in which the effect of the language of the statute has not been carefully considered; but in *Bewley* v. *Atkinson* (13 Ch. Div., at p. 399) Thesiger, L.J. points out that the expressions used are wider than was necessary for the decision, and it is not supported by *Re Raven*; *Ex parte Pitt* (*ubi sup.*), in which Fry, J. merely held that a letter written by a client to a solicitor did not show 'accession in writing.' I think that the document satisfies the statute, and that the client is not now entitled to have the agreement examined by the officer of the court." Charles, J., who was the other judge forming the court, gave judgment to the same effect, and it was held that an agreement signed by the client alone was an agreement within the statute. I consider myself bound by that authority to hold that this is a document within the Act. Then, as to the second question, whether this court has jurisdiction to examine into the agreement, and if necessary to set it aside; that is an entirely new point, and though the Act was passed in 1870, and its provisions have been discussed in many cases, and though, as I am told by an experienced master of the Crown Office, agreements relating to the costs in criminal matters have repeatedly been before the courts, of which the case of *Re Lewis* (*ubi sup.*), which has been before referred to, was an instance, this point has never arisen for decision. The sections of the Act material to be considered for this purpose are the 4th, 8th, 10th, and 15th. [His Lordship read the sections, and continued:] The contention is that the court having jurisdiction to examine into and enforce the agreement within the meaning of sect. 8 is the court of the magistrate at Cardiff, or the Court of Quarter Sessions; and consequently that, under sect. 10, one or other of those courts, or a judge of them, is the proper tribunal to re-open the matter, and that the jurisdiction of this court is excluded by sect. 15. The words of the early part of sect. 4 are very wide, and seem to authorise agreements between solicitors and clients with reference to all costs capable of taxation under 6 & 7 Vict. c. 73; and it has already been held, in *Re Lewis* (*ubi sup.*), that a bill of costs in respect of proceedings before magistrates is subject to such taxation. I think, therefore, that the agreement in question is within the Act of 1870. Sect. 8 provides that, the agreement is to be enforced or set aside by the court in which the business or any part thereof was done, or a judge thereof. It is contended that the word "court" in this section includes a court of quarter sessions and a police magistrate's court. If the word is read in a sense wide enough to include a court of quarter sessions, who are the judges of that court? They must be the justices of the peace who took part in the trial of the particular case, and possibly every justice who was qualified to sit on the occasion, so that an application to enforce or set aside the agreement might be made on motion or petition to any such justice. I cannot think that such a result was intended. It seems to me that the courts referred to by the Act are those presided over by judges; and justices of the peace who constitute the Courts of Quarter Sessions would not in the ordinary use of language be referred to as judges. At all events, I think that what is in this Act referred to as a "court" is one of the same kind as those in which actions at law or suits in equity could be brought. The expression "the court or a judge" is first found in the Act in the concluding portion of sect. 4, and the context there shows, I think, what is the meaning of it. It is there used with reference to business done in an action at law or a suit in equity, and

the judges spoken of are those who have power to deal with such actions and suits, and those I think must be the judges which were intended to be referred to all through the Act, and not the justices who constitute a court of quarter sessions. That being my opinion as regards a court of quarter sessions, I must come to the same conclusion as regards the magistrate of the police-court. The position and duties of such magistrates are regulated by the Act 26 & 27 Vict. c. 97, ss. 3 and 5, and the functions which they discharge are simply those of a justice of peace. I come, therefore, to the conclusion that the preliminary objection must be overruled, and the summons must be restored to the paper in the ordinary course.

Subsequently the matter came again before Stirling, J. on the merits, when his Lordship decided that an order to tax the bill of costs ought to be made.

The solicitor now appealed.

Dunham, for the appellant, contended that, having regard to sects. 8, 10, and 15 of the Attorneys and Solicitors Act 1870, the court to enforce or set aside the agreement was the court in which the business to which it related was done, in this case the court of the borough magistrate or the Court of Quarter Sessions; and that the High Court had no jurisdiction to examine into the agreement, or set it aside, as it would have had if the business had been done in no court. He also submitted that on the merits of the case the agreement ought not to be set aside; and that therefore no order to tax ought to be made.

Ashton Cross, for the respondent, was not called upon to argue.

LINDLEY, L.J.—This is an appeal by a solicitor from an order of Stirling, J. setting aside an agreement between the solicitor and a client that the solicitor should be paid 75*l.* for costs. The point raised by the argument of Mr. Dunham—one of the points raised before Stirling, J.—is that the application to set aside this agreement was made to the wrong court. The costs in question were incurred in relation to defending the client in a criminal proceeding before a magistrate and before the Court of Quarter Sessions. The client was committed for trial by the magistrate, but at the quarter sessions he was acquitted. Mr. Dunham contends that in order to set aside this agreement, the proper course is to take it either to the magistrate or to the Court of Quarter Sessions. He relies upon certain provisions of the Attorneys and Solicitors Act 1870, and says that, according to the language of that Act, these costs have been incurred in a proceeding in a court, and that the court having jurisdiction to set aside the agreement is the court in which the proceeding took place. Now, that contention strikes an English lawyer as rather startling, because until 1870 nobody ever imagined that either a magistrate or justices at quarter sessions had jurisdiction to set aside an agreement. And it certainly would be strange if the Legislature, in dealing with agreements between solicitors and their clients, and in providing machinery for setting aside such agreements, had made such a very large alteration in the law without there being the slightest sign of an intention to alter the law with regard to magistrates and quarter sessions in other respects. But it must be admitted that the Act is awkwardly drawn, and that there are some words in it which warrant Mr. Dunham's contention. The material sections of the Act are 4, 8, 10, and 15. The Act contains no definition of "court." It is an Act to amend the law relating to the remuneration of attorneys and solicitors, not an Act to extend the jurisdiction of magistrates or quarter sessions. That is not what Parliament was thinking of. Now, sect. 4 is a section which in effect enables a solicitor to make an agreement with his client as to his remuneration for work done without the necessity of taxation. It says this: "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements, in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained." That is to say, the section renders lawful that which was previously considered illegal, namely, an agreement by a solicitor with his client for a lump sum. There can be no question that the expression, "whole or any part of any past or future services," and so on, includes business done in all courts and in all places—in a criminal court or in no court at all. Then follows this proviso: "Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement." That does not look as if any court like a criminal court were intended. Then the section goes on thus: "And if it shall appear to such taxing officer that the agreement is not fair and reasonable, he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement, or to order the agreement to be cancelled, and the costs, fees, charges, and disbursements, in respect of the business done to be taxed in the same manner as if no such agreement had been made." That is the first time that the expression "court or a judge" is used in this Act of Parliament. That must mean a court or a judge qualified to try an action at law or hear a suit in equity. Then sect. 8 provides that any such agreement may be enforced or set aside "by the court in which the business or any part thereof was done, or a judge thereof, or if the business was not done in any court, then where the amount payable under the agreement exceeds 50*l.* by any superior court of law or equity or a judge thereof, and where such amount does not exceed 50*l.* by the judge of a County Court which would have jurisdiction in an action upon the agreement." Mr. Dunham says that the work done by the solicitor in this case was work done in a court, and that the court which alone has jurisdiction to set aside this

agreement is the court in which the business was done. But it is to be observed that the expression used is "by the court or a judge thereof." That language appears to us to be inapplicable to a police magistrate and to the Court of Quarter Sessions. A police magistrate is not a judge, nor are justices sitting at quarter sessions; and it is quite obvious that the term "court or a judge" means a court of law or equity, or a court which in the exercise of its ordinary jurisdiction has power to set aside agreements of this kind. I do not think that the other sections really throw any light on the matter or carry it any further. No doubt the language of the sections which Mr. Dunham has picked out is to some extent in favour of his contention. But when I come to ask myself, "Is this language so plain as to give magistrates or justices sitting at quarter sessions a new jurisdiction?" my answer is, that it is not. It is also to be observed that under the previous Act these costs would have been taxed by the Court of Queen's Bench, and it is absurd to say that Parliament intended to transfer the jurisdiction from the Court of Queen's Bench to the Court of Quarter Sessions. The appeal must be dismissed, with costs.

Smith, L.J.—I am of the same opinion. This is a proceeding taken by a client who was tried at Cardiff for receiving stolen goods with the knowledge that they were stolen. He retained Mr. Jones as his solicitor, first before the borough magistrate and afterwards before the Court of Quarter Sessions. Jones took 25*l.* for his expenses before the magistrate. I see no objection to that. But after Mordecai, the client, had been committed, and when the time of the trial was drawing nigh, Jones, in effect, said to him: "If you do not agree to pay me 75*l.* for my costs I withdraw from the case." Under this pressure Mordecai acceded to that request, and gave a charge on his property for the amount. He afterwards paid the balance of the 75*l.*, so that Jones has in his pocket 75*l.* for defending his client before the magistrate and at quarter sessions. Mordecai was acquitted and is at large, and he now refuses to be bound by this agreement. In these circumstances the case came on before Stirling, J. for the purpose of having the agreement set aside and getting an order for taxation of these costs. Mr. Dunham took this point: He said: "Stirling, J. had no jurisdiction to set aside this agreement or to make an order to tax, because of sect. 8 of the Attorneys and Solicitors Act 1870, which gives the court jurisdiction to enforce or set aside agreements for costs. Under that section the proper court to set aside this agreement is not the Court of Chancery, but is either the court of the magistrate at Cardiff or the Court of Quarter Sessions." If it can be made out that those courts have jurisdiction we must give effect to that argument. But if not, the point is a bad one. I agree that sect. 8 is not artificially drawn; but, looking at it as a whole, it is obvious what the Legislature intended. Sect. 4 enables a solicitor to enter into a bargain with his client for a lump sum. That is the first section in which the term "court or a judge" is mentioned. The section does not refer to a police magistrate nor to a court of quarter sessions. Sect. 8 commences thus: "No action or suit shall be brought or instituted upon any such agreement." Now what does that mean? Did anybody ever hear of bringing an action or instituting a suit before justices either at petty sessions or quarter sessions? The section then proceeds thus: "But every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside without suit or action on motion or petition of any person or the representative of any person a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges, or disbursements in respect of which the agreement is made by the court in which the business or any part thereof was done, or a judge thereof." The words "action" "suit," "motion," "petition," are all applicable to proceedings in Superior Courts, or possibly also to proceedings in the County Courts. Then what is the meaning of the words "the court or a judge thereof?" Who ever heard of a magistrate being described as a judge of a court? Magistrates are justices of petty sessions; and the same observation applies to the Court of Quarter Sessions. They are all justices. The language of the section is inapplicable either to a magistrate or to justices at quarter sessions. The section then provides a remedy in the case of "business not done in any court," *i.e.*, any court having jurisdiction to enforce or set aside the agreement. [His Lordship read the concluding part of the section, and continued:] It is suggested that in the present case the effect of this section is to transfer the jurisdiction to set aside the agreement from the courts which have heretofore exercised it to the magistrate or the justices at quarter sessions. In my judgment this contention cannot prevail. I cannot read the section in that way. Sects. 10 and 15 neither add to nor detract from sect. 8. The technical objection therefore fails; and there being ample evidence of pressure I think that this agreement ought to be set aside, and an order to tax made.

Rigby, L.J.—I am of the same opinion. I agree with the reasons already given, and especially the reasons with respect to the words "the court or a judge thereof." So far as I know it is neither the legal practice nor the common practice to speak of magistrates or justices as judges. No doubt they have important judicial functions to perform; but they have been called justices for centuries, and *primâ facie* when the Legislature uses the words "a court or a judge thereof" it is intended to exclude courts in which justices sit. Then you find the functions imposed by this statute are functions of a character which never have been imposed upon justices. So there can be no doubt that "business not done in any court" in sect. 8 means business not done in any court having a judge who has jurisdiction to set aside agreements. As soon as the technical difficulties are out of the way, I have no doubt that this is a proper case in which an order should be made. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Riddell, Vaizey,* and *Smith,* agents for *J. H. Jones,* Cardiff.

Solicitors for the respondent, *Vallance* and *Vallance,* agents for *Hervey E. Murly,* Bristol.

July 6 and 30, 1895.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

MONSEN *v.* MACFARLANE AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—Charter-party—Demurrage—Cargo of coal—"To be loaded as customary at . . . as per colliery guarantee"—Incorporation of guarantee into charter-party—Commencement of lay days.

A charter-party provided that the ship was "to proceed to a customary loading place in the Royal Dock, Grimsby, and there receive a full cargo of coals, to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days; demurrage to be at the rate of 4d. per register ton per day." By the colliery guarantee, the colliery owners agreed with the charterers "to load with coal in fifteen colliery working days after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo . . . Time not to commence before the 2nd Aug. Time to count from the day following that on which notice of readiness is received . . . the said notice to be handed to office as soon as the ship is ready as above stipulated, and not before."

Notice of readiness was given by the shipowner to the charterers on the 3rd Sept. The ship, in her turn, could have loaded at the customary loading place on the 17th Sept., but, owing to delay for which the charterers were responsible, she did not get there until the 10th Oct., and her loading was completed on the 13th Oct.

Held (dissentiente *Kay, L.J.*), *that the provisions of the colliery guarantee as to loading were incorporated into the charter-party; that the lay days commenced on the day after notice of readiness was given by the shipowner to the charterers; and that the charterers were, therefore, liable to pay demurrage after the expiration of fifteen colliery working days from that time.*

Judgment of Mathew, J. affirmed.

THIS was an appeal by the defendants from the judgment of Mathew, J. at the trial without a jury.

This action was brought by the shipowner against the charterers for demurrage at the port of loading.

By a charter-party, dated the 16th July 1894, between the plaintiff and the defendants, it was agreed that the ship *Fjeld*, then at Grimsby, should with all convenient speed,

Proceed to a customary loading place in the Royal Dock, Grimsby, or as near thereto as she may safely get always afloat, and there receive a full and complete cargo of Kiveton Park coal from such colliery as charterers or their agents may direct; . . . to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days . . . Demurrage to be at the rate of fourpence per register ton per day.

The "colliery guarantee," which was a printed form in common use at Grimsby, partly filled up in writing, was an agreement between the charterers and the Kiveton Park Coal Company, dated the 20th July 1894.

By this agreement the colliery company undertook to load the *Fjeld* with coal

In fifteen colliery working days (Sundays and colliery holidays not working days) after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo (strikes of pitmen, frosts, and storms, delays at spout caused by stormy weather or floods, and delay on the part of the railway company either in supplying trucks or loading the coals from the colliery, or any other accident stopping the workings, loadings, or shipping of the cargo always excepted) . . . Time to count from the day following that on which notice of readiness is received; the said notice (in writing) to be handed to office during office hours . . . as soon as the ship is actually ready as above stipulated, and not before. No notice received on Sundays or any colliery holidays. The ship to move to the spout and proceed with her loading whenever required to do so during the entire continuance of the lay days. Demurrage as per charter-party, but not exceeding fourpence per registered ton per colliery working day. The non-fulfilment of any of the above conditions to render the guarantee null and void.

In the Royal Dock at Grimsby there was only one spout at which a ship of the size of the *Fjeld* could load. All ships loading coal at the Royal Dock were obliged to load at a "spout," that being the customary mode of loading.

The ship was ready in the dock to receive her cargo on the 3rd Sept., when due notice was given by the shipowner to the charterers and harbour-master that the ship was ready to load, and she was entered in the "turn book" as ready to go to the "spout." Her turn did not come until the 17th Sept., and before that date she could not have loaded any coal at the spout.

The colliery company did not give notice that they were ready to deliver coal until the 9th Oct., and the ship went under the spout on the 10th Oct. The loading was completed on the 13th Oct.

Mathew, J., at the trial, held that the terms of the colliery guarantee as to loading were incorporated into the charter-party, and that the lay days commenced to run from the day after the 3rd Sept., when notice was given that the ship was ready to load. He gave judgment for the plaintiff for twenty-three days' demurrage.

The defendants appealed.

Joseph Walton, Q.C. and *Danckwerts* for the appellants.—The colliery guarantee is not to be incorporated into the charter-party. The lay days commenced when the ship arrived at the customary loading place, that is, at the berth, and not before:

Nelson v. *Dahl*, 44 L. T. Rep. 381; 12 Ch. Div. 568;

Tharsis Sulphur Company v. *Morel Brothers and Co.*, 65 L. T. Rep. 669; (1891) 2 Q. B. 647;

Good and Co. v. *Isaacs*, 67 L. T. Rep. 450; (1892) 2 Q. B. 555.

It was the fault of the colliery company that the vessel did not get sooner to the loading berth, and not the fault of the charterers. The shipowner cannot sue upon the colliery guarantee:

Restitution Steamship Company v. *Pirie and Co.*, 61 L. T. Rep. 330.

The reference in the charter-party to the colliery guarantee must be governed by the express provision in the charter-party that the ship is "to be loaded as customary at Grimsby:"

Tapscott v. *Balfour*, 27 L. T. Rep. 710; L. Rep. 8 C. P. 46.

Lawson Walton, Q.C. and *Carver* for the respondent.—The charter-party provides that the loading is to be as customary "as per colliery

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

guarantee." That guarantee is in a form commonly used at this port, and all its provisions are incorporated into the charter-party. The guarantee defines the time at which the obligation to load commences, and the lay days begin to run from that time. That is, the lay days are to commence on the day after notice of readines to load is given.

Joseph Walton, Q.C. replied.

Cur. adv. vult.

July 30.—Lord ESHER, M.R.—This is an action for demurrage brought by a shipowner against the charterers of the ship. The action was tried by Mathew, J. without a jury, who decided in favour of the plaintiff. The dispute is as to when the lay days began, and this appeal is from the decision of Mathew, J. upon the construction of the charter-party. It will be well to consider first what was the subject matter. In *Nelson* v. *Dahl* (*ubi sup.*) the court undertook to explain several well-known forms of charter-party, and to state when, in each case, the lay days would begin. That was not an exhaustive explanation, for there may be other forms of charter-party besides those explained in that case. If there are, then that case does not apply. It seems to me that this charter-party is a particular kind of charter-party, which is not one of those explained in *Nelson* v. *Dahl* (*ubi sup.*). It is a form of charter-party applicable to a particular port. The port is a coal port where coals are shipped direct from the colliery through "spouts." We must consider, then, who are necessary parties to the transaction of loading. The shipowner and the shipper are, of course. Loading a ship is a combined operation by shipper and shipowner. The division of the operation is that the shipowner must have the ship ready to receive the cargo, and that the shipper must have the cargo ready to put into the ship, and must bring it to the side of the ship and to the deck; there the shipowner is bound to receive the cargo and to deal with it, unless there is some stipulation to the contrary. In such a port as this, however, there are other parties to the operation of loading, without whom the loading cannot be done. There is a dock, which is under the control of the harbour-master as to the placing and moving of ships. The harbour-master, therefore, takes part in the transaction. The coals are to be brought from a colliery, and are to be put into the ship through a "spout." The coals cannot come to the spout without the act of the colliery owner. There are, therefore, in such a case as this, four parties to the operation of loading a ship with coal. The shipowner, the shipper, the harbour-master, and the colliery owner. It follows that there must be a customary mode of dealing with such loading; and, as a matter of course, that charter-parties are in a form which will enable the parties to deal with that mode of loading. This charter-party seems to me to deal with all such matters. It provides that the ship, being then in Grimsby, shall with all convenient speed proceed to a "customary loading place in the Royal Dock, Grimsby, as required by charterers . . . and there receive on board from the factors or agents of the charterers a full and complete cargo of Kiveton Park coals from such colliery as the charterers or their agents may direct . . . to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days. . . . Demurrage to be at the rate of fourpence per register ton per day." There is the intended transaction described. But, inasmuch as there must be several parties to that transaction, it was necessary to determine the rights, liabilities, and duties of each party as to the separate parts of each transaction. That is settled by the demurrage clause. That clause is one clause, and applies to the duties of all parties, and, if it is altered, it is altered as regards all of them. The demurrage clause, therefore, deals with the one transaction of loading and receiving the cargo, and deals with each part as being part of the one transaction. Here the ship is to proceed "to be loaded as customary at Grimsby as per colliery guarantee," and is to be loaded in "fifteen colliery working days." The loading there is to be a joint transaction. In the charter-party the parties are the charterer and the shipowner; but we must take into consideration the fact that there are other parties to the operation of loading. The ship is to be loaded as customary at Grimsby, where there is a colliery guarantee; and she is to be loaded in fifteen colliery working days. That gives a right to the charterer, and gives him fifteen days in which to perform his part. Then, demurrage is to be at the agreed rate. The demurrage clause does not increase the number of lay days, but refers to days beyond the lay days. The "lay days" are the days for loading, that is, the days given to the charterer for doing his part in loading the ship. The ship is to be loaded as customary at Grimsby, "as per colliery guarantee." In my opinion the effect of that is to incorporate the colliery guarantee into the charter-party, and into the demurrage clause, so far as it is applicable. The charterer undertakes to load in fifteen colliery working days, and the colliery guarantee adopts the same figures. The colliery company undertake to load the ship "in fifteen colliery working days after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo:" "time to count from the day following that on which notice of readiness is received." The lay days, therefore, are to run from the day following that on which the shipowner gives notice in writing that the ship is ready to receive the entire cargo. In such a port as this a ship cannot receive cargo at any time she chooses; she cannot move under a "spout" to load without an order from the harbour master. It is, therefore, customary to give notice to the harbour-master that the ship is ready to load, and the ship is then put "on turn" to go under the "spout," after the notice has been given. But if, when the ship's turn comes the charterer is not ready to load, the harbour-master will not allow the ship to go under the "spout." It is, then, the duty of the charterer to have the coals ready at the spout, and to make use of the spout when the turn comes. If the shipowner has given notice to the charterer and to the harbour-master that he is ready to receive the cargo, but the colliery company cannot bring the coal to the spout, who is answerable for the delay? That is a part of the operation of loading which belongs to the charterer, and he has to see that he gets the coal ready to load within the lay days. It is for this reason that the charterer takes care to

get from the colliery owner a guarantee to deliver the coal within the lay days. Therefore the number of days specified in the guarantee is the same as the number of days specified in the charter-party. The charterer is liable to the shipowner, and he has a remedy over against the colliery owner. That being the state of things, when did the lay days first begin in the present case? It is ridiculous to suppose that the lay days begin when the vessel is under the spout. The insuperable difficulty in the way of that construction is that the harbour-master would not put the ship under the spout to remain there for fifteen days, and that there never would be any demurrage at all. It is for that reason that it is expressed in the colliery guarantee in what way the delivery must be done; it must be after "notice of readiness is received." The ship must be ready to load as soon as the harbour-master will allow her to go under the spout. When the ship is in that condition the shipowner can give notice of readiness to the charterer and to the harbour-master. I think, therefore, that the clear meaning of the charter-party, coupled with the colliery guarantee, is that notice may be given by the shipowner when the ship is ready to go under the spout to receive the cargo, and that the lay days begin to run on the day after that on which the notice of readiness is given to the charterer. The charterer is liable to the shipowner, and has his remedy over against the colliery owner under the guarantee. This is a particular kind of charter-party which is peculiar to this port and to similar ports. In my opinion the judgment of Mathew, J. was right, and this appeal must be dismissed.

KAY, L.J. read the following judgment:—This appeal does not raise any question of mercantile or commercial law, but only what is the construction of a charter-party. The action is by the shipowners against the charterers for demurrage at the port of loading. The charter-party is in a form calculated to puzzle anyone as to its meaning. It refers to another document called a colliery guarantee, and whether any and, if any, what part of that is incorporated in the charter-party, and, if it be, what is the effect of such incorporation, is the problem to be solved. The charter-party provides for lay days. The question is when they began. The lay days are fifteen. But they are not fifteen loading days. They are fifteen colliery working days. The cargo to be shipped was coal. It would seem that the charterers wished to stipulate for an ample number of days to enable them to obtain the coal from the colliery. The ship was actually loaded in three days; fifteen days would be much longer than would be requisite if the coal was ready. The fifteen days were wanted to give sufficient time for the coal to be got ready. Without the colliery guarantee the form of the charter-party is one as to which a number of decisions have established a canon of construction. It is an agreement that the ship *Fjeld*, then in Grimsby, should with all convenient speed "proceed to a customary loading place in Royal Dock, Grimsby, or as near thereto as she may safely get always afloat, and there receive on board from the factors or agents of the said charterers a full and complete cargo of Kiveton Park coal from such colliery as charterers or their agents may direct," and, among other exceptions, "strikes, lock-outs, or accidents at the colliery directed, or on railways, or any other hindrances of what nature soever beyond the charterers' or their agents' control throughout this charter always excepted." And the charter contained these words which occasion the difficulty, "To be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days." Omitting the words "as per colliery guarantee," it has been decided in several cases, of which *Nelson* v. *Dahl* (*ubi sup.*), *Tharsis Sulphur Company* v. *Morel Brothers* (*ubi sup.*), and *Good* v. *Isaacs* (*ubi sup.*) are the latest, that according to the true construction of such a charter-party the lay days, which are the time within which the ship is to load, do not begin until she has arrived at the place mentioned in the charter-party where the loading is to be made. Moreover, notice that the ship is ready to receive her cargo need not be given until the ship is at the place named: *Nelson* v. *Dahl* (*ubi sup.*). The place named in this charter-party is a "customary loading place in Royal Dock, Grimsby." In the Royal Dock there are two berths with shoots or spouts, as they are called in these documents, for loading coal into ships. Only one of these had sufficient depth of water to float the *Fjeld*. Therefore, this berth was the place of loading indicated in this charter-party, and, as the ship could not occupy the berth until permitted by the harbour-master, *primâ facie* the lay days would not begin until the ship occupied the berth by such permission. Of course the colliery owners were not parties to this contract. When the charter-party was signed, no colliery guarantee had been given as to the cargo for this ship, but one was arranged shortly afterwards. I understand that it was a printed form filled up in writing. It was an agreement by the owners of the Kiveton Colliery with the charterers. The shipowners were not parties to it. By it the colliery owners undertook to load the *Fjeld* with coal "in fifteen colliery working days (Sundays and colliery holidays not working days) after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo (strikes of pitmen, frosts and storms, delays at spout caused by stormy weather, or floods or delay on the part of the railway company either in supplying trucks or leading the coals from the colliery, or any other accident stopping the workings, loadings, or shipping of the cargo always excepted)." So far that seems to be part of the common form. Then is introduced in writing, "Time not to commence before the 2nd Aug. 1894;" and then follows, in the common form, "Time to count from the day following that on which notice of readiness is received, said notice in writing to be handed to office during office hours 9 a.m. to 5 p.m., Saturdays 9 a.m. to 1 p.m., as soon as the ship is actually ready as above stipulated and not before. No notice received on Sundays or any colliery holidays." I pause to observe that, this being an agreement between the colliery owners and the charterers, the notice here referred to is a notice, not by the shipowner who had nothing to do with the colliery owners, but by the charterers to the colliery owners, and the stipulations as to the hours at which, and the office at which, the notice was to be delivered, did not affect the shipowner in any way. The office referred to is the office of the colliery company. The guarantee proceeds, "The ship to

move to the spout and proceed with her loading whenever required to do so during the entire continuance of her lay days. Demurrage as per charter-party, but not exceeding 4*d.* per registered ton per colliery working day. The non-fulfilment of any of the above conditions to render the guarantee null and void." These provisions cannot, I should think, be imported into the charter-party. How could anyone seriously contend that a failure by the colliery owners or the charterers to observe these provisions of the guarantee would make the charter-party void, or how could the stipulation as to the amount of demurrage between the colliery owners and the charterers affect the shipowner? Moreover, the clause as to demurrage distinguishes in terms between the guarantee and the charter-party—"Demurrage as per charter-party." The exceptions in the guarantee are worded differently to those in the charter-party. Can these be treated as added to those in the charter-party? Even if the exceptions in the charter-party are equally extensive, the argument loses none of its force; one set were as between the charterers and the shipowner, the other between the charterers and the colliery owners. They could not be read as being twice over in the charter-party. It, therefore, seems to me unreasonable to say that the whole of the guarantee is to be read into the charter-party. Is any part of it incorporated? I should rather construe the reference to the guarantee as meaning only to explain why the lay days are to be "colliery working days." Fifteen colliery working days "as per colliery guarantee" referring to the guarantee to describe the colliery working days, or perhaps only to show why that description of the days was used in the charter-party. I cannot read the contract as meaning whatever stipulations as to time may be contained in any guarantee hereafter to be given by the colliery owners to the charterers shall be treated as binding between the charterers and the shipowners. Take, for instance, the special provision introduced in writing, "Time not to commence before the 2nd Aug. 1894." Can the shipowners be held bound by this, which did not exist in the common form, and could not be anticipated when they signed the charter-party on the 16th July. Suppose the berth and the ship had been ready, on the 17th July, could not the shipowner have claimed demurrage if not loaded within fifteen colliery working days thereafter? Or suppose the charterers delayed giving notice to the colliery owners that the ship was ready, are the shipowners only to begin their lay days from one day after such notice is given by the charterers to the colliery owners? The learned judge seems to have considered that the lay days began on the day following that on which the shipowners gave notice to the charterers that the ship was ready. This he says was on the 3rd Sept., so that the lay days began on the 4th. The ship could not get to the berth indicated in the charter-party till the 19th. I confess I cannot find anywhere in these documents, whether read together or separately, an agreement that the lay days are to begin one day after notice by the shipowners that the ship was ready. The notice mentioned in the guarantee, as I have pointed out, is a notice to be given by the charterers to the colliery owners, and to read that as meaning a notice given by the shipowners to the charterers is not to construe this agreement, but to add to it a stipulation which it does not contain. Moreover, the words in the guarantee, "After the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo," I should read as meaning, ready according to the charter-party. It does not refer merely to the ship being empty. If it did, the reference to the dock would be unmeaning. Ready in dock does not mean ready in any dock. It must mean ready in the dock in which the ship was to be loaded. It is agreed that she could not be loaded in the Royal Dock until she got under one particular spout; and "to be loaded as customary at Grimsby," in the Royal Dock, means to be loaded at that spout. Therefore, it seems to me that, even as between the colliery owners and the charterers, the ship would not be ready in dock until she was at the spout. The construction which the learned judge has put upon this charter-party involves a result which it seems to me neither party intended, and which would be very unjust. If, whenever the ship was empty, and in a condition to receive cargo, and lying in the Royal Dock notice might be given by the shipowners to the charterers, and the lay days must then commence, such notice might be given although it was perfectly well known she could not get to her berth under the spout within fifteen days. It seems to me impossible to suppose that the charterers intended to run this risk. In my opinion the lay days ought not to begin before the 17th, the first day on which the ship could get to her berth in the Royal Dock. As the 17th Sept. was the first on which, by the custom of the port, the ship could occupy her berth, in my opinion the lay days began then. The fifteen lay days would expire on the 2nd Oct., and the demurrage I think should be reckoned from that date.

Smith, L.J. read the following judgment:—This is an action by the owner of the ship *Fjeld* against charterers for demurrage at the port of loading, and the question is upon what day the lay days commenced to run, whether upon the 4th Sept. 1894, as held by Mathew, J. or upon the 18th Sept. 1894, as contended for by the defendants. By the charter-party, which is dated the 16th July 1894, it was agreed that the ship should proceed to a customary loading place in the Royal Dock, Grimsby, as required by charterers, and there receive from the agents of the charterers a full and complete cargo of Kiveton Park coals, to be loaded as customary at Grimsby, as per colliery guarantee, in fifteen colliery working days; demurrage to be at the rate of 4*d.* per registered ton per day. By the colliery guarantee, which is dated the 20th July 1894, the Kiveton Park Colliery agreed with the charterers to load the *Fjeld* with a cargo of coal in fifteen colliery working days after the ship was wholly unballasted and ready in dock at Grimsby to receive her entire cargo, strikes of pitmen, stormy weather, delay on the part of the railway company, or any other accident stopping the workings, loading, or shipping of the said cargo, always excepted. It was also therein agreed that the fifteen days were not to commence before the 2nd Aug., and to count from the day following that on which notice of readiness was received, which notice was to be given as soon as the ship was actually ready as above stipulated, and not before. It was also agreed that the ship should move to the

spout and proceed with her loading whenever required to do so during the entire continuance of her lay days; and it was further agreed that the colliery owners would pay demurrage to the charterers, it not exceeding 4*d.* per registered ton per colliery working day, if they did not load the ship within the abovementioned fifteen days. I cannot doubt but that the meaning of this document, as between the charterers and the Kiveton Park Colliery, is, that the colliery, subject to the abovementioned exceptions, undertook to load the ship with coal within fifteen colliery working days from the day after that upon which notice was given that the ship was ready in *the dock* at Grimsby to receive her entire cargo, *i.e.*, empty and ready in dock to receive it, and that, as between the charterers and the colliery, the latter had then fifteen working days in which to load the ship, although the actual loading whilst under the spout might only occupy two or three days. It has been found by my brother Mathew that the ship was ready in the dock to receive her cargo upon the 3rd Sept., when due notice thereof was given, and he held that the fifteen lay days commenced to run from the next day, namely, the 4th Sept. 1894, he being of opinion that the terms of the colliery guarantee as to loading, which necessarily included the question of lay days, were incorporated into the charter-party by the clause, "To be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days." The defendants contend that is not so, and that the lay days, by the terms of the charter-party, did not commence until the ship was under the spout, which was the customary loading place in the Royal Dock at Grimsby. They admit that, under the circumstances of this case, the lay days began on the 18th Sept., for the ship, but for the defendants' acts, could have been under the spout upon the 17th Sept.; and also that she was kept away from the spout, by acts for which the defendants are responsible, from that day (17th Sept.) until the 10th Oct. 1894, when she went under the spout and loaded a full and complete cargo in three days ending on the 13th Oct. 1894. Now, the object for which a colliery guarantee is taken by, and given to, a charterer, and for which it is by him incorporated into a charter-party, is well known to shipowners, charterers, and colliery proprietors, and it is agreed that the guarantee in the present case is in ordinary form, being mostly in print. It is a document which is obtained by a charterer who is about to load a ship under a charter-party with coals from a colliery, in order that the charterer may obtain from that colliery a guarantee that it will load the ship with coal within a given time, *i.e.*, within a given number of lay days. It is a document which the charterer, who takes coal from a colliery wherewith to load a ship, is ever anxious to have incorporated into the charter-party so that, as regards the time to be occupied in loading the ship, he may be under no more obligation to the shipowner than the colliery is under obligation to him, and by its incorporation he secures for himself the position of not having to pay damages (whether by way of demurrage or detention) to the shipowner which he cannot recover over against the colliery, who are the real masters of the situation as regards the time to be occupied in loading the ship with coal. I agree with the argument of the defendants that, if the first clause in the charter-party, viz., "the ship . . . shall proceed to a customary loading place in the Royal Dock, Grimsby, as required by the charterers, and there receive a full and complete cargo of Kiveton Park coals," had stood alone, the cases of *Nelson* v. *Dahl* (*ubi sup.*), *The Tharsis Sulphur Company* v. *Morel Brothers* (*ubi sup.*), and *Good* v. *Isaacs* (*ubi sup.*) have decided that the ship would not have been an arrived ship, so that the lay days would commence to run, until she had arrived under the spout in the Royal Dock at Grimsby, which was the named place in that dock to which the shipowner had to take his ship in order to receive her cargo. But, by this charter-party, in addition to the above-mentioned clause, it was expressly agreed between the shipowner and the charterer that the ship was "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days," and when that guarantee is looked at it appears that the fifteen lay days, in which the ship was to be loaded, were to commence to run, not from the date when the ship was under the spout, as the defendants now contend, but from the day after notice was given that the ship was wholly unballasted and ready in dock at Grimsby to receive her entire cargo. Now what is the meaning of the clause in the charter "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days"? Does it mean that the ship is to be loaded as customary at Grimsby in fifteen colliery working days after the ship is under the spout, which is certainly not in accordance with the terms of the colliery guarantee, or does it mean that the ship is to be loaded as customary at Grimsby (*i.e.*, under the spout) in fifteen colliery working days after notice given that the ship is in the dock ready to receive her entire cargo, which is in accordance with the colliery guarantee? I cannot read this charter-party otherwise than a contracting in this latter sense. I read the words "to be loaded as customary at Grimsby as per colliery guarantee" as meaning as provided for by the guarantee, which clearly made the fifteen lay days in which the ship was to be loaded by the charterer to commence from the day after the notice was given, and not from the day when the ship happens to get under the spout. If this charter-party is to be read as meaning that, as between the shipowner and charterer, the lay days were to begin at one date, and as between the charterer and colliery they were to begin at another, it would frustrate the very object for which the charterer obtained the incorporation of the colliery guarantee as to loading, and to which the shipowner agreed, and I cannot think that this is its true construction. It would require strong words in the charter-party to show that this was the intention of the parties, and was the true construction of the charter, and no such words are to be found therein. It is true that, under the peculiar circumstances of this case, the charterer having kept the ship away from the spout from the 17th Sept. 1894 to the 10th Oct. 1894, the incorporation of the colliery guarantee into this charter-party has in the result turned out a detriment to the charterers instead of, as they contemplated, to their advantage, but this cannot affect the true reading of the charter with the incorporated guarantee, and, in my judgment, for the reasons above, Mathew, J.

was right in the conclusion he arrived at, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *Hill* and *Dickinson*, Liverpool.

Solicitors for the respondent, *Stokes* and *Stokes*.

Tuesday, Oct. 29, 1895.

(Before Lord ESHER, M.R., KAY and RIGBY, L.JJ.)

COTTON *v.* VOGAN AND CO. (*a*.)

APPEAL FROM THE MAYOR'S COURT.

Metage on Grain (Port of London) Act 1872—*Grain duty—Grain brought in "for sale"—Construction of Act* (35 *& 36 Vict. cap. c., s.* 4).

The Metage on Grain (Port of London) Act 1872 *gives to the Corporation a duty upon "grain brought into the port of London* for sale."

Held (dismissing the appeal) that the duty is payable only in respect of grain brought in for the purpose of sale as "grain" in a commercial sense, and is not payable in respect of grain brought in for the purpose of being converted into something which is not commercially known as "grain" and then sold.

THIS was an appeal by the plaintiff from a judgment of the Mayor's Court upon special findings, upon the ground of error on the record.

The action was brought by the plaintiff, as the chamberlain of the city of London, to recover from the defendants, as the owners and consignees of certain quantities of "grain," duties under the Metage on Grain (Port of London) Act 1872.

The Metage on Grain (Port of London) Act 1872 (35 & 46 Vict. cap. c.) provides:—

Sect. 2. "Grain" means corn, pulse, and seeds, except the following seeds when brought into the port of London in sacks or bags; that is to say, linseed, rapeseed, millet seed, canary seed, cotton seed, poppy seed, teel seed, niger seed, gingetty seed, and sesame seed.

Sect. 3. From and after the 31st day of October 1872 compulsory metage of grain, and compulsory metage dues on grain, and fillage and lastage, in the port of London shall cease.

Sect. 4. From and after the 31st day of October 1872, and for thirty years thereafter, the Corporation may demand and receive in respect of all grain brought into the port of London *for sale* a duty at the rate of three-sixteenths of a penny per cwt., to be called the City of London grain duty, and such duty shall, subject to the provisions of this Act, be held by the Corporation for the preservation of open spaces in the neighbourhood of London, not within the Metropolis as defined by "the Metropolis Management Act 1855."

Sect. 5. A drawback of the amount of the City of London grain duty shall be allowed on all grain which, having been brought into the port of London for sale, is afterwards exported, whether coastwise or to foreign ports, without being unloaded or without the bulk thereof being broken.

The facts were found by the special verdict of a jury in the Mayor's Court, as follows:

That on 4th Dec. 1893 the steamer *Holkar* brought into the port of London, within the meaning of the Metage on Grain (Port of London) Act 1872, 4269cwt. of "grain," within the meaning of the said Act, viz., maize, shipped in the said steamer at Libau; that on the 6th Dec. 1893, the steamer *British Empire* brought into the port of London, within the meaning of the said Act, 2143cwt. of "grain," within the meaning of the said Act, viz., maize, shipped in the *British Empire* in America; that on the 11th Dec. 1893, the steamer *Eric* brought into the port of London, within the meaning of the said Act, 1353cwt. of "grain," within the meaning of the said Act, viz., oats, shipped in the *Eric* at Libau; that on the 16th Dec. 1893 the steamer *Shildon* brought into the port of London, within the meaning of the said Act, 1411cwt. of "grain," within the meaning of the said Act, viz., oats, shipped in the *Shildon* at Libau; that the defendants, Messrs. Vogan and Co., are dealers in grain and millers carrying on business in London; that the defendants, Messrs. Vogan and Co., were both the owners and the consignees, within the meaning of the said Act, of each of the said four shipments of "grain;" that the plaintiff, Sir William James Richmond Cotton, is, and at the times of the said "grain" being respectively brought into the port of London was, the Chamberlain of the City of London, within the meaning of the said Act; that 612cwt. of maize, out of the said shipment *ex Holkar*, were sold by the said defendants on divers dates from the 4th Dec. 1893 to the 8th Dec. 1893 to divers persons in the same state as the maize was when it arrived in and was discharged from the *Holkar*; that the duty on such 612cwt. at the rate of three-sixteenths of a penny per cwt., is 9*s.* 7½*d.*, and that the said defendants admit their liability to pay the said duty and have paid the same into court; that 128cwt. of maize out of the said shipment in *British Empire* were sold by the said defendants on the 6th Dec. 1893 to Messrs. Horne, Son, and Brayant, of the London Corn Exchange, in the same state as the maize was when it arrived in and was discharged from the *British Empire*; that the duty on such 128cwt. at the rate of three-sixteenths of a penny per cwt. is 2*s.* 0½*d.*, and that the defendants admit their liability to pay the said duty, and have paid the same into court; that, if duty be payable under the said Act on the residue of the maize *ex Holkar*, viz., 3656cwt., the residue of the maize *ex British Empire*, viz., 2014cwt., the said oats *ex Eric*, and the said oats *ex Shildon* respectively, then the duty thereon respectively at the rate of three-sixteenths of a penny per cwt. would be 2*l.* 17*s.* 1*d.*, 1*l.* 11*s.* 5½*d.*, 1*l.* 1*s.* 2*d.*, and 1*l.* 2*s.* 1*d.* respectively; that the said residues of the maize *ex Holkar* and *ex British Empire*, and the said oats *ex Eric* and *ex Shildon*, were after the same were respectively discharged from the said steamers taken to the defendants' mills; that a portion of the said maize, viz., forty-two cwt., was there ground into meal between rollers and then sold by the defendants in that condition; that the remainder was crushed and cracked between rollers, and then sifted so as to separate the crushed and cracked maize from the meal which resulted from such crushing and cracking; that the said meal was then sold separately from the crushed and cracked maize; that the said crushed and cracked maize was then mixed in certain proportions with beans, peas, and oats, which had been similarly treated, and when so mixed was sold for horse food; that the said oats *ex Eric* and *ex Shilton* were first washed, and then laid out to dry, and then sifted so as to get rid of the dirt which accompanied them, then crushed between rollers, then sifted so as to separate the crushed oats from the meal and chaff which resulted from such crushing, and then mixed in certain proportions with beans, peas, and maize, which had been similarly treated, and when so mixed were then sold as horse food; that the said residues of the maize *ex Holkar* and *ex British Empire*, and the said oats *ex Eric* and *ex Shildon* were all respectively brought into the port of London by the defendants, Vogan and Co., for the purpose of being so dealt with as aforesaid, and then so sold as aforesaid. But whether or not upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the said residues of the maize *ex Holkar* and *ex British Empire*,

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

and the said oats *ex Eric* and *ex Shildon*, or any part or parts thereof, were respectively brought into the port of London for sale within the meaning of the Metage on Grain (Port of London) Act 1872, and whether or not, upon the whole matter aforesaid, the said defendants are liable to pay the said duty of three-sixteenths of a penny per cwt. upon the said residue of maize and of the said oats respectively, or any part or parts thereof, pursuant to the said Act, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of the court thereupon, and if, upon the whole matter aforesaid, it shall seem to the court that the said residue of the maize *ex Holkar* and *ex British Empire* and the said oats *ex Eric* and *ex Shildon*, or any part or parts thereof, were respectively brought into the port of London for sale within the meaning of the said Act, and that the said defendants are liable to pay the said duty of three-sixteenths of a penny per cwt. upon the said residues of maize and the said oats respectively, or any part or parts thereof, pursuant to the said Act, then the jurors say that the defendants are indebted to the plaintiff in the whole of the sums claimed by the plaintiff in and by his declaration in this action, or (as the case may be) in parts of the said sum proportionate to the part or parts of the said residues of maize, and (or) oats liable to the said duty, and that in manner and form as in and by the said declaration is alleged, and find a verdict for the plaintiff accordingly; but if, upon the whole matter aforesaid, it shall seem to the court that the said residue of the maize *ex Holkar* and *ex British Empire* and the said oats *ex Eric* and *ex Shildon* were respectively not brought into the port of London for sale within the meaning of the said Act, and that the defendants are not liable to pay the said duty of three-sixteenths of a penny per cwt. upon the said residues of maize and the said oats respectively, or any part or parts thereof, pursuant to the said Act, then the jurors aforesaid say that the debtors are not indebted to the plaintiff beyond the said sums of 9*s.* 7½*d.* and 2*s.* 0½*d.*, *i.e.*, the sum of 11*s.* 7½*d.* in all, and find that the sums brought into court by the said defendants are enough to satisfy the claims of the plaintiff whereto such payments into court are respectively pleaded.

The judge of the Mayor's Court gave judgment for the defendants upon the findings of the jury.

The plaintiff appealed to the Court of Appeal, alleging error upon the record.

Sir *Edward Clarke*, Q.C. and *Danckwerts* for the appellant.—The contention of the defendants is that the duty under the Metage on Grain (Port of London) Act, 1872, is payable only upon "grain" which is brought into the port of London "for sale" as grain, and is not payable when the grain is brought for the purpose of being dealt with as this grain was dealt with, and then sold. That contention is wrong. The grain is just as much "grain" though it is ground, cracked, crushed, or mixed, and is imported "for sale" within the meaning of the Act, though it is intended to be so dealt with before sale. To support the contention of the defendants it is necessary to read into the Act, after the words "for sale," the further words "as grain." Such words cannot be read into the Act. In *Attorney-General* v. *Green* (4 Price, 224), decided upon the words "brewed or made for sale" in 43 Geo. 3, c. 69, it was held that vinegar was made "for sale," although it was only made and used as an ingredient in the making of blacking. In *Pharmaceutical Society* v. *Armson* (71 L. T. Rep. 315; (1894) 2 Q. B. 720) it was decided that the defendant had "sold" a poison within the meaning of the Pharmacy Act 1868, though the poison was only an ingredient in a medicine; and there was a similar decision in

Pharmaceutical Society v. *Piper*, 68 L. T. Rep. 490; (1893) 1 Q. B. 686.

The present case is a stronger one than any of the above, especially with regard to the grain which was merely crushed and mixed with other things to be sold as horse food. Though the importer may crush or crack grain, and sell one part to one person and another part to another person, yet he sells all the grain which he imported. The case of *Scott* v. *Taylor* (48 J. P. 424) ought to be overruled.

Joseph Walton, Q.C. and *Albert Grey* for the respondents.—The words of the Act "grain brought in for sale," must mean "grain to be sold," that is, for the purpose of being sold as something which is usually sold as "grain." The duty is imposed upon the trade of selling grain, and not upon trades which deal with grain and sell it as something else. The grain in this case was not sold "as grain," but was manufactured into something else, and sold as that something else. The Act applies only to grain which is imported to be sold as grain according to commercial language.

Sir *Edward Clarke*, Q.C. replied.

Lord ESHER, M.R.—In this case the Act deals with a matter of business, and we have to say what, as a matter of business, is the meaning of the Act. I think that the words "brought into the port of London for sale" mean brought in for sale as grain. That is the necessary implication, as a matter of business. It is obvious, therefore, that in these cases the grain was not brought in for the purpose of being sold as grain. It was brought in for the purpose of being turned into something else, and being so sold. This appeal, therefore, must be dismissed.

KAY, L.J.—I am of the same opinion. I have no doubt as to the meaning of the Act of Parliament. The Act says that "from and after the 31st Oct. 1872, and for thirty years thereafter, the Corporation may demand and receive in respect of all grain brought into the port of London for sale a duty, &c." What is the meaning of the words "brought . . . for sale?" Suppose that a merchant had sold "maize." Would a delivery by him of the mixture described in the special verdict fulfil that contract? It would not. The same may be said with regard to the oats. Looking at the Act of Parliament, it seems to me to be necessary to say that it must refer to grain brought for the purpose of sale *as grain*, and that, if it is not brought for sale, but in order to be made into something else which could not be delivered in fulfilment of a contract to sell grain, then it is not grain brought in for sale within the meaning of the Act. Therefore, the sale of the mixture was not a sale of grain brought in for sale. The special verdict finds that the maize and oats were brought in for the purpose of being crushed and mixed as therein described, and turned into an article not known in commercial language as "grain," but as something else. In this case, therefore, this grain was not brought into the port of London for sale, but for the purpose of being manufactured into a different article.

Grain brought in for the purpose of being consumed is not the only antithesis to grain brought in for sale. There is also the third case, viz., for the purpose of being manufactured into a different commercial article. That is this case, and it is not within the Act of Parliament.

RIGBY, L.J.—I am of the same opinion. "Brought . . . for sale," in my opinion, primarily means for sale as and for what it is, unless there is something in the context to alter that meaning. That is the *primâ facie* meaning of the words. There is nothing in the Act to alter that meaning. This grain was not brought to be sold as grain. Even if it were only crushed, it would not be saleable as in its original condition, and therefore was not brought in for sale, within the meaning of the Act. This grain was not intended for sale, but to be disposed of in another manner, and not by way of sale. The appeal, therefore, fails and must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *H. H. Crawford.*

Solicitors for the respondents, *Wansey, Bowen,* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Nov. 27, 1895.

(Before NORTH, J.)

Re BEEMAN; FOWLER *v.* JAMES. (*a*)

Administration—Insolvent estate—Administratrix—Annuitant—Retainer.

A. covenanted by deed for valuable consideration to pay his mother a certain weekly sum during her life, and a few years afterwards died intestate. The mother took out administration to his estate, and a creditor brought an action for its administration, and obtained the usual order directing accounts and inquiries. The estate proved to be insolvent. The mother as administratrix drew her annuity out of A.'s banking account until it was exhausted; and the payments of the annuity then fell into arrear. Upon a summons by the mother taken out in the action for the determination of the question whether she was entitled as administratrix to retain out of A.'s personal estate all arrears due to her and also the capital value of the annuity:

Held, that she was entitled to retain out of the estate all arrears due to her of the annuity, and also to prove in the action in respect of the future payments thereof, but not to retain out of the estate the capital value of the annuity.

BY an indenture, dated the 10th Oct. 1891, T. G. Beeman, in consideration of the release by Jane M. James his mother of her life interest in certain property whereby he became absolutely entitled thereto in possession, covenanted to pay her the weekly sum of 6*l.* during her life.

Thomas Greenwood Beeman died on the 25th Sept. 1894 a bachelor and intestate, and on the 24th Nov. 1894 letters of administration to his personal estate and effects were granted to Jane M. James.

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Jane M. James, as administratrix, drew out of the intestate's banking account the sums due to her in payment of her annuity until the 24th April 1895, when the account was exhausted; and the payments of her annuity then fell into arrear.

In 1894 Robert H. Fowler, a creditor of the intestate, brought an action for the administration of his estate, making Jane M. James the defendant in the action, and obtained the usual order for accounts and inquiries. The estate proved to be insolvent.

There was due to Jane M. James the sum of 78*l.* for arrears of her annuity; and the capital value of the annuity was 2720*l.*

This was a summons in the action taken out on the 17th June 1895 on behalf of Jane M. James for the determination of the question whether, as administratrix of the intestate, she was entitled to retain out of his personal estate the sum of 78*l.* due to her for arrears of her annuity, and also the sum of 2720*l.* as the capital value thereof. The plaintiff in the action was made defendant in the summons.

Gatey for the applicant.—Mrs. James is entitled, as administratrix of the intestate, to retain out of his personal estate the debt due to her for arrears of her annuity. She is also entitled to retain thereout the capital value of her annuity. The estate being insolvent, she can prove for the capital value of her annuity:

Re Hargreaves; Dicks v. *Hare*, 62 L. T. Rep. 819; 44 Ch. Div. 236.

Having a right to prove, she can as administratrix retain the amount of her proof:

Soane v. *Casey*, 2 Wm. Blacks. 965;
Re Morris; Morris v. *Morris*, 31 L. T. Rep. 491; L. Rep. 10 Ch. App. 68.

Cann for the plaintiff in the action.—The applicant has a right to retain only the amount of arrears due to her:

Re Hargreaves; *Dicks* v. *Hare* (*ubi sup.*).

Sect. 10 of the Judicature Act 1875 (38 & 39 Vict. c. 77) does not affect the right of retainer; and she cannot claim to retain the capital value of her annuity under the common law right of an executrix to retain for a debt due to her. The decision in *Soane* v. *Casey* (*ubi sup.*) is not in point, as this is not a case in which damages are claimed.

Gatey in reply.—The intestate's estate is insolvent, and that constitutes a breach of his covenant to pay the annuity. Therefore the applicant is entitled to claim for breach of covenant; and whether she obtains damages or the capital value of the annuity is immaterial. The Judicature Act 1875, by allowing the applicant to prove in a particular way, recognises her right to claim the capital value of the annuity.

NORTH, J.—I think the applicant has a right to retain out of the intestate's personal estate in respect of all arrears which have accrued due to her of the annuity, but I do not think she is entitled to capitalise her annuity and claim to retain out of the estate enough to satisfy the capital value of the annuity. She may prove in respect of the future payments of her annuity, but I do not see how there can be any right of retainer with respect to the capital value of it. The Judicature Act allows a person who would be entitled to prove for and receive dividends out of an estate to establish his right against the estate

under an order for the administration of the estate. That does not make such person a creditor to the estate. When the sums due in respect of the annuity are paid, there are no arrears, and no debt is owing to the annuitant out of the estate. The annuitant has no right to take proceedings for the administration of the estate. If such proceedings are instituted by some other person, then the question as to providing for the rights of the annuitant arises. But that is not the claim made here; and the applicant is not entitled to retain out of the estate the capital value of her annuity.

Solicitors: *H. Dolling Smith*; *Macarthur* and *Co.*

Dec. 4, 5, 6, 7, 8, 11, 12, 1894, *and Aug.* 9, 1895.

(Before NORTH, J.)

CRICHTON *v.* CRICHTON. (*a*)

Settlement—Execution of trusts — Misappropriation of trust funds—Satisfaction.

By a marriage settlement certain sums of stock, the property of the wife, were vested in trustees upon trust for the wife for life for her separate use, and after her death for the husband for life, and after the death of the survivor (in default of appointment) for the children of the marriage in equal shares. There was issue of the marriage two sons only, each of whom attained his majority and married. The father obtained the sole control of the trust funds, and appropriated them to his own use, but at the same time made handsome settlements on the two sons upon their respective marriages, and also various other gifts and advances to them out of his own property, except in the case of the marriage settlement of one of the sons, which included a sum of stock afterwards proved to be an investment of part of the proceeds of the misappropriated trust funds. The various gifts and advances to the sons did not, in respect either of quantity of interest or amount, correspond with the shares to which they became entitled in the trust funds. The mother and sons all predeceased the father, who subsequently died.

Held, that the father's estate was liable to make good to the representatives of the two sons their shares in the trust funds misappropriated by him without accounting for the properties settled upon, or given or advanced to, the sons by the father, except with regard to the sum of stock included in the marriage settlement of one of the sons, and proved to be an investment of part of the proceeds of the misappropriated trust funds, which must be accounted for by the representative of such son.

BY a settlement made in 1832 on the marriage of W. J. Crichton and Miss Clutterbuck, two sums of 10,857*l.* 13*s.* 7*d.* Three per Cent. Reduced Annuities and 9746*l.* 13*s.* 4*d.* Three per Cent. Consols, belonging to the lady, were vested in four trustees upon trust for the wife for life, for her separate use without power of anticipation, with remainder to the husband for life, and after the death of the survivor in trust for all or any of the children and other issue of the marriage as the husband and wife should by deed appoint, and in default of such joint appointment as the survivor should, after the death of the other, appoint by deed or will, and, in default of any such appointment, the trust funds were (in case of there being two or more children of the marriage) to be transferred to such children being sons in equal shares vesting at twenty-one. The settlement contained a power for the trustees and the survivors and survivor and the executors or administrators of such survivor, with the consent in writing of the husband and wife, or of the survivor of them, and after the death of the survivor at their or his discretion, to vary the stocks, funds, and securities (such securities being real securities only) in or upon which the trust funds should be from time to time invested.

There were only two children of the marriage, Arthur William Crichton, born in 1833, and Henry Benyon Crichton, born in 1835.

In Aug. 1863 Henry Crichton married, and W. J. Crichton settled 4000*l.* India 10½*l.* per Cents., producing the annual income of 430*l.* 10*s.*, upon him, which sum was accordingly transferred to the trustees of his marriage settlement. It was held on the evidence that this settlement, made before the existence of the liability incurred by W. J. Crichton in consequence of his subsequent dealings with the settled trust funds, was not a satisfaction of such liability.

Subsequently in 1863 the third of the four trustees of the settlement of 1832 died: two other trustees having died shortly after the date of its execution; and it was proposed by W. J. Crichton, his wife, and two sons, to execute two deeds for the purposes (*inter alia*) of enlarging the powers of investment given by the settlement and appointing three new trustees to act with the surviving trustee; but these deeds were never executed, as the surviving trustee died in Nov. 1863, having made a will appointing his widow and W. J. Crichton executors. The widow, who died in 1884, acted under the direction of W. J. Crichton, and consented to the realisations of the whole of the trust funds and to the receipt of the proceeds by W. J. Crichton alone.

From 1864 to 1891 W. J. Crichton treated the proceeds of the trust funds as his own, mixed them with his own property, and sold, invested, and transferred them as he thought fit, ignoring the trusts of the settlement. At the same time he was a very liberal father. He made a handsome settlement of about 15,490*l.*, including 4000*l.* London and St. Catharine Dock Stock, part of the proceeds of the trust funds, upon his son Arthur William Crichton on his marriage; and also various gifts and investments in favour of his sons, which are more particularly mentioned in the judgment.

In 1882 Arthur William Crichton died, having by his will bequeathed all his personal estate to his widow, and appointed her his sole executrix.

On the 29th Sept. 1886 W. J. Crichton conveyed to Henry Benyon Crichton an estate known as Broadwood Hall, in Shropshire, for the purpose of giving him a qualification to act as a justice of the peace for the county of Radnor. This estate was, after the death of Henry Benyon Crichton, sold by his executors with the concurrence of W. J. Crichton for 7000*l.*, which the executors claimed to retain. It was alleged by the defendants to the action that Henry Benyon Crichton held the estate as trustee for W. J. Crichton; and

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

that any part of the sum of 7000*l.* retained by the executors of Henry Benyon Crichton must be taken in satisfaction, or part satisfaction, of any claims by them under the settlement of 1832.

In 1889 Henry Benyon Crichton died, having by his will appointed his widow and her sons his executors.

The wife of W. J. Crichton died in 1887, having received more income than she would have done if the trust funds had been invested according to the provisions of the settlement, and in 1888 W. J. Crichton married a lady for whom he made considerable provision out of his estate.

In July 1891 the present action was brought for the execution of the trusts of the settlement of 1832, the plaintiffs being the widow of Arthur William Crichton and the widow and two sons of Henry Benyon Crichton, and the defendant being W. J. Crichton. W. J. Crichton died in Dec. 1891, and the action was continued against his executors, Alice M. Crichton, his widow, L. D. Crichton, his grandson, and Edward Neale.

No appointment under the power given by the settlement was ever made.

W. J. Crichton left a memorandum dated the 30th April 1870, headed "Instructions to my Executor," in which he set out his various dealings with the trust funds and his intentions with respect to them.

The sales of the trust funds were as follows:—The Consols were sold on the 19th Feb. 1864 and produced the net sum of 8869*l.* 9*s.* 6*d.* These proceeds were on the day after their receipt re-invested in the purchase of 2500*l.* India 5*l.* per Cents., and 5000*l.* Russian 5*l.* per Cents., which together cost 8871*l.* 5*s.*, W. J. Crichton finding the excess in price. These stocks were transferred into the joint names of W. J. Crichton and his wife. On the death of the latter they together with other investments standing in their joint names became the property of W. J. Crichton absolutely, and thus the whole capital of the consols comprised in the settlement passed to him.

The Reduced Annuities were sold on the 29th July 1865 and produced the net sum of 9744*l.* 12*s.* 10*d.*, which was on the same day re-invested in the purchase of 40,000*l.* rupees or 4000*l.* India Five-and-a-Half per Cent. Stock (which cost 4459*l.* 1*s.* 11*d.*), 4000*l.* London and St. Catharine Dock Stock (which cost 2885*l.*), both of which were transferred into the joint names of W. J. Crichton and his son Arthur William Crichton; and 3000*l.* Brazilian Four-and-a-Half per Cent. Bonds (cost 2403*l.* 15*s.*), which were transferred into the joint names of W. J. Crichton and his wife. The 4000*l.* London and St. Catharine Dock Stock was afterwards included in the son's marriage settlement. The Indian Stock on the death of the son, and the Brazilian Bonds on the death of the wife, became the property of W. J. Crichton by survivorship. These purchases cost altogether 9747*l.* 16*s.* 11*d.*, the slight excess in price over the proceeds of the Reduced Annuities being found by W. J. Crichton.

The transfer of the 4000*l.* India Five-and-a-Half per Cent. Stock and of the 4000*l.* London and St. Catharine Dock Stock into the joint names of W. J. Crichton and his son Arthur William Crichton was no doubt with the privity of the latter. Part were transferred by deed executed by both, but the form of transfer of the rest did not require execution by the transferees.

The facts stated in the memorandum were proved by the evidence adduced on behalf of the plaintiffs.

The defence put forward on behalf of the father's estate was, that part of the proceeds of the Reduced Annuities had been actually received by the son Arthur William Crichton, and that although the residue of the proceeds of the Reduced Annuities and the whole proceeds of the Consols had gone into the estate of W. J. Crichton, and could not be traced to his son, still the liability of W. J. Crichton in respect thereof was more than satisfied by other payments or advances or gifts to or benefits conferred by W. J. Crichton upon his two sons, so that there was not any liability in respect of the trust funds on the part of W. J. Crichton's estate.

Everitt, Q.C. and *Stock* for the plaintiffs.—The estate of W. J. Crichton is liable to make good the trust funds misappropriated by him; and neither the properties settled by him on his two sons upon their respective marriages, nor the various gifts and advances made by him to his two sons can be regarded as a satisfaction of such liability. The property settled upon his son Henry on the marriage of the latter was so settled by him before he had misappropriated the trust funds, and cannot be regarded as any satisfaction. The conveyance to Henry of Broadwood Hall was a gift for the purpose of giving him a qualification to act as a justice of the peace, and not in satisfaction for any part of the trust funds to which he was entitled. It appears from the facts attending the settlement on his son Arthur that such settlement was not made in satisfaction of any part of the trust funds to which Arthur was entitled. The various advances made by W. J. Crichton to his sons respectively cannot be regarded as any satisfaction of their respective shares in the trust funds, since such advances were respectively of less amount than such respective shares:

Plunkett v. *Lewis*, 3 L. T. Rep. O. S. 457; 3 Hare, 316;
Graham v. *Graham*, 1 Ves. sen. 262;
Tolson v. *Collins*, 4 Ves. 483.

And since the respective interests of the sons in such respective advances were of a nature different from their respective interests in the trust funds:

Belassi v. *Uthwatt*, 1 Atk. 426;
Davys v. *Boucher*, 3 Y. & C. Exch. 397;
Batstone v. *Salter*, 31 L. T. Rep. 600; L. Rep. 19 Eq. 250; L. Rep. 10 Ch. 431.

Cozens-Hardy, Q.C., *Swinfen Eady*, Q.C., and *Micklem* for the defendants Alice M. Crichton and L. D. Crichton.—It appears from the evidence given in this case that W. J. Crichton regarded the settlements made by him on the marriages of his two sons, and also the various gifts and advances by him to such sons, as a satisfaction of their shares in the trust funds; and they should be regarded as such satisfaction:

Plunkett v. *Lewis* (*ubi sup.*).

The interest of Henry in the settled trust funds was a portion, and a portion may be satisfied *pro*

tanto by a subsequent provision of lesser amount, although a debt cannot:

Bengough v. *Walker*, 15 Ves. 507;
Kirk v. *Eddowes*, 3 Hare, 509;
Re Lawes; Lawes v. *Lawes*, 45 L. T. Rep. 273, 453; 20 Ch. Div. 81;
Re Vickers; Vickers v. *Vickers*, 58 L. T. Rep. 920; 37 Ch. Div. 525.

At any rate, since the evidence shows that the 4000*l.* London and St. Catharine Dock Stock included in Arthur's marriage settlement was part of the settled trust funds misappropriated by W. J. Crichton, Arthur cannot claim to have that fund over again:

Nail v. *Punter*, 5 Sim. 555;
Evans v. *Benyon*, 58 L. T. Rep. 700; 37 Ch. Div. 329.

Everitt, Q.C. in reply.—There is nothing to show that Arthur knew that the 4000*l.* St. Catharine Dock Stock included in his marriage settlement was part of the trust funds misappropriated by his father, and therefore he is not prevented from claiming his full share of such funds by that fact having been now proved.

NORTH, J.—[His Lordship having mentioned in detail various money dealings and transactions which took place between W. J. Crichton and his two sons, proceeded:] The question I have to try is, whether the father's liability is discharged by the several particular dealings and transactions which I have had to trace at some length. So far as Arthur is concerned, the question of satisfaction rests on the settlement made upon his marriage and the investments in 4000*l.* India Five-and-a-Half per Cents. and the 4000*l.* London and St. Catharine Dock Stock, made in 1865. As regards the two latter, I do not see how the dealings with these can possibly amount to a satisfaction of the liability of the father. There are numerous cases which show that a debt of a father to a child may be satisfied by an advance to the child of an equal or greater amount, whether in the father's lifetime or by his will. See *Plunkett* v. *Lewis* (*ubi sup.*), a case of a debt being satisfied by a marriage portion; *Talbot* v. *Earl of Shrewsbury* (Prec. in Ch. 394), a case of satisfaction by a legacy. But there is a leaning against any presumption of satisfaction in such cases, and there are many exceptions to this general rule. If, for instance, the amount advanced is less than the debt (as in the present case) there is no satisfaction even *pro tanto*: (*Cranmer's* case, 2 Salk. 508; *Graham* v. *Graham* (*ubi sup.*).) See too *Lady Thynne* v. *Earl of Glengall* (2 H. of L. Cas. 131). Each of these sums was less than the liability. Therefore, even if they had been advanced to Arthur irrevocably, they would not have been any satisfaction. Again, there is another exception to that rule within which the present case falls, viz., where the debt is certain and the alleged satisfaction is contingent or uncertain, even though of greater amount than the debt; *à fortiori*, I may add, if the contingency does not take place. There are many illustrations of this in cases where a legacy made payable after the death of a testator is held not to be a satisfaction of a debt payable on the testator's death, as to which see the recent decision of Stirling, J. in *Re Harlock; Calham* v. *Smith* (72 L. T. Rep. 253; (1895) 1 Ch. 516) and cases there cited. There are two other cases which I desire to refer to: *Mathews* v. *Mathews* (2 Ves. sen. 635) and *Talbot* v. *Earl of Shrewsbury* (*ubi sup.*). These authorities with many others seem to me conclusive on the present question. I cannot understand how the father's debt or liability to the son would be satisfied by investments in the joint names which ultimately came not to the son but to the father, the debtor; nor how the son's certainty of succeeding ultimately to a moiety of the trust funds in default of an appointment which never was, and which the father contemplated never would be made, could be satisfied by giving him a chance of succeeding to something else of smaller amount. It was also said that the son Arthur must have known more of what took place than can now be proved, and that I ought to infer that what was done was with his consent. It was pointed out that he had executed a transfer of the 4000*l.* India, and the like amount of London and St. Catharine's Dock, stock into the joint names of his father and himself on the 29th July 1865, being the very day on which the Reduced Annuities comprised in the settlement of 1832 were sold, and it was contended that the whole facts must have been explained to him. But I am unable to arrive at this conclusion. So far, therefore, as Arthur is concerned the only material question remaining is the effect of his settlement. The value of the securities settled thereby is proved to have been about 15,490*l.* (the income of which was a little more than 800*l.* a year), and far more than one moiety of the Consols and Reduced Annuities settled in 1832, which at the prices of the day would then have been 9273*l.* only. But the legal presumption of satisfaction in such a case is liable to be rebutted, and in my opinion it is rebutted, by the correspondence which took place before the settlement was made, which satisfies me that the parties did not intend that the reversionary interest of Arthur was to be settled. [His Lordship having held on the evidence that Arthur's reversionary interest in the trust funds was not intended to be settled, proceeded:] But, though I think it clear that Arthur's settlement was not a satisfaction in whole or in part of the father's liability, the fact that 4000*l.* of the dock stock settled thereby arose from the investment of 2885*l.* part of the Reduced Annuities, is not immaterial. The sons Arthur and Henry and their representatives complaining of the conversion and appropriation by their father of the proceeds of the securities originally settled in 1832 are entitled to follow the proceeds of the conversion, and, so far as such proceeds cannot be traced, to recover from the father's estate the loss arising from their misappropriation; but, as it has been proved that this part of the proceeds of the improper conversion came into Arthur's hands, his representatives cannot claim it over again from the father's estate, but must be treated as having received that amount: (see *Nail* v. *Punter* (*ubi sup.*); *Evans* v. *Benyon* (*ubi sup.*). [His Lordship then referred to his decision that Henry's settlement was not a satisfaction of the liability of W. J. Crichton, which had no existence when the settlement was made, and proceeded to the consideration of various other advances, amounting to 4801*l.* 7*s.* 6*d.*, which had been made to Henry by W. J. Crichton; and having held that such advances could not be treated as a satisfaction of the liability of W. J. Crichton to Henry, proceeded:]

With respect to these sums, one plausible argument was put forward by Mr. Cozens-Hardy which I ought not to pass without notice. It was said that what Henry was entitled to under the 1832 settlement was a portion; that, although satisfaction of a debt cannot be presumed even *pro tanto* from a subsequent legacy or gift of lesser amount, the law is different as to portions; that a portion may be partially satisfied by a subsequent provision of lesser amount; and therefore Henry's claim to his original portion is answered *pro tanto* by the 4801*l.* 7*s.* 6*d.* actually received by him. This contention seems to me not well founded. Call Henry's share a portion, if you will; it was not a portion provided by the father, or for which he or his estate was in any way liable. The liability of his estate merely arises from the fact that he, as trustee, received the trust money, and became a debtor for the amount; and the legal doctrine invoked by the defendant's counsel does not apply. There is one other important matter to which I have not yet attended. On the 29th Sept. 1886, after the death of his son Arthur, the father conveyed to his son Henry an estate called Broadwood Hall, in Shropshire, for the purpose of giving him a qualification to act as a justice of the peace. After Henry's death the estate was sold by his executors, with the father's concurrence, for 7000*l.*, which the executors of Henry claim to retain. The defence alleges that this estate was held by Henry as trustee for his father, and that any part of the proceeds of sale which the executors can retain, must be taken in satisfaction, or part satisfaction, of any claims of Henry under the original settlement. The deed recites the father's desire to convey the estate, and the consideration was expressed to be natural love and affection. This latter circumstance, though not conclusive, is entitled to serious consideration where the value of the property is not shown to exceed the amount of the debt alleged to be satisfied by the transaction (see *Plunkett* v. *Lewis* (*ubi sup.*), and *Re Lawes*; *Lawes* v. *Lawes* (*ubi sup.*) Again, there is no memorandum in writing and no evidence of any express trust, which would indeed be somewhat at variance with the terms of the deed, and on a voluntary conveyance by a father to a son no trust results by operation of law. Again, in order to confer a qualification to act as justice of the peace, a beneficial occupation is necessary and not merely a legal title, and the defendant's counsel admitted that Henry did have such beneficial occupation. Under these circumstances the creation of such a trust as is alleged would have been a fraud upon the law, and the father could not be heard to aver its existence (see *Curtis* v. *Perry*, 6 Ves. 739; *Brackenbury* v. *Brackenbury*, 2 Jac. & Walk. 391; *Cecil* v. *Butcher*, 2 Jac. & Walk. 565; and *Childers* v. *Childers*, 3 Kay & J. 310), though that case was reversed on appeal on the ground that for the qualification there in question a beneficial occupation was not requisite. It is hardly necessary, therefore, to consider the point whether a conveyance of land could be assumed to be a satisfaction of a debt. As regards the difficulty of ascertaining the value of the land, it was said that this was no greater than in the case of a residue, and the defendant's counsel relied on the cases of *Bengough* v. *Walker* (*ubi sup.*), *Lawes* v. *Lawes* (*ubi up.*), and *Vickers* v. *Vickers* (*ubi sup.*); but those cases were all as to the satisfaction not of debts, but of portions, which stand on a different footing. I have referred to a great many authorities in connection with this case, but have not found one in which a debt has been treated as satisfied in whole or in part either by a conveyance of land or by a gift of residue. The result is, that the gift of Broadwood Hall was not a satisfaction, and that no part of the purchase money can be taken into account in discharge or reduction of the liability of the father's estate. I must, therefore, declare that the father's estate is liable to make good to the estates of his sons their shares of the trust funds misappropriated by him.

Solicitors: *Mullens* and *Bosanquet*; *Nye* and *Moreton*; *Nield* and *Strouts*.

Dec. 3 *and* 4, 1895.

(Before STIRLING, J.)

Re EARL OF STAMFORD; PAYNE *v.* STAMFORD. (*a*)

Trustee—Appointment of new trustees—Trustee "abroad"—Trustee also executor—Appointment by tenant for life of her own solicitor—Validity.

Although the practice of the court, upon an application under sect. 38 *of the Settled Land Act* 1882, *or under its general jurisdiction, is to refuse to appoint, or to sanction the appointment of, the solicitor of the tenant for life as a trustee of a settlement under which he would become a trustee for the purposes of the Settled Land Acts, that practice does not prevent a tenant for life acting in the* bonâ fide *exercise of a power from so appointing.*

A settlement of real and personal estate contained a power to appoint new trustees, which became exercisable in case (inter alia) *either of the trustees should "be abroad." A., one of the trustees, in consequence of his wife's ill-health, had taken a lease for five years of a house in Normandy, where he was residing. He had, however, with few exceptions, attended all the meetings of the trustees, and had been in constant correspondence with his co-trustees and the solicitors of the trust.*

Held, that A. was "abroad" within the meaning of the power.

The mere fact that a trustee of a will is also one of the executors does not prevent his removal from being a trustee if there is no part of the testator's personal estate remaining in his hands unadministered.

ADJOURNED SUMMONS.

The Earl of Stamford and Warrington, by his will dated the 26th Jan. 1875, devised four estates in Staffordshire, Leicestershire, Cheshire, and Lancashire, to the use of A. F. Payne, R. Cocks, and H. Hall, their executors, administrators, and assigns, during the life of his wife, the Countess of Stamford and Warrington, on certain trusts for her benefit, and he directed the trustees to set apart out of the rents and profits of those estates the yearly sum of 12,000*l.* to be applied in aid of his personal estate in or towards the discharge of his debts and the legacies and annuities given by his will, such payment and application to be in

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

the absolute discretion of his trustees: After the death of the countess the testator devised the several estates to uses in favour of different families, but, in respect of the Lancashire estates, he created a term therein of 1000 years, and limited the same to the trustees upon trust to apply the rents in aid of his personal estate, first in payment of his funeral and testamentary expenses, and the legacies given by the will, and then in discharge of moneys charged by mortgage upon the four shire estates in manner therein mentioned. He bequeathed his residuary personal estate to the trustees upon trust to convert the same into money, to pay thereout his funeral expenses, debts, and legacies, and to apply the surplus, if any, towards the discharge of mortgages, and if any surplus remained after that to pay the same to the countess absolutely. The testator then, after giving various legacies, some of which were specific, appointed A. F. Payne, R. Cocks, and H. Hall to be the general trustees of his will with powers of sale and management, and also appointed them his executors, and he declared that, in case either of his trustees or trustee thereafter appointed should die in his lifetime, or decline to act, or having survived him and acted should die or "be abroad," or desire to be discharged, or refuse or become incapable to act, then and in every such case it should be lawful for the countess during the continuance of the estates limited in trust for her benefit, and afterwards for the surviving or continuing trustees or trustee, or the executors of the last surviving or continuing trustee, to appoint a new trustee or new trustees.

The testator died on the 2nd Jan. 1883, and his will was duly proved by the executors therein named, all of whom were still living.

The personal estate was insufficient to pay the debts in full and had been exhausted. The simple contract debts had been paid, but there remained mortgage debts to the amount of about 800,000*l.* and annuities to the extent of nearly 4000*l.* which were undischarged.

The executors had assented to the specific legacies and had paid all the pecuniary legacies except some which were given on the countess's death, and there remained no personal estate in their hands available for distribution.

Down to the 29th July 1895 all three trustees had acted together, but on the 8th Aug. 1895 Sir Thomas Wright, the solicitor of the countess, had forwarded to the solicitors of the trustees a draft appointment of himself as trustee in the place of Payne, who was therein stated to be residing abroad. The member of the firm who attended to the business of the trust was not in town at the time, so the letter accompanying the draft appointment was merely acknowledged.

On the 28th Aug. the countess, without further communication with the trustees, executed the deed whereby she appointed Sir Thomas Wright to be a trustee in the place of Payne for all the purposes of the will, and made a declaration vesting in Cocks and Hall and Sir T. Wright, as trustees of the will, the real and personal estate subject to the will for all the interest therein of the original trustees. The deed was not executed by either Payne, Cocks, or Hall.

This was a summons taken out by the original trustees of the will asking for the determination by the court of the question whether, having regard to the circumstances, the indenture of the 28th Aug. 1895 was a valid appointment of a new trustee under the will.

It appeared from the evidence that Payne had all along acted in conjunction with his co-trustees in the administration and management of the testator's estate. In the year 1893, in consequence of his wife's health, he took a lease of a house at Lisieux, in Normandy, where he had since principally resided, but he stated that, with a few exceptions, he had attended all the meetings of the trustees, which had taken place three or four times a year or oftener, and had been in constant correspondence with his co-trustees and the solicitors to the trust. The special management of the Lancashire estates had been carried on by Hall, and that of the Cheshire estates by Cocks, both of those gentlemen having acted as agents of the late earl during his life. The Leicestershire estates were under the special management of Sir Thomas Wright, who was a solicitor at Leicester, and had been appointed the trustees' agent for that purpose a few years after the earl's death. Another agent had been appointed for the Staffordshire estates. Payne, in his evidence, stated that it had never been suggested until the 10th Aug. 1895 that his residence abroad had in any way interfered with the performance of his duties as trustee, or rendered it desirable or expedient that he should cease to be trustee. Lisieux, where he resided, was about forty miles from Havre and fifty or sixty from Rouen. Letters sent from London were received by him the next day at Lisieux, and he could leave Lisieux at 4.30 p.m. and be in London by 8 o'clock the next morning. At the expiration of his lease, which had about three years to run, he should probably return to England; though he had no immediate intention of leaving Lisieux.

Payne was still willing to act, and no request by the persons entitled in remainder had been made to the countess to appoint a new trustee in his place.

Buckley, Q.C. and *Austen-Cartmell* for the summons.—The power to appoint a new trustee in the place of a trustee who shall "be abroad" arises only if the trustee "be abroad" permanently in such a way as to be unable to perform the duties of the trust. A mere temporary residence abroad is not sufficient:

Re Moravian Society, 26 Beav. 101;
Re Arbib and Class's Contract, 64 L. T. Rep. 217; (1891) 1 Ch. 601.

Whether Payne is or is not "abroad" for the purposes of the will is a question of fact, and on the evidence we submit he is not. Assuming, however, that he is, we say that the appointment by the countess of her own solicitor as trustee is not a valid exercise of the power. The duty of a trustee is to check the proceedings of the tenant for life, and the appointment, therefore, by her of her own solicitor as trustee is not a proper appointment:

Re Kemp's Settled Estates, 49 L. T. Rep. 231; 24 Ch. Div. 485;
Re John Walker's Trusts, 48 L. T. Rep. 632: see also s.c. *nom. Wheelwright* v. *Walker*, 23 Ch. Div. 752.

No doubt, in *Re Marquis of Ailesbury and Lord Iveagh* (69 L. T. Rep. 101; (1893) 2 Ch. 345) the court appointed the solicitor of the tenant for life a trustee for the purposes of the Settled Land

Act 1882, but the circumstances in that case were peculiar, and justified the appointment. The court will not appoint a person to be a trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator or to the interests of others of the *cestuis que trust*:

Re Tempest, 14 L. T. Rep. 688; L. Rep. 1 Ch. 485.

Where a power to appoint new trustees has been improperly exercised the court will hold the appointment invalid, and no reconveyance of the trust property by the new trustee will be necessary:

Sugden v. *Crossland*, 26 L. T. Rep. O. S. 307; 3 Sm. & Giff. 192;
Re Skeats' Settlement; *Skeats* v. *Evans*, 61 L. T. Rep. 500; 42 Ch. Div. 522.

Payne was appointed both trustee and executor, and so long as any of the debts remain unpaid ought not to be removed from the office of trustee against his will. He has assented to the specific legacies on the assumption that the 12,000*l.* a year were assets in the hands of the executors. There is now no personal estate available for the payment of the debts. If a new trustee is appointed Payne will lose his right of indemnity against that fund.

H. Fellows, for the successive tenants for life in remainder of the Leicestershire estates, *Borthwick*, for the infant tenant in tail of the Staffordshire estates, *W. A. Peck*, for the tenant for life of the Staffordshire estates, and *L. A. Wallington*, for the present Lord Stamford, stated that their clients were satisfied either with Payne or Sir T. Wright, and that they did not propose to take any part in the argument, but left the matter to the discretion of the court.

Hastings, Q.C. and *Fossett Lock* for the countess.—Nothing has happened in this case to interfere with the exercise by the countess of the power of appointment given her by the will. Residence abroad is *primâ facie* a disqualification for the office of trustee:

O'Reilly v. *Alderson*, 8 Hare, 101.

On the evidence we submit that Payne was clearly abroad at the date of the appointment of Sir T. Wright. Further, we say that the power was validly exercised. No doubt, upon an application under sect. 38 of the Settled Land Act 1882, for the appointment of trustees by the court, the practice is not to appoint the solicitor of the tenant for life; but that practice does not interfere with such an appointment by a tenant for life acting in the *bonâ fide* exercise of a power of appointment. The distinction between the two cases is clearly shown by Pearson, J., in

Re Norris; *Allen* v. *Norris*, 51 L. T. Rep. 593; 27 Ch. Div. 333, 341.

Re Skeats' Settlement; *Skeats* v. *Evans* (*ubi sup.*) was an entirely different case from the present. The ground of the decision there was, that the donees of a joint power could not appoint one of themselves. That case was followed in

Re Newen; *Newen* v. *Barnes*, 70 L. T. Rep. 653; (1894) 2 Ch. 297.

Lastly, it is said that Payne cannot be removed from being trustee so long as he remains an executor, and therefore that the power has not arisen. But, in a sense, an executor never ceases to be an executor. Here, however, all the personal estate has been exhausted, and it cannot be contended that there remain any executorial duties to be performed.

Grosvenor Woods, Q.C. and *Blakesley* for Sir Thomas Wright.—There being no allegations made against either the personal character or the fitness of Sir T. Wright to act, we can only offer observations as *amici curiæ*. It is clear that the 12,000*l.* a year did not vest in the executors as executors but as trustees. The definition of the expression "trust" in sect. 50 of the Trustee Act 1893 seems to indicate that there may be duties which devolve upon trustees in the nature of administration.

Austen-Cartmell in reply.—In *O'Reilly* v. *Alderson* (*ubi sup.*) it was admitted that the trustee's residence abroad was permanent. Here Payne distinctly says that he is not permanently residing abroad. Whether a trustee who is also an executor can be removed against his will from being trustee has been doubted:

Re J. R. Willey, W. N. 1890, p. 1.

In *Re Moore*; *McAlpine* v. *Moore* (21 Ch. Div. 778), where a similar question arose, it was proved that all the testator's debts had been paid. He also referred to

Eaton v. *Daines*, W. N. 1894, p. 32;
Farwell on Powers (2nd edit.), p. 649.

STIRLING, J.—[After stating the facts and observing that, without attributing any blame to the countess or her advisers, he thought it was matter of regret that the execution of the appointment was not postponed until the views of the trustees had been ascertained, he continued:] However, I have now to decide whether the appointment is valid. The first question which arises is one of fact. The power to appoint new trustees arises (*inter alia*) in case one of the trustees should be abroad, and the first question is whether at the date of the appointment Mr. Payne was "abroad" within the meaning of the power. In my opinion that question may be decided without difficulty upon Mr. Payne's own evidence. It seems to me that he was. He has been residing abroad since 1893, and does not intend to return until the end of the lease. The result therefore is, that for three years more he will probably be residing abroad, and certainly on the 28th Aug. 1895 he was properly described as being abroad. I do not desire to depart from anything laid down by Lord Romilly in *Re Moravian Society* (*ubi sup.*). In each case it is a question of fact, and here the conclusion I come to is, that Mr. Payne was abroad at the time of the appointment executed by the countess. But then it was said that residence abroad was not a disqualification for the office of trustee, and I was invited to read the clause as if it were to the effect that a new trustee might be appointed in the place of a trustee who should be abroad in such a way as to interfere with the performance of his duties. But those words are not in the will. A trustee by residing abroad, as laid down by Wigram, V.C., in the case of *O'Reilly* v. *Alderson* (*ubi sup.*), puts himself in such a position as would entitle any *cestui que trust* to require that the office should be filled by another trustee. In this case none of the remaindermen have called upon the countess to exercise the power of appointing a new trustee:

still it was within her discretion to do so. If the exercise of that discretion was merely capricious and the appointment was not made *bonâ fide*, the court might be called upon to interfere; but that does not appear to be so here, and no such case has been suggested. Mr. Payne's residence abroad created a certain amount of inconvenience and expense. The countess is tenant for life, and it was quite within her competence to consider the circumstances of the case, and if she thought fit, in the interests of everybody, to appoint a new trustee in the exercise of her power, and I cannot on the evidence come to the conclusion that, as donee of the power, she has exercised it with caprice or without good grounds. Then it was said that Mr. Payne was in the position of an executor and legal personal representative of the testator, and that the power of appointment ought not to be exercised so long as there are debts remaining unpaid. However that might be, if there were any personal estate remaining unadministered, that objection cannot prevail in the present case. All the general personal estate is exhausted. Pecuniary legacies have been paid and specific legacies assented to, and that could only have been done on the footing that the duties of the executors had been fully executed, and that they were willing to convert themselves into simple trustees. It is clear, when one looks at the terms of the will relating to the 12,000*l.*, that the estate *pur autre vie* was vested in the trustees as trustees. Nothing is now vested in Mr. Payne *virtute officii*. I now come to a matter which is deserving of my most serious consideration—namely, the fact that the countess had thought fit to appoint as a new trustee her own solicitor. The trustees of the will are vested with a power of sale of the real estates, and they would also be trustees for the purposes of the Settled Land Acts, and as such would have to consider matters where the respective interests of the tenant for life and the remaindermen might be in conflict, and where they would consequently be bound to hold an even hand between the parties; and it was suggested that the solicitor of the tenant for life was not in a position to discharge that duty properly. I feel greatly the force of that objection. It would prevent the court from appointing as trustee a person in the position of Sir Thomas Wright, and from sanctioning any such appointment. The rule was laid down by the Court of Appeal in *Re Kemp's Settled Estates* (*ubi sup.*), a case of the appointment of trustees for the purposes of the Settled Land Act. In that case Cotton, L.J. said: "The gentleman is, no doubt, a most fit person to be a trustee, and the only objection to him is that he acts as solicitor for the tenant for life. Now the appointment of trustees is required to impose a check upon the extensive powers conferred by the Act upon the tenant for life, and the 44th section contemplates the probability of there being differences between the trustees and the tenant for life. I have no doubt that Mr. Wood, as solicitor of the tenant for life, would advise him to the best of his ability and recommend him to exercise his powers with a proper regard to the interests of the remaindermen. But solicitors, like judges, are fallible; and how could Mr. Wood, as one of the trustees, exercise a proper judgment on their behalf upon questions on which he had advised the tenant for life? It would be Mr. Wood as trustee putting a check upon Mr. Wood as solicitor to the tenant for life, and he would be placed in a false position." That case lays down a rule of practice for the guidance of the court, from which it would not be right for me to depart, and of which moreover, I entirely approve; but the question is whether the rule is binding under all circumstances, or whether the court can, if it thinks fit, depart from it. I should be slow to do so myself, though I have done it in one case, *Re Marquis of Ailesbury and Lord Iveagh* (*ubi sup.*); but before doing so I should like to be satisfied, not only that there would be no disadvantage to the estate, but that great advantages would accrue from such a course. I am not so satisfied as regards the present appointment, and if this were an application to the court under sect. 38 of the Settled Land Act 1882, or under its general jurisdiction, to appoint a new trustee, I should consider that I was prevented from doing so by the rule of the court to which I have referred. But that is not the question. This is not a case in which the sanction of the court is asked for in any way; and, as was pointed out by Cotton, L.J., in *Re Kemp's Settled Estates* (*ubi sup.*), the question whether an appointment by the donee of the power is or is not valid is quite different from the question whether the court would see fit to make the appointment itself in the first instance, or sanction it if made. The case of *Forster* v. *Abraham* (L. Rep. 17 Eq. 351) was referred to in *Re Kemp's Settled Estates* (*ubi sup.*), in which the late Master of the Rolls pointed out that there was nothing in itself to prevent the tenant for life being appointed one of the trustees of the settlement; and Cotton, L.J., in reference to it, says: "That case only decides that the appointment of a tenant for life under a power was invalid, it does not decide that the court would have appointed him." In *Re Norris*; *Norris* v. *Allen* (*ubi sup*), the court was asked to sanction an appointment made by the only trustee of a will of an additional trustee, the person appointed being the son of the old trustee and the partner in his business, which was that of a solicitor, in which capacity he was acting for the trustees. Pearson, J. refused to sanction the appointment, but he said: "I am very far from saying, and I must not be understood to say, that, if there was a trust which was not being administered by the court, and the person who had the power of appointing new trustees had *bonâ fide* appointed as trustees a father and his son who were solicitors in partnership, it would be a bad appointment, so as to render any deed executed by the trustees so appointed null and void. I should be very sorry to hold that such an appointment outside the court would be invalid. If such a case came before me, and I found that the appointment had been made *bonâ fide* outside the court, I should certainly hold that the trustees were validly appointed." The question then is, does the existence of the rule of practice prevent the donee of the power from so exercising the power as to appoint her own solicitor to be one of the trustees? In my judgment, though I should not have made such an appointment myself, or sanctioned it if asked so to do, the rule does not prevent the tenant for life from exercising the power in the way which she has. So far as the individual appointed is concerned, there can be no question that he is qualified to act. He is

a gentleman of large experience, and well acquainted with the estate, and although all the beneficiaries are before the court, not one of them has said a word in opposition to his appointment. They take up a neutral position. They would have been content that Mr. Payne should remain a trustee, but they are equally satisfied with Sir Thomas Wright's appointment, and leave the matter to the court. Under those circumstances I cannot say that the appointment is otherwise than valid. In the last place, it was said that Mr. Payne, who remains one of the legal personal representatives of the testator, and is under some liability in that respect, will by reason of this appointment be deprived of the right to which he is entitled of being indemnified against that out of the rents and profits of the estate. Nothing can prejudice that right if it exists. It is no more, in my opinion, than a nominal liability, but it is important to preserve to trustees their right to indemnity out of the trust funds, and if I were called upon to make a vesting order, or to require the remaining trustees to do something which would have the effect of taking out of Mr. Payne an estate which was then vested in him, I should take care that he was not deprived of that right of indemnity. However, it does not appear to me that there is any necessity for the court in this case to give any directions to the new trustees in the matter. All the property, subject to the trusts of the will, is now real estate, and by the joint operation of the trusts of the appointment and the Conveyancing and Law of Property Act 1881 the legal estate has become vested in the new trustees, or will become so; but, however that may be, I desire to say in the most emphatic way that no right to which Mr. Payne may be entitled as legal personal representative ought to be prejudiced, and I will reserve to him liberty to apply in case he can show any matter in respect of which he requires any specific indemnity.

Solicitors: *Bower, Cotton,* and *Bower; Evans, Foster,* and *Wadham; Iliffe, Henley,* and *Sweet,* for *Laycock, Dyson,* and *Laycock,* Huddersfield; *Gamlen* and *Burdett; Smith, Fawdon,* and *Low,* for Sir *T. Wright* and *Son,* Leicester.

QUEEN'S BENCH DIVISION.

Oct. 28 *and Dec.* 5, 1895.

(Before Lord Russell, C.J. and Cave, J.)

Marshland Smeeth and Fen District Commissioners, *v.* Marshland District Council. (*a*)

Highway authority — District inclosure commissioners with jurisdiction over highways—District council—Transfer of authority—Repair of roads —Mode of raising expenses—Exemption from outside highway rates—Local Government Act 1894 (56 *&* 57 *Vict. c.* 73), *ss.* 25 *and* 29.

The expression "highway authority" in the Local Government Act 1894 (56 *&* 57 *Vict. c.* 73) *is general, and has not the limited meaning given to the same expression in the Highways and Locomotives (Amendment) Act* 1878 (41 *&* 42 *Vict. c.* 77). *And highway expenses raised by an acre rate are not defrayed out of any property or funds other than rates within sect.* 29 *of the Local Government Act* 1894.

Commissioners of M. had under certain local and private Acts powers of inclosure and drainage, and jurisdiction over the roads in M., a district made up of parts of certain parishes, some of which were in rural and others in urban sanitary districts. Under these Acts the expenses of repairing the roads in M. were raised by an acre rate levied equally on the lands in M., and the lands in M. were exempted from all other highway expenses. The opinion of the court being asked, it was

Held, that the commissioners were a highway authority within the Local Government Act 1894; *that their authority as to the roads in the rural district was by sect.* 25 *of that Act transferred to the rural district council, their authority as to the roads in the urban district to the urban district council; that the highway expenses of M., after the transfer, were not to be raised by an acre tax, but treated as general expenses under sect.* 29 *of the Act, and that the lands in M. were no longer exempted from general highway rates.*

Special case submitted to the court for their decision pursuant to sect. 70 of the Local Government Act 1894 (56 & 57 Vict. c. 73).

The Marshland Smeeth and Fen Commissioners acquired their jurisdiction under three private Acts known as the Marshland Smeeth and Fen District Acts, passed respectively in the years 1796, 1849, and 1863, which extended for inclosure over certain lands, formerly common, called Marshland Smeeth and Marshland Fen, forming parts of several parishes (one of those (Walsoken) being urban and the others rural) in the county of Norfolk, and for drainage over those lands with certain adjacent fens, called Well Moor, Broad Fen, and Short Fen, in the same county, and for highway purposes over the same lands and fens, with the exception of Well Moor.

The Act of 1796 (36 Geo. 3, cap. c.) commences with the provisions for drainage. The provisions relating to inclosure commence with sect. 41, the most material for present purposes being sect. 61, which provides for the setting out of public and private roads over the lands to be inclosed, the public roads to be repaired when made by the inhabitants of the parish or place to which the commissioners for inclosure should declare and adjudge such roads to belong, and the private roads to be repaired at the expense of all, or any, of the persons entitled to the land to be inclosed, as the commissioners for inclosure should in that behalf order, direct, or appoint. The Act also provided (sect. 75) that the allotments to be made should be deemed to be and lie respectively in such parish as the respective manors, messuages, tofts, or other rights or interest for or in respect whereof such lands should be so allotted were and did lie respectively, and should be assessed to and charged with the land tax and parish rates of those respective parishes in the same manner as the other lands lying therein respectively were assessed and charged.

The commissioners for inclosure did not set out any public roads, but all the roads set out by them were set out as private roads. This gave dissatisfaction in course of time to the owners of land within the district subject to the commis-

(*a*) Reported by J. A. Strahan, Esq., Barrister-at-Law.

sioners, inasmuch as their lands were assessed to the highway rates of the different parishes in which such lands were respectively situate, but no portion of those rates were applicable or applied for the maintenance of the roads in Marshland Smeeth and Fen. Accordingly, in 1849, another Act was passed (12 & 13 Vict. c. cxviii.), which, besides effecting an alteration as to the drainage, provided (sect. 11) that certain specified roads should be amended and repaired with hard materials within two years, and should from and after the passing of the Act be deemed and taken to be public highways, and be maintained and kept in repair by the owners and occupiers for the time being of the lands within Marshland Smeeth and Marshland Fen, and in Broad Fen and Short Fen, Well Moor not being included. And the commissioners for the time being acting in the execution of the previous Act, and of that Act, should be subject and liable to such legal proceedings for not repairing such roads as inhabitants of parishes were then by law subject and liable to for the non-repair of public highways.

The Act of 1849 also empowered the commissioners (sect. 12) from time to time to amend and repair the several other roads in Marshland Smeeth and Fen, and to appoint surveyors and other officers (sect. 13) to levy and raise rates and assessments for repairing and amending the roads, and provides (sect. 14) that such rates and assessments shall be made, levied, and assessed upon the lands equally by the acre, and (sect. 15) that after the passing of the Act no parish surveyor, surveyor of highways, or other officer (other than and except the surveyor or officer appointed by the commissioners under the authority of the Act) shall have any control over the lands, roads, and ways in Marshland Smeeth and Fen, and in Broad Fen and in Short Fen, and that the several lands in Marshland Smeeth and Fen, and the said several roads and ways and the several lands in Broad Fen and Short Fen, or any of them, or any of the owners or occupiers thereof, shall not in respect thereof be charged or chargeable with or contributory to the amendment, repair, or maintenance of any public or private roads or ways not being within the said Marshland Smeeth and Fen, or in Broad Fen or Short Fen, or with or to any highway rate or other charge or assessment for the amendment, repair, or maintenance of any of such last-mentioned roads or ways, and the several lands not lying within Marshland Smeeth and Fen and Broad Fen and Short Fen, or either of them, should not, nor should the owners or occupiers thereof, or of any part thereof, be charged or chargeable in respect of the same, or contributory to the amendment, repair, or maintenance of any of the roads or ways within Marshland Smeeth and Fen, or in Broad Fen or Short Fen, or either of them, or with or to any highway rate or other charge or assessment for the amendment, repair, or maintenance of any such last-mentioned roads or ways.

The principal provisions of the Act of 1863 (26 & 27 Vict. c. lxviii.) in reference to the roads are the definition of the district in the preamble, and sect. 41, which enacts that such of the several roads and ways in the Marshland Smeeth and Fen District as then or from time to time thereafter were made of hard materials, and were from time to time repaired by the commissioners with hard materials, should be deemed and taken to be public highways in like manner as the roads made public highways by the Act of 1849.

The commissioners, on the passing of the Act of 1849, proceeded to amend, and they had since repaired with hard materials, the several roads specified in sect. 11 of that Act, and they had since the passing of that Act from time to time amended and repaired with hard materials several of the other roads in Marshland Smeeth and Fen set out under the Act of 1796.

Since the passing of the Act of 1849 no highway rate had been laid upon the lands in Marshland Smeeth and Fen by the surveyors of the highways of the rural parishes extending into Marshland Smeeth and Fen, neither was any highway rate laid upon the land in Marshland Smeeth and Fen lying in Walsoken, by the surveyor of the highways of the parish of Walsoken, before it became urban, nor had that land been charged with any highway expenses by the urban authority of the parish of Walsoken since it became urban.

The roads district of the Marshland Smeeth and Fen District Commissioners is wholly situate in the county of Norfolk and within the area of the Wisbech Poor Law Union, which extends into the counties of Cambridge and Norfolk. The Marshland Rural District Council have jurisdiction over such part of the area of Wisbech Union as is situate in the county of Norfolk and is rural; and so much of the parish of Walsoken as is situate in the Marshland Smeeth and Fen is under the jurisdiction of the Walsoken Urban District Council.

The decision of the court was desired upon the following points:—

(1.) Do the Marshland Smeeth and Fen District Commissioners retain their powers, duties, and liabilities under their Act of 1849 over the roads in their roads district, or have those powers, duties, and liabilities been transferred or affected, and if so to what extent, by the Local Government Act 1894 (*a*) as regards the roads in the rural parishes, (*b*) as regards the roads in the urban parish of Walsoken?

(2.) Is the land in the Smeeth and Fen Roads District entitled to exemption from the rates to be laid for highway purposes by the Marshland Rural District Council (*a*) for the repair of roads within the district of the commissioners, (*b*) for the repair of roads in the parts of the parishes not within the district of the commissioners?

(3.) Is the land in the Marshland Smeeth and Fen District entitled to exemption from the rates to be laid for highway purposes by the Urban District Council of Walsoken, (*a*) for the repair of roads within the district of the commissioners, (*b*) for the repair of roads in the parts of the parishes within the district of the commissioners?

(4.) Is the land in the Marshland Smeeth and Fen Roads District entitled to any benefit, and if so, what, under sect. 29 (*d*) of the Local Government Act 1894?

(5.) If the powers, duties, and liabilities of the Marshland Smeeth and Fen District Commissioners over the roads as aforesaid have been transferred by virtue of the Local Government Act to any district council, are the expenses of the district council in respect of the roads still to be defrayed in manner provided by the Commissioners Act of 1849 by means of an acre rate, or

are such expenses to be defrayed by the district council under sect. 29 of the Local Government Act 1894?

By sect. 114 of the Public Health Act 1875 (38 & 39 Vict. c. 55) it is provided as follows:

Every urban authority shall within their district exclusively of any other person execute the office of the surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act; every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act 1835 (5 & 6 Will. 4, c. 50), or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district.

All ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint.

Sect. 216 of the same Act makes provision as to the mode in which the costs of repairing and maintaining the highways within an urban district are to be defrayed, in the absence of any local Act making such provision.

Sect. 303 of the same Act gives the Local Government Board power, on the application of the local authority of any district, by provisional order, to repeal wholly or partially, alter or amend any local Act other than an Act for the conservancy of rivers.

The Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) provides as follows:

Sect. 14. The following areas shall be deemed to be highway areas for the purposes of this Act (that is to say): (1) urban sanitary districts, (2) highway districts, (3) highway parishes not included within any highway district or any urban sanitary district.

Sect. 15 gives the county authority power, on the application of any highway authority, to declare an ordinary highway to be a main road on the ground that it is a medium of communication between great towns, or a thoroughfare to a railway station, or otherwise.

Sect. 100 of the Local Government Act 1888 (51 & 52 Vict. c. 41) adopts the definition of highways areas of the Highways and Locomotives (Amendment) Act 1878, and it there enacts:

The expression "highway authority" means as respects an urban sanitary district, the urban sanitary authority, and as respects a highway district the highway board or authority having the powers of a highway board, and as respects a highway parish the surveyor or surveyors of highways, or other officers performing similar duties. The expression "urban authority" means until the establishment of district councils as aforesaid, an urban sanitary authority, and after their establishment the district council of an urban county district. The expression "rural authority" means until the establishment of district councils as aforesaid, a rural authority, and after their establishment the district council of a rural county district.

The Local Government Act 1894 (56 & 57 Vict. c. 73) provides as follows:—

Sect. 25.—(1.) As from the appointed day there shall be transferred to the district council of every rural district all the powers, duties, and liabilities of any highway authority in the district, and highway boards shall cease to exist, and rural district councils shall be the successors of the highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under sects. 144 to 148 of the Public Health Act 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority.

Sect. 29. The expenses incurred by the council of a rural district shall, subject to the provisions of this Act, be defrayed in manner directed by the Public Health Act 1875 with respect to expenses incurred in the exercise of the Act by a rural sanitary authority, and the provisions of the Public Health Act with respect to those expenses shall apply accordingly. Provided as follows: (*a*) Any highway expenses shall be defrayed as general expenses. (*d*) Where highway expenses would, if this Act had not been passed, have been in whole or in part defrayed in any parish or other area out of any property or funds other than rates, the district council shall make such provision as will give to that parish or area the benefit of such property or funds by way of reduction of the rates on the parish or area.

Sect. 75.—(1.) The definition of parish in sect. 100 of the Local Government Act 1888, shall not apply to this Act, but, save as aforesaid, expressions used in this Act shall, unless the context otherwise requires, have the same meaning as in the said Act.

Sect. 89. . . . So much of any Act, whether public, general, or local and personal, as is inconsistent with this Act is also hereby repealed.

W. Graham for the Marshland Smeeth and Fen Commissioners.—As to the first question I contend that the commissioners are not a highway authority within the Act. A highway authority within this Act is the same as one within the Highways Act 1878, and the Local Government Act 1888, s. 100. Such a highway authority must have the powers of a highway board which the commissioners in some respects have not, and it must have jurisdiction over a highway area as defined in sect. 14 of the Highways Act 1878. But it has been held that the commissioners are not a highway authority within these Acts. We applied under sect. 15 of the Highways Act 1878 to have a certain road within the district declared a main road, but on the county council refusing to consider our application, the court refused us a *mandamus* to them to hear it on the ground that we were not a highway authority within a highway area:

Reg. v. *County Council of Norfolk*, 65 L. T. Rep. 222.

[Cave, J.—*Re The Isle of Wight Highway Commissioners* (72 L. T. Rep. 569) is directly against you.] I submit that case is wrongly decided. As to the second question I contend that, even if the authority is transferred to the district council, the Marshland Smeeth district is not liable for highway rates (*Re The Isle of Wight Highway Commissioners* (*ubi sup.*); the only effect of the transfer will be as far as Walsoken is concerned, that the urban authority will become surveyor of highways while the money is raised as before: (Public Health Act, ss. 144, 211, and 216.)

A. MacMorran for the Marshland District Council.—The whole design of the Local Government Act 1894 was to abolish special rural highway authorities and transfer their powers to the district council. In it highway authority means any highway authority. It is not confined to highway authority as defined in the Local Government Act 1888. See sect. 75 of the Act of 1894, and note there the words "unless the context

otherwise requires." Note too the provisions of sect. 89 of the Act of 1894. [Lord Russell, C.J.—This provision seems to alter not merely the machinery, but to repeal the special and personal Acts under which the special authorities were established]. Yes. Assuming then that the powers of the commissioners are transferred, then sect. 29 of the Act applies to the mode of raising expenses, and as to the urban part of the district—that within Walsoken—this depends entirely on sect. 144 of the Public Health Act 1875. If this is so, then the expenses in the urban district will be raised in the old mode unless the Local Government Board alters or repeals the local Acts which it has power to do under sect. 303 of the Public Health Act 1875.

Cur. adv. vult.

Dec. 5.—Lord Russell, C.J. read the following judgment:—Down to 1875 the Marshland Smeeth and Fen District Commissioners exercised jurisdiction for highway purposes over Marshland Smeeth and Marshland Fen, and Broad Fen and Short Fen, under three local Acts passed respectively in 1796, 1849, and 1865, and under these Acts the commissioners repaired highways and levied rates in their district. In 1875 the Public Health Act was passed, which, by sect. 144, enacted that every urban authority should within their district, exclusively of any other person, execute the office of and be surveyors of highways and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force. Sect. 216 provided for the cost of the repair of the highway. Sect. 303 gave the Local Government Board power, on the application of the local authority, to repeal and alter local acts; but it does not appear that any such application has ever been made. By sect. 25 of the Local Government Act 1894 all the powers, duties, and liabilities of any highway authority in the district are transferred to the district council of the district; by sect. 29 the highway expenses are to be defrayed as general expenses; and by sect. 89 so much of any Act, whether public, general, or local, and personal as is inconsistent with that Act is repealed. It was contended that "highway authority" in sect. 25 of the Act of 1894 did not include such an authority as the Marshland Commissioners, on the ground that in *Reg.* v. *Norfolk* (65 L. T. Rep. 222; 60 L. J. 379, Q. B.) (1891) it was held that they were not a highway authority within the meaning of sect. 15 of the Highways and Locomotives (Amendment) Act 1878. But the case of *Reg.* v. *Norfolk* was decided on the ground that the Act of 1878 was shown by its general scope and by particular sections to be of a limited nature, and not to extend to highway authorities by local Acts, while on the contrary the Act of 1894 is of the most general nature, and expressly provides (sect. 89) that so much of any local and personal Act as is inconsistent with it shall be repealed. This was the interpretation put on the Act of 1894 in the *Isle of Wight* case (72 L. T. Rep. 569; (1895) 59 J. P. 438), in which leave to appeal was granted, and as appears from the note to the report an appeal was actually brought and abandoned. A secondary point was made that under sect. 25 of the Act of 1894 the district was entitled to continue the mode of rating previously in force, viz., by an acre rate, on the ground that an acre rate is a mode of defraying the highway expenses within the meaning of sect. 29 (*d*); but we are of opinion that highway expenses defrayed by an acre rate are not defrayed out of any property or funds other than rates. We must therefore answer the questions put to us as follows: To the first question the answer is—The commissioners' powers over the roads in the rural parishes have been transferred to the rural district council by the Act of 1894, and their powers over the roads in the urban parishes have been transferred to the urban district council by the Public Health Act of 1875 and the Act of 1894. To the second question the answer is: The land in the rural parishes in the Smeeth and Fen Roads district is not exempt from the rates to be laid for highway purposes by the Marshland Rural District Council. To the third question the answer is: The land in the urban parish of Walsoken in the Smeeth and Fen district is not exempt from the rates to be laid for highway purposes by the Urban District Council of Walsoken. To the fourth question the answer is: No. To the fifth question the answer is: The highway expenses of the Marshland District Council are to be defrayed under sect. 29 of the Act of 1894.

Solicitors for the Marshland Smeeth Commissioners, *Wing* and *Du Cane*, agents for *Francis* and *Ed. Hugh Jackson*, Wisbech.

Solicitors for the Marshland District Council, *Smiles, Ollard, Yates*, and *Ollard*, agents for *Welchman, Carrick* and *Jackson*, Wisbech.

Tuesday. Dec. 10, 1895.

(Before Lord Russell, C.J. and Williams, J.)

Re The County Council of West Sussex. (*a*)

*County council—No election on appointed day—*Mandamus—*Municipal Corporations Act* 1882 (45 *& 46 Vict. c.* 50), *s.* 70.

Under sect. 70 (2) *of the Municipal Corporations Act* 1882—*which is incorporated in the Local Government Act* 1888 (51 *& 52 Vict. c.* 41) *by sect.* 75 *of that Act—an order for a peremptory* mandamus *to the returning officer to hold an election will issue in the first instance on the* ex parte *application of a duly qualified elector.*

Application *ex parte* for an order for a peremptory writ of *mandamus* to the returning officer of the administrative county of West Sussex to hold an election of a county councillor for the Stoughton division of that county.

It appeared that the representation of the Stoughton division had become vacant on the 4th March 1895 by the death of the former councillor. The returning officer thereupon arranged for a new election, appointing the 19th March for the nomination of candidates and the 27th March for the polling. On the 19th March two candidates were nominated, but both were objected to, and the returning officer held both nominations invalid. On the 27th March the returning officer returned that no one had been elected. Counsel, instructed by a duly qualified elector, now applied under sect. 70 of the Municipal Corporations Act 1884 (45 & 46 Vict. c. 50) for the order before mentioned.

(*a*) Reported by J. A. Strahan, Esq., Barrister-at-Law.

Sect. 70 of the Municipal Corporations Act 1884 is as follows:

(1.) If a municipal election is not held on the appointed day, or within the appointed time, it may be held on the day next after that day or the expiration of that time.

(2.) If a municipal election is not held on the appointed day, or within the appointed time, or on the day next after that day or the expiration of that time, or becomes void, the municipal corporation shall not thereby be dissolved or be disabled from electing, but the High Court may, on motion, grant a *mandamus* for the election to be held on a day appointed by the court.

These provisions are incorporated in the Local Government Act 1888 (51 & 52 Vict. c. 41), and made applicable to elections of county councillors by sect. 75 of that Act.

R. O. B. Lane, jun., for the applicant.—There having been no election within sub-sect. (1) the provisions of sub-sect. (2) apply. An order, and not merely a rule *nisi* for a peremptory *mandamus*, can be granted on an *ex parte* application under this sub-section:

Reg. v. *Mayor of Stratford-on-Avon*, 2 Times L. Rep. 431.

The county council will act on the order; it will not be necessary to issue the writ. The county council have agreed to pay the costs.

Lord RUSSELL, C.J.—You may take your order, but it must mention the day on which the election is to be held. That is clear from sect. 70 (2). As it seems the 30th Dec. is a convenient date, we appoint that as the election day. This application has been made with the privity of the county council, who have agreed to pay the costs. If it were otherwise we certainly would not give them.

Order granted.

Solicitors for the applicant, *Upton, Atkey, and Co.*

Oct. 30 *and Dec.* 5, 1895.

(Before Lord RUSSELL, C.J. and CAVE, J.)

ELLESMERE BREWERY COMPANY *v.* COOPER AND OTHERS. (*a*)

Principal and surety—Co-sureties—Contribution—Material alteration in bond.

The principle of contribution inter se *between co-sureties who are jointly and severally bound in unequal amounts, where the default of the principal does not exhaust the full amount for which each surety is liable, is, that each must contribute to the loss in proportion to the amount of his liability on the bond.*

The defendant C. and four others as sureties for him joined in a bond whereby they were jointly and severally bound to the plaintiffs in 150*l. in case C., who was employed by the plaintiffs as their agent, should fail to account for all moneys received by him for the plaintiffs. By the terms of the bond the liability of E. and N. (two of the sureties) was limited to* 50*l., and that of P. and B. (the other two) to* 25*l. N., who was the last to sign the bond, added after his signature the words "*25*l. only." C. having failed to account to the plaintiffs for moneys to the amount of* 48*l., the plaintiff sued all the defendants on the bond.*

Held, that the words added by N. were a material alteration, rendering the bond void against all the defendants (except C.), including N. himself.

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

THIS was an appeal from the judgment of the County Court judge sitting at Oswestry. The facts of the case are set out in the judgment.

The learned County Court judge gave judgment for the plaintiffs as against the defendant Cooper, the principal, but in favour of the other four defendants, the sureties.

A. T. Lawrence for the appellant.—The learned County Court judge was wrong in holding that this bond was void as against the sureties. In the first place, the words added by Nunnerly are repugnant to the proviso in the bond, and are therefore void. Secondly, if not repugnant, the alteration is not material, because the right to contribution between co-sureties is based on the equitable principle that all should contribute, even where bound in unequal amounts, so long as the limit of the lowest man's liability is not exceeded. [Lord RUSSELL, C.J.—Perhaps you might regard it as a several bond by each defendant for the full loss up to his limit.] In that case it is clear all would be liable in an equal amount. See

Ward v. *Bank of New Zealand*, 49 L. T. Rep. 315; 8 App. Cas. 755.

The principle which governs contribution is equality:

Dering v. *Earl of Winchelsea*, 2 Bos. & Pull. 270; *Craythorne* v. *Swinburne*, 14 Ves. 160.

See, however, *Re McDonaghs* (Ir. Rep. 10 Eq. 269), which is against the present contention. Thirdly, Nunnerly at least is liable to the extent of 50*l.*, or if not of 50*l.* then of 25*l.* If the alteration operates to discharge the other sureties, then it is a separate contract by Nunnerly to be liable for 25*l.*

E. W. Hansell for the respondents.—The deed is void as against all the sureties. The alteration is not repugnant. See

Thompson v. *Butcher*, 3 Bulstrode, 300.

It is a material alteration, because it alters the relationship between the creditor and Nunnerly. See

Gardner v. *Walsh*, 24 L. J. 285, Q. B.;
Saffete v. *Bank of England*, 47 L. T. Rep. 146; 9 Q. B. Div. 594.

The true principle of the liability of co-sureties *inter se* is, that it is proportionate to the amounts in which each is liable to the creditor. See

Pendlebury v. *Walker*, 4 Y. & C., per Alderson, B., at p. 441.

The principle of contribution cannot depend upon the amount to be made up. As to Nunnerly himself, he cannot be sued upon the original deed, because of the alteration. [CAVE, J.—He altered it himself.] It is no longer his deed. Nor upon the deed as altered, because his co-sureties are discharged by the alteration.

A. T. Lawrence in reply.

Dec. 5.—The following written judgment of the Court was delivered by Lord RUSSELL, C.J.—This was an action against Cooper and four other defendants who had signed a bond as sureties for Cooper. At the trial before the learned County Court judge of No. 27 Circuit, judgment was given for the plaintiffs as against Cooper, and judgment given for the four remaining defendants—the sureties. The facts were, that Cooper,

having become agent and traveller for the plaintiffs, was called upon to give them some security. He accordingly gave the bond in question, in which he was joined by the four other defendants. The bond is dated the 30th April 1894. By its terms the five defendants are jointly and severally bound to the plaintiffs in the sum of 150*l*. It then recites that Cooper had been appointed agent for the company, and states the condition of the bond to be that, if Cooper duly accounted for all moneys received by him for the plaintiffs and otherwise performed the dates of his agency, the bond should be void. It then provided that the liability of Nunnerly and Emberton (two of the defendants) should be limited to 50*l*., and that of Pay and Bromfield (two other of the defendants) to 25*l*. each. The effect therefore of the bond as drawn was, that the principal and the sureties were jointly and severally bound in the sum of 150*l*., but that liability could not be enforced against any of the sureties beyond the limit of the sum specified as to each of them. Nunnerly was the last to sign, and his signature thus appears on the bond—"Walter Nunnerly. Twenty-five pounds only." The witness to the execution of each of the signatures was Mr. Bruce, the plaintiffs' manager, who, so far as appears, took the bond without making any objection to the manner of Nunnerly's execution; nor was it suggested that Nunnerly had surreptitiously added the qualification of "twenty-five pounds only" to his signature. As no evidence was given on the point it cannot be assumed that Nunnerly in bad faith sought, by the form of his execution of the bond, to limit any liability he had previously agreed to undertake. The probability is that, in giving particulars of his sureties, Cooper had erroneously stated, that Nunnerly had agreed to undertake liability to the extent of 50*l*., whereas he had done so only to the extent of 25*l*. Subsequently Cooper, the principal, received moneys for the plaintiffs to the amount of 48*l*. for which he had failed to account, and judgment was given against him at the trial for that amount. The contested question was the liability of the other defendants—the sureties. The learned County Court judge held that no one of them was liable, and gave judgment for them accordingly. The present appeal is against that judgment. It was argued for the plaintiffs—(1) that the form of Nunnerly's execution did not constitute an alteration of the bond so as to discharge from liability the three prior executing sureties; (2) that, if an alteration, it was not a material alteration, and therefore did not discharge such sureties; and lastly (3) that in any case Nunnerly was liable to the extent of 50*l*., or if not of 50*l*. at least to the extent of 25*l*. In my judgment no one of these contentions is well founded. I think the effect of Nunnerly's mode of execution on the facts of this case is substantially the same as if the proviso in the body of the bond had been altered by him before execution by him by striking out 50*l*. and inserting instead 25*l*. It was therefore an alteration; its effect I shall presently discuss. The argument of the learned counsel for the appellant was, that the loss in question was to be divided into fourths, and that so long as each fourth did not exceed the sum for which each surety had become liable, each of them was bound to pay and without any right to contribution from his co-sureties, whether the fixed limit of his liability was for the greater or the smaller amount. Here it was said the one-fourth of the loss was 12*l*., and as Nunnerly had clearly intended to make himself liable, as also had Pay and Bromfield, for 25*l*. each, it was immaterial whether Nunnerly signed for 25*l*. or for 50*l*. Each, it was contended, was bound to pay 12*l*., and Emberton was bound to bear no more of the loss than the others. In my judgment this contention is founded on a misapprehension of the law. It renders it necessary to consider the principle upon which liability of sureties *inter se* rests. That principle is, that sureties for the same principal, and for the same engagement, even although bound by different instruments, and for different amounts, have a common interest and a common burden, so that, if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties whose obligations to the creditor he has discharged. But how is the amount of the claim to be determined? According to the argument of the learned counsel for the plaintiffs it is to be determined by the number of the sureties. Thus, if there are four sureties, and one of them pays all, he can recover one-fourth, and one-fourth only, of his payment from each of the other three co-sureties. But this is not in all cases true, even where each of the sureties has made himself liable for the same amount. Thus, where four sureties are jointly and severally bound in a surety bond, and one of them pays the amount of the bond, but one of the remaining three sureties is insolvent, the right to contribution against the two other sureties is for thirds, not for fourths, of the sum paid. But how, when, although the sureties are jointly and severally bound, there are different limits of liability, as in this case? It is clear that, where the full amount of the bond is due and payable to the creditor, that liability can only be enforced against each surety to the limit of the liability fixed in the instrument. In such case there would be no right of contribution, for each had paid to the limit of his liability. But, suppose only half the amount of the bond is due and payable to the creditor, and such amount is paid by one only of the sureties who has fixed the limit of his liability at one-half the amount of the bond, could it be said that he had no right to any contribution from his co-sureties? Surely not. The burden is a common burden of all, but unequally distributed. By his payment of the loss of one-half the surety has discharged a liability which might have been enforced against the other sureties up to the fixed limit. It would be against all equitable principles that in such a case the other sureties should go free because it happened that the creditor had enforced payment against one only. Again, it is clear that one surety cannot keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement. Suppose, then, that one surety, whose limit of liability was 1000*l*., had realised 1000*l*. from such a security, being bound with three other sureties with a limit of liability of 2000*l*. each, making in all 7000*l*.; it is clear that that 1000*l*. must be taken into account for the benefit of all the sureties *inter se*. But upon what principle? Surely, upon the only principle which will secure its equitable division—namely proportional distribu-

tion. Thus the surety for 1000*l.* would benefit to the extent of one-seventh, and each of the others to the extent of two-sevenths each. The same principle must apply where the burden has to be distributed. Where the claim of the creditor is to the full amount, each must pay up to the fixed limit of his liability; but when the claim is less than such full amount, and it is discharged by one, the claim must be proportionately borne by the others, even where the claim does not exceed the fixed limit of the liability of the surety who has paid. What I have so far said is, I think, to be gathered from the principles laid down in *Dering* v. *Winchelsea* (1 Cox. 318); but in *Pendlebury* v. *Walker* (4 Y. & C. 424) Alderson, B. expressly states the rule thus: "Where the same default of the principal renders all the co-sureties responsible, all are to contribute, and then the law superadds that which is not only the principle but the equitable mode of applying the principle that they should all contribute equally if each is a surety to an equal amount, and if not equally, then proportionately to the amount for which each is a surety." In *Steel* v. *Dixon* (45 L. T. Rep. 142; 17 Ch. Div. 831) Fry, J. cited with approval the language I have quoted; and, later Pearson, J., in *Re Arcedeckne* (24 Ch. Div. 715) adopts the language of Fry, J.: (see also *Ellis* v. *Emmanuel*, 34 L. T. Rep. 553; 1 Ex. Div. 162; and *Evans* v. *Bremridge*, 2 K. & J. 174.) Apply this principle to the present case. I assume the bond to have been executed according to its original tenor without qualification or alteration. The total loss being 48*l.*, Emberton having subscribed for 50*l.* out of the total of 150*l.*, would be liable for one-third; and if he paid no more would have no claim for contribution; if he paid to the plaintiff more than one-third, he could claim contribution from his co-sureties in the proportion of their subscription. Stated as a sum in proportion Emberton's liability would be arrived at thus: As 150 is to 50, so is 48 to the result. So worked out Emberton would be liable for 16*l.* only, and if he paid more would have a claim for contribution. In like manner Pay and Bromfield would be liable for 8*l.* each, and Nunnerly for 16*l.* Now, to appreciate the materiality of the alteration, let us consider its effect upon the liability of Nunnerly. He explicitly says, "I execute the bond only on the terms of my liability being limited to 25*l.*" He could not therefore in any case be made liable for more (whether he can be made liable even for the 25*l.* I shall presently consider). What, then, is the effect of the altered limitation to 25*l.* by Nunnerly upon the position of the other three sureties? Take Emberton's position. For simplicity assume that the total liability to the plaintiff company for 48*l.* had been paid by Emberton. According to the tenor of the bond without the alteration Emberton would have to bear two-sixths, equal to one-third of the loss; Nunnerly, two-sixths, equal to one-third; and Pay and Bromfield, one-sixth each. But by the alteration it is manifest that Emberton, who has paid, would not have the same right of contribution against Nunnerly; and if Nunnerly is not bound at all would have no right of contribution against him. The alteration then was clearly material. It is unnecessary to give similar illustrations as to Pay and Bromfield. The result, therefore, is that neither Emberton, Pay, nor Bromfield can be made liable on this bond. Each of them is entitled to say, "The contract into which I entered was on the basis of Nunnerly being a party to it with a liability of 50*l.* That is not the contract as it now appears from the bond, and I am therefore not bound by it." Their position would be still stronger if Nunnerly is not bound by the bond at all. The remaining question then is, is Nunnerly bound at all? I have already intimated that as he has expressly said, "I shall be liable only for 25*l.*" He cannot be made liable for 50*l.*; but, is he liable even for the 25*l.*? I think he is not. He, in good faith, as must be assumed, expressly limits his liability to 25*l.*, but he undertakes that liability, not as a separate or independent liability, but as part of a contract, in which three other sureties are joining him, against whom in certain eventualities he will have rights of recourse, between whom and himself a common burden is to be borne, although unequally distributed, But if, in fact, such other sureties are not bound by the contract—and I have adjudged that they are not—Nunnerly is entitled to say, "That is not the contract into which I have entered, and I am not bound by it." The judgment of the learned County Court judge must stand, and the appeal will therefore be dismissed with costs.

Solicitors for the appellants, *Moore* and *Davies*, for *Salter* and *Giles*, Ellesmere.

Solicitors for the respondents, *Kennedy*, *Hughes*, and *Kennedy*, for *Lloyd*, Ellesmere.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Dec. 9, 1895.

(Before Lindley, Smith, and Rigby, L.JJ.)

Russell *v.* Russell (No. 2). (*a*)

ORIGINAL MOTION.

Practice — Costs — Taxation — Set-off — Husband and wife—Restitution of conjugal rights—Judicial separation.

A petition by a wife for restitution of conjugal rights and a counter-claim by her husband for judicial separation were both dismissed with costs by the Court of Appeal, the costs of the one to be set off against the costs of the other in the court below, and no costs of the appeal being allowed. The husband having subsequently presented an appeal to the House of Lords, the Court of Appeal ordered that the taxation of the costs should be suspended until after his appeal was determined, on his undertaking to duly prosecute it.

In Nov. 1890 the Countess Russell commenced a suit against the earl for judicial separation, on the grounds of cruelty and sodomy. That suit was dismissed, but the countess continued to reiterate the charges of sodomy, notwithstanding the verdict of acquittal which the earl had obtained.

This suit was then brought by the countess for restitution of conjugal rights.

The earl opposed the suit, and, by counter-claim, asked for a decree of judicial separation on the ground of the countess's cruelty in making the above charges, well knowing them to be false.

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

He also set up as a defence that the suit was not brought *bonâ fide* with the desire of resuming cohabitation, but for the purpose of founding proceedings under the Matrimonial Causes Act 1884 (47 & 48 Vict. c. 68) for alimony and judicial separation.

In April 1895 the suit came on for trial before Pollock, B., sitting with a special jury.

In answer to the questions put by the learned judge, the jury found that the countess had been guilty of cruelty, and had not acted *bonâ fide* since the last trial.

The learned judge upon that verdict dismissed the countess's petition, and pronounced a decree of judicial separation in favour of the earl.

The countess appealed, and it was decided by the Court of Appeal (varying the order of Pollock, B.) that the conduct of the countess in making the charge of sodomy against the earl was sufficient to justify the court in refusing to decree restitution of conjugal rights; but (*dissentiente* Rigby, L.J.) that it did not amount to legal cruelty sufficient to support the earl's counter-claim for judicial separation: (73 L. T. Rep. 295.)

As regarded the costs of the proceedings, the Court ordered that the petition of the countess for restitution of conjugal rights and the counter-claim of the earl praying for judicial separation should both be dismissed with costs, the costs of the one to be set off against the costs of the other in the court below; and that there should be no costs of the appeal.

Both parties subsequently presented appeals to the House of Lords, but that of the countess was shortly afterwards withdrawn. Her costs were carried in for taxation.

The earl now applied to the Court of Appeal that the taxation of the costs of the countess might be stayed until after the hearing of his appeal by the House of Lords, the result of which might be that he would not be liable to pay any costs.

The countess opposed the application on the ground that she was entitled to an immediate taxation of both bills of costs and payment of the balance found due to her (if any), the ordinary practice being not to stay the taxation of costs because of an appeal, but only to require the respondent's solicitors to undertake personally to refund the costs in the event of the success of the appeal.

Bargrave Deane for the applicant.

Barnard for the respondent.

LINDLEY, L.J.—I think that this application must be acceded to. Whatever the ordinary practice may be, this is not a case in which the taxation of the costs ought to be allowed to proceed pending the appeal of the earl. It is quite true that in setting off the costs of the one party against the costs of the other there may be a balance in favour of the countess. But, considering that the countess has now acquiesced in the decision of this court, it seems to me that the common-sense view to take is that the taxation of the costs should be suspended until after the appeal of the earl to the House of Lords has been determined, on the undertaking of the earl to duly prosecute his appeal. But I think that he must be ordered to pay the costs of the present application.

SMITH, L.J.—I am of the same opinion.

RIGBY, L.J.—I concur.

Application allowed.

Solicitors for the applicant, *Vandercom, Hardy, Oatway,* and *Doulton.*

Solicitors for the respondent, *Valpy, Chaplin,* and *Peckham.*

Wednesday, Dec. 4, 1895.

(Before LINDLEY, SMITH, and RIGBY, L.JJ.)

PILLING *v.* THE JOINT STOCK INSTITUTE LIMITED. (*a*)

ORIGINAL MOTION.

Practice — Costs — Taxation — Shorthand-writer's notes—Evidence at trial of action before a judge and jury—Summing up of the judge.

In an ordinary case, in the absence of special directions, the practice is not to allow the costs of the shorthand-writer's notes of the evidence taken at the trial of an action before a judge and jury, but only of the judge's summing up.

THIS was an application by the plaintiff, J. R. Pilling, for directions to the taxing master as to the allowance of the costs of the shorthand-writer's notes of the evidence taken at the trial of the action before a judge sitting with a jury.

Notice of an application for a new trial had been given, but was withdrawn.

Haldinstein for the applicant.

Rufus Isaacs for the respondents.

LINDLEY, L.J.—I do not think that we can interfere in this case. When the application for a new trial was withdrawn it is quite obvious that the Court of Appeal gave no special directions as to the costs of the shorthand-writer's notes. What is the ordinary rule? The ordinary rule is that the shorthand-writer's notes of the judge's summing up are allowed; but as regards the shorthand-writer's notes of the evidence taken at the trial the rule is the other way. That rule is founded on good sense. The shorthand-writer's notes of the evidence are usually of great length, and the costs would be enormously increased if they were to be allowed. And generally their allowance ought not to be necessary. I do not say never. But generally, the Court of Appeal does not require them because it has the judge's own notes of the evidence, and counsel ought not to want them because the notes taken by themselves should be sufficient. Therefore, unless there is some special reason, the costs of the shorthand-writer's notes of the evidence cannot be allowed. Here I can see no reason whatever for departing from the ordinary rule of allowing only the costs of the shorthand-writer's notes of the judge's summing up.

SMITH, L.J.—I am of the same opinion. As regards the costs of the shorthand notes of the evidence taken at the trial, I understand that these are ordinarily disallowed, because the judge himself in an ordinary case can take a note. That remark does not apply to the shorthand-writer's notes of the judge's summing up. He takes no note of what he says to the jury. There is no record of what he says. We have therefore no record in this court to inform us of what he did say. The only thing to be done, in the event of

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

any conflict between counsel as to what was said by the judge in his summing up, is to refer to the shorthand-writer's notes. Therefore the rule is that, unless there is some special reason to the contrary, only the costs of the shorthand-writer's notes of the summing up ought to be allowed.

Rigby, L.J.—I am entirely of the same opinion. I think that this application ought to be dismissed. I am satisfied that no directions as to the shorthand-writer's notes were given to the taxing master when the application for a new trial was withdrawn. Indeed it was impossible to do so, because we did not know the merits of the case. Speaking for myself personally, I think that, though when a case comes on to be heard on the merits, the court may see that the shorthand-writer's notes of the evidence are necessary for the court to have, and it may give directions to that effect, yet in order to place the court in that position the facts must be before the court. And I do not think that we could go into all the facts now to establish that the shorthand-writer's notes of the evidence ought to be allowed in the present case.

Application dismissed.

Solicitors for the applicant, *Dawes* and *Sons*.

Solicitors for the respondents, *William Webb* and *Co*.

Wednesday, Dec. 18, 1895.

(Before Lindley, Smith, and Rigby, L.JJ.)

Eyre *v.* Wynn-Mackenzie. (*a*)

ORIGINAL MOTION.

Practice—Appeal—Leave—Time expired—Mortgage—Solicitor-mortgagee—Profit costs—Alteration of law since judgment—Mortgagees' Legal Costs Act 1895 (58 *&* 59 *Vict. c.* 25), *s.* 3.

Extension of the time limited for appealing from decisions in cases which had been adjudicated upon previously to the passing of the Mortgagees' Legal Costs Act 1895, *and which were right at the time when they were pronounced, will not be allowed, notwithstanding that sect.* 3 *of that statute is retrospective in its operation.*

This was an application by the plaintiff for leave to appeal from a decision of Kekewich, J. (69 L. T. Rep. 823), notwithstanding that the time limited for appealing had expired.

The decision of the learned judge was pronounced on the 28th Nov. 1893, but the order was not passed and entered until April 1894, and it had never been acted upon by any of the parties. His Lordship had decided that a solicitor-mortgagee could not in the absence of a special contract charge profit costs against a mortgagor for work done in connection with the mortgaged premises; that, if such costs were not properly chargeable otherwise, the solicitor-mortgagee could not, either as solicitor or as agent, claim them under a covenant in the mortgage deed to pay all sums which might become owing by the mortgagor to the plaintiff, because to include them in the mortgage would be to clog the equity of redemption; and that no profit charge could be made for the receipt and distribution of the income, as that was work done in connection with the mortgaged premises. His Lordship also decided that, unless the mortgagee could prove that the mortgagor was aware that profit charges could not be properly made, the mortgagor was not precluded from disputing settled accounts, and leave would be given to him to surcharge and falsify the accounts between the mortgagor and mortgagee so far as regarded such costs and charges.

The application for leave to appeal was based on the ground that since the order was entered the law as to a solicitor-mortgagee's costs had been altered by the passing of the Mortgagees' Legal Costs Act 1895; and that, as sect. 3 of that statute was retrospective in its operation, the court had power to decide differently from what it had before the passing of the Act, and within the time limited for appealing.

Sect. 3 empowers any solicitor to or in whom any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, to receive and recover "all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor and such person had retained and employed such solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration."

De Castro, for the applicant, stated the facts of the case, and referred to sect. 3 of the Act.

C. Gurdon, for the respondents, was not called upon to argue.

The Court (Lindley, Smith, and Rigby, L.JJ.) were of opinion that the application ought not to be acceded to, for, although sect. 3 of the Act was retrospective in its operation, it could not have been intended to affect judgments which had been pronounced previously to the passing of the Act, and where the time limited for appealing therefrom had expired; and that to allow such applications would be to make it possible for innumerable appeals to be brought in cases which had been adjudicated upon, and the decisions in which were, as here, quite right but for a subsequent statutory alteration of the law. Their Lordships accordingly dismissed the application with costs.

Application dismissed.

Solicitors for the applicant, *C. L. P. Eyre* and *Co*.

Solicitor for the respondents, *A. H. Burns*.

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, Nov. 30, 1895.

(Before North, J.)

Re Lawson's Trusts. (*a*)

Practice — Fund in court — Payment out — Insolvency in India — Intestacy — Petition by official assignee at Bombay—Administration to intestate's estate in England dispensed with.

An Englishman, residing at Bombay, became insolvent, and, on his petition, an order was made by the Court for the Relief of Insolvent Debtors there, vesting all his estate, present and future, until he should obtain his discharge, in

(*a*) Reported by J. Trustram, Esq., Barrister-at-Law.

the official assignee of the court. He died intestate without having obtained his discharge, leaving children. Subsequently his father died, bequeathing to him a legacy of considerable amount, which, as he had left children, did not lapse, and was paid into court by the trustees of the father's will under the Trustee Relief Act. An administrator was appointed of his estate at Bombay, but administration was not taken out to his estate in England. On a petition by the official assignee at Bombay praying for the payment out to him of the fund in court:

Held, that he was entitled to have the fund paid out to him, although administration had not been taken out to the intestate's estate in England.

IN 1866 Henry Lawson, an Englishman residing in Bombay, became insolvent, and, on his petition to the Court for the Relief of Insolvent Debtors there, an order was made on the 3rd Nov. 1866 under sect. 7 of the Act, 11 & 12 Vict. c. 21 (an Act to consolidate and amend the laws relating to insolvent debtors in India), that all his real and personal estate and effects, and all future estate, right, title, interest, or trust in or to any real or personal estate or effects which he might purchase, or which might revert, descend, be devised, or bequeathed, or come to him, should vest in the official assignee for the time being of the court.

On the 4th June 1873 Henry Lawson died at Bombay intestate, leaving a widow and three children. The debts established in the court in the matter of his insolvency had not been paid, and he had not obtained his discharge.

In Aug. 1873 an administrator was appointed at Bombay of his estate and effects there; but no letters of administration to his estate and effects were taken out in England.

In Sept. 1874 Henry Lawson's father died, having by his will bequeathed to Henry Lawson a legacy of 1500*l.*, which did not lapse, as he had died leaving children. The sum of 1500*l.* was paid into court by the trustees of his father's will under the Trustee Relief Act in 1876.

This was a petition by the official assignee of the Court for the Relief of Insolvent Debtors at Bombay for the payment out to him of the fund in court.

Everitt, Q.C. and *T. L. Wilkinson* for the official assignee at Bombay.—The applicant is entitled to have the fund paid out to him without taking out letters of administration to Henry Lawson's estate in England:

Re Davidson's Settlement Trusts, L. Rep. 15 Eq. 383.

Methold for the official solicitor.—The question is whether the applicant ought not to take out letters of administration to Henry Lawson's estate in England.

Proctor for the trustees of the will and one of the next of kin.

NORTH, J.—I think that the applicant is entitled to have the fund paid out to him, and that it is not necessary that he should take out letters of administration to the intestate's estate in England. The decision in *Re Davidson's Settlement Trusts* (*ubi sup.*) is in point. The order will therefore be as prayed.

Solicitors: *A'Beckett, Terrell*, and *Co.*; *The Official Solicitor*; *Hanbury* and *Whitting*.

Saturday, Nov 30, 1895.

(Before NORTH, J.)

HOLT AND CO. *v.* SAUNDERS, GREEN, AND CO.; *Re* HOLT AND CO.'S TRADE MARK. (*a*)

Trade mark — Registration — Name of fictitious person—Patents, Designs, and Trade Marks Act 1888 (51 *&* 52 *Vict. c.* 50), *s.* 10.

The name of a real person, living or dead, or of a fictitious person or of a firm, is not a proper subject for registration, as a mere name, as a trade mark, unless printed, impressed, or woven, in some particular and distinctive manner under sub-sect. (*a*) *of sect.* 10 *of the Trade Marks Act* 1888.

THIS was a motion on behalf of Messrs. Holt and Co., the plaintiffs in the action, for an injunction to restrain Messrs. Saunders, Green, and Co., the defendants, until the trial of the action or further order, from selling, offering, or advertising for sale under the name of "Trilby" any ladies' aprons not manufactured or supplied by the plaintiffs, and from otherwise infringing the plaintiffs' trade mark No. 188,921 of 1895, registered in respect of certain goods in class 38 of the Trade Marks Rules 1890.

There was also a cross-motion by the defendants for an order that the register of trade marks might be rectified by the removal of the plaintiffs' trade mark above mentioned.

The word "Trilby" was first heard of as the title of a novel by Mr. Du Maurier, in which Trilby O'Farrell, or "Trilby" was one of the principal characters, and was described as wearing "a neat black gown and white apron." The novel first appeared in *Harper's Magazine* in Dec. 1893, and was afterwards published as a separate book.

On the 26th July 1895 the plaintiffs applied to the Comptroller-General of the Patent Office (Trade Marks Branch) for leave to register the word "Trilby" in class 38 of the Trade Marks Rules 1890, for gloves, ladies' blouses, and ladies' aprons. The application was duly advertised in the *Trade Marks Journal* of the 11th Sept. 1895, and also in the *Drapers' Record* of the 26th Sept. 1895, and on the 2nd Nov. 1895 the Comptroller-General granted his certificate whereby the plaintiffs became the registered owners of the trade mark "Trilby," No. 188,921 of 1895, in the above-mentioned class for the above-mentioned goods. The trade mark set out at the end of the certificate was a piece of paper with the word "Trilby" printed in the middle of it, in ordinary type.

On or about the 26th Oct. 1895 the plaintiffs became aware that the defendants were advertising and selling an apron called the "Trilby" apron; and, when communicated with on the subject, the defendants denied that the plaintiffs had the sole right to use the word "Trilby" in connection with aprons.

The plaintiffs thereupon brought the action against the defendants for an injunction to restrain them from infringing the plaintiffs' trade mark.

On the motions coming on for hearing it was arranged that the defendants' motion should be disposed of first, as, if the plaintiffs' trade mark were held to be valid, its infringement was clear.

Evidence was put in by the defendants in

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

support of their motion to show that "Trilby" aprons were sold in July; that the name of "Trilby" was common to the trade; and that a large number of goods, including velvets, boots, hats, and aprons, had been advertised and sold by different traders under the name of "Trilby"; but it appeared that such advertisements were not issued before October, which was subsequent to the date of the plaintiffs' application for registration of their "Trilby" trade mark.

Vernon Smith, Q.C. and *Kerly* for defendants' motion.—The plaintiffs' trade mark ought to be removed from the register because the word "Trilby" (1) is not distinctive; (2) was at the date of its registration in common use for similar articles; (3) the registration is deceptive, as the defendants have prior to its registration used the word with reference to aprons; and (4) is descriptive of the article with respect to which it is used. Under sect. 64, sub-sect. (*e*), of the Trade Marks Act 1888, the word must have "no reference to the character or quality of the goods." [NORTH, J.—How is the word "Trilby" descriptive of aprons?] It has reference to the character "Trilby," who is described in Du Maurier's book as being dressed in a "neat black gown and white apron." A person might assume that a "Trilby" apron was an apron like that supposed to be worn by "Trilby." It is apparently descriptive, and would be understood to have some reference to the goods. They referred to

Re Harris's Trade Marks, 9 Pat. Cas. 492;
Re Farbenfabriken Application, 70 L. T. Rep. 186; (1894) 1 Ch. 645;
Richards v. *Butcher*, 63 L. T. Rep. 757; (1891) 2 Ch. 522;
Re Hopkinson's Trade Marks, 66 L. T. Rep. 487; (1892) 2 Ch. 116;
Burland v. *Broxburn Oil Company*; *Re Burland's Trade Mark*, 61 L. T. Rep. 618; 42 Ch. Div. 274.

Swinfen Eady, Q.C. and *Micklem* for the plaintiffs.—The motion to expunge the plaintiffs' trade mark is misconceived. The plaintiffs' title to the trade mark dates back to the 26th July, the date of their application for its registration. There is no evidence of the word "Trilby" being in common use for similar articles at the time of the plaintiffs' application for its registration. It comes within the description of "an invented word." The suggestion that the word "Trilby" is understood to have reference to the character of the goods is unsupported by evidence. According to Mr. Du Maurier's book "Trilby" appears to have worn several aprons, but none of the defendants' witnesses have proved the word "Trilby" to be characteristic of any particular kind of apron. According to the defendants' evidence only three instances have been discovered where the word "Trilby" has been used in the trade in respect to articles similar to those with reference to which the plaintiffs use their trade mark. The word "Trilby" is an indistinctive word. They referred to

Slazenger v. *Jeffreys and Co.*, 79 L. T. p. 95; W. N. 1885, p. 124;
Re Banks and James' Trade Mark, W. N. 1895, p. 116.

Vernon Smith, Q.C. in reply.—The evidence shows that "Trilby" aprons were in fact made on the 1st July prior to the plaintiffs' application for the registration of their trade mark. The question whether the word "Trilby" has reference to the character of the goods is one for the consideration of the judge, who determines whether there is any connection between a word and the character of the goods to which it is applied. Therefore, the defendants have not adduced any evidence as to that. The word "Trilby" is descriptive in a sense, and not capable of registration as a trade mark.

NORTH, J.—In this case the plaintiffs Messrs. Holt and Co., who are sueing for an injunction, have obtained registration of a particular trade mark for gloves, ladies' blouses, and ladies' aprons, being articles contained in class 38 of the Trade Marks Rules 1890. The trade mark, which is set out at the foot of the comptroller's certificate, is a blank piece of paper with the word "Trilby" printed in the middle of it in ordinary type. That is what the plaintiffs have registered, and that is what the defendants seek to expunge from the register. I do not think it was properly registered according to the true construction of sect. 10 of the Act of 1888, which provides that "for the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars: sub-sect. (*a*) A name of the individual or firm printed, impressed, or woven in some particular and distinctive manner." Now this word "Trilby" is not printed in any particular or distinctive manner at all within the meaning of sub-sect. (*a*). Sub-sect. (*b*) is "A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark." The word "Trilby" does not come within that sub-section. Sub-sect. (*c*) is "A distinctive device, mark, brand, heading, lable, or ticket." It is not that. Then we come to sub-sects. (*d*) and (*e*). Sub-sect. (*d*) is "an invented word or invented words," and sub-sect. (*e*) is "a word, or words having no reference to the character or quality of the goods, and not being a geographical name." A trade mark must contain one of these five things, and it is said that in the present case the word "Trilby" comes under the headings of "an invented word" and "a word having no reference to the character or quality of the goods." Now, the facts are very short indeed. In Dec. 1893 the first number of "Trilby" was published in this country and in the United States in *Harper's Magazine*, and from that time onwards the name of "Trilby" has been very largely known. On the 26th July the plaintiffs applied for the registration of their trade mark "Trilby." On the 11th Sept. there appeared in the *Trade Marks Journal* the advertisement of the plaintiffs' application; and a few days afterwards it was advertised in the *Drapers Record*. On the 2nd Nov. the application was acceded to, and the registration dates from the time of the application, viz., the 26th July. The defendants say that they had formed the idea of using the word "Trilby" before July, but their first open use of it, as proved before me, was on the 19th Oct., when they advertised and sold what they called "Trilby" aprons. Then the plaintiffs having complained of that, and the defendants having denied the plaintiffs' right to the sole use of the term with respect to aprons, the action for an injunction was brought; and a motion is made in the action. This is a cross-application by the defendants to rectify the register of trade marks by removing therefrom the plaintiffs' trade mark. Now it was suggested

faintly that the word "Trilby" is an "invented word." I think it is clear that it is not an "invented word" within the meaning of the 19th section of the Act of 1888. It was not claimed as such, and I take it to be clear from the judgment in *Re Farbenfabriken Application* (*ubi sup.*) that if the word "Trilby" became widely known at the end of 1893, it cannot be said to be an invented word in July 1895. What all the Lords Justices considered in that case was that there must be something new about "an invented word;" and without saying exactly what an "invented word" is, I think that, in July 1895, the word "Trilby" had nothing new about it. It is clear, therefore, that "Trilby" is not an "invented word." It is said that it is capable of registration under sub-sect (*e*) as "a word having no reference to the character or quality of the goods, and not being a geographical name." Sub-sect. (*e*) is more difficult to deal with. Of course "Trilby" is not a geographical name. Can it be said that it is a word which has no reference to the character or quality of the goods? As regards that, I cannot see how it has. I do not see how "Trilby" represents the character of the apron, or pair of gloves, or their quality; and there is no evidence before me suggesting in any way that the word can represent either character or quality. But the reason why I think it cannot be registered is because I do not think that the word or words referred to in sub-sect. (*e*) conclude the matter at all. I look upon "Trilby" as a name. The two sub-sections which deal with names are the first two. Sub-sect. (*b*) applies to a written signature, or copy of a written signature of the individual or firm applying for registration. That cannot be in point, as it must be the signature of the firm applying for registration. According to sub-sect. (*a*) it must be a name of an individual or firm printed, impressed, or woven, in a particular and distinctive manner. This is not confined like sub-sect. (*b*) to the name of the applicant. It may be the name of any one. I think therefore that sect. 10 of the Act of 1888 must be read so as to bring the case of a name used as a trade mark within sub-sect. (*a*), so that it must be used in some particular and distinctive manner. Does it make any difference that the name proposed is not the name of the person actually applying, but the name of somebody else? On the authorities it appears to me that a person cannot take the name of a living person and call it a fancy word not in common use, because it is the name of a great man who lived many years ago, and register it as used for the first time in reference to some article. It has been held in *Re Banks and James' Trade Mark* (*ubi sup.*), that the word Shakespeare is not a fancy word, and therefore not a proper trade mark for cigars. I think it clear therefore that under sub-sect. (*a*) the applicant could not register the name of Shakespeare or Du Maurier. Then does it make any difference that the name used is not the name of a person, but the name of a fictitious character? I take it that if Shakespeare cannot be registered as a name, it is equally illegal to register the name of Hamlet, so that if Du Maurier cannot be so used, I do not know any reason why the name of "Trilby" can be so used. Indeed, I do not see why it should be said that if "Trilby" can be registered, her full name Trilby O'Farrell cannot be registered, which in my opinion clearly cannot. The Act of 1888 has been held judicially not to extend the power of registration under the earlier Act of 1883; but in fact to limit it to some extent. Lindley, L.J., in *Re Farbenfabriken Application*, said that the Legislature, in passing the Trades Mark Act 1888, had also had for one of its objects the exclusion of inconvenient monopolies in words which were already common property. If that is the object of the Act it is very singular if "Trilby" (which, in my opinion, is common property now) can be claimed by one man for corsets, by another for boots, by another for tobacco, and by another for soap and other things. In my opinion "Trilby" is not a word that can be registered, and that being so the registration must be expunged.

Solicitors: *Edward Le Voi*; *Sharpe, Parker, Pritchards*, and *Barham*.

Tuesday, Nov. 12, 1895.

(Before KEKEWICH, J.)

EDWARDS *v.* JENKINS. (*a*)

Custom — Inhabitants of a particular district — Custom laid in inhabitants of several adjoining parishes.

A claim to a right of recreation by custom must be confined to the inhabitants of a particular district, by which is meant that particular division of the country defined by the law in which the particular property over which the right is claimed is situate. A custom, therefore, alleged of all the inhabitants for the time being of three adjoining and contiguous parishes to a right of recreation over a piece of land situate in one of the parishes is bad in law.

ACTION.

This was an action commenced on the 28th Aug. 1893 by Howell Powell Edwards against Alexander Jenkins and three others inhabitants of the parish of Beddington in Surrey. The plaintiff by his statement of claim alleged that he was in possession of a piece of land situate at Beddington Corner in the parish of Beddington in the county of Surrey, and that, while in possession, the defendants, on the 24th Aug. 1893, broke and entered and trespassed upon the said land and did great damage by throwing down a fence inclosing the same, and that the defendants asserted a right to do the acts complained of and threatened to repeat them. The plaintiff claimed damages, and an injunction to restrain the defendants from repeating the trespass complained of. The action originally came on for trial on the 21st Feb. 1895, when the defendants appeared in person. The plaintiff established his title to maintain the action, and proved the perpetration of the acts complained of. Upon the application of the defendants, however, the case was then ordered to stand over, and leave was given them to amend their defence. By their amended defence the defendants alleged: "The said piece of land has from time immemorial, until the month of Aug. 1893, been an open piece of common land, and there has been, and is now, an ancient custom and approved in the said parish of Beddington that all the inhabitants for the time being of the said parish, and of the adjoining or contiguous

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

parishes of Carshalton and Mitcham, have, during the time aforesaid, used and of right have had, and still have, the right and privilege of recreation and of exercising and playing of all lawful games, sports, and pastimes upon the said piece of land every year, at all seasonable times of the year, at their own free will and pleasure, and that for the purposes aforesaid the said inhabitants should have free access to the said piece of land."

Warmington, Q.C. and *W. Clode* for the plaintiff. —The custom is laid in the inhabitants of more than one parish; it is, therefore, bad in law. *Vide* Coke on Littleton, 113 *b*: "A custom which is local is alleged in no person, but in some manor or other place":

Gateward's case, 6 Coke, 59 *b*; Dyer, 363 *b*, 27;
Hammerton v. *Honey*, 24 W. R. 603;
Cox v. *Shoolbred*, *Times* newspaper, 15th Nov. 1878.

Johnston Edwards and *Baildon* for the defendants.—A custom alleged of the inhabitants of a particular district is good, and we are justified, in the absence of any decision to the contrary, in saying that these three parishes constitute such a district:

Bourke v. *Davis*, 62 L. T. Rep. 34; 44 Ch. Div. 120;
Fitch v. *Rawling*, 2 H. Bl. 393.

[KEKEWICH, J. referred to *Earl of Coventry* v. *Willes* (9 L. T. Rep. 384).] If we are wrong we should be allowed to amend. [KEKEWICH, J.—in the case of *Cox* v. *Shoolbred* (*ubi sup.*), decided by Jessel, M.R., there was a claim by the inhabitants of the parish of Pangbourne, but the evidence went beyond that, and the case accordingly failed.] They also cited

Mounsey v. *Ismay*, 7 L. T. Rep. 717; 32 L. J. 94, Ex.

KEKEWICH, J. (after stating the facts above set out and commenting thereon) continued:—Now, I will deal with the amended defence on the question of law, and it certainly has the advantage of novelty. This is the allegation of the defendants: "The said piece of land has from time immemorial until the month of August 1893 been an open piece of common land, and there has been, and is now" (this is the point), "an ancient custom, and approved in the said parish of Beddington, that all the inhabitants for the time being of the said parish and of the adjoining or contiguous parishes of Carshalton and Mitcham have during the time aforesaid used, and of right have had and still have the right and privilege of recreation, and of exercising and playing of all lawful games, sports, and pastimes, upon the said piece of land every year, at all seasonable times of the year, at their own free will and pleasure, and that for the purposes aforesaid the said inhabitants should have free access to the said piece of land." No argument has been addressed to me, and I am not for the moment considering, as to whether the right alleged is good or otherwise. I will assume without further comment or inquiry that the right claimed is a perfectly good one in law, of course, subject to evidence, provided it is laid in the proper persons. The only question is whether, such a right being assumed to be good in law, and not too large, is properly laid in "all the inhabitants for the time being of the said parish," that is, the parish of Beddington, in which the land is situate, "and of the adjoining or contiguous parishes of Carshalton and Mitcham." It seems to me that, although there is no authority exactly deciding that such an allegation is bad, all the cases so directly point that way that I ought to consider it concluded by authority. I understand that the defendants have taken for their guide the case of *Fitch* v. *Rawling* (*ubi sup.*), which is not the earliest authority on the subject, but still now just one hundred years old, and one which is quoted in all the books and continually referred to on this subject. There the allegation was as regards "all the inhabitants for the time being of the parish aforesaid," and that was supported by the court. "The court was of opinion that an ancient and laudable custom for all the inhabitants for the time being of the parish to have the right and privilege of playing at all kinds of lawful games, sports, and pastimes in the plaintiff's close at all seasonable times of the year was good; but there was another averment, and that was, that the custom was 'for all persons for the time being being in the said parish,' and that the court, with like unanimity, but without much exposition of the law, held to be wholly bad." Therefore, it is perfectly clear that something beyond a custom for all the inhabitants for the time being of the parish is bad. The question is, how much beyond? Mr. Edwards's argument, founded upon the language of Kay, J. in *Bourke* v. *Davis* (*ubi sup.*), is, that it must be confined to the inhabitants of a particular district, and that you may construe "district" to mean two or three other adjoining or contiguous parishes in addition to the parish in question. I cannot find myself any justification for that. No doubt Kay, J. does use the term "district," and it is used also by Cockburn, C.J. in his judgment in the case of *The Earl of Coventry* v. *Willes* (*ubi sup.*). He says: "The claims set up are much too general, for there can be no customary right for all the Queen's subjects to be present and to go and remain upon the land," that is too large a claim. Then he limits it in this way: "A customary right can only be applicable to certain inhabitants of the district where the custom is alleged to exist, and cannot be claimed in respect of the public at large." The only way in which that could be used in favour of the defendants is to say that all these parishes are situate in a certain district. They might be all the parishes in a county, or all the parishes in a hundred—it is difficult to know how to define a district; but I suppose the real solution of the difficulty is to consider how it could have had a legal origin, and I fail to see how you can attribute a legal origin to a "habit"—I use that word instead of "custom" for the moment—of persons from many parishes, to come on and play cricket on a particular piece of land. Heath, J., in the case of *Fitch* v. *Rawling* (*ubi sup.*), seems to indicate what, in his opinion, must be the foundation of the custom. He says: "The lord might have granted such a privilege as is claimed by the first custom before the time of legal memory. As to the second, it is clearly bad, being for all mankind." So that I do not find in any of those cases anything that could justify me in saying that the use of the word "district" means more than that particular division known to the law in which the particular property is situate. This is situate in a parish. It might be situate in a manor, or there might be some other division; but I cannot myself see how a number of parishes, without any proof or any evidence, can be said to be situate in a particular district, and that, there-

fore, land in one of those parishes is land in a particular district. I take it that the judges have used the term "district" in the sense of meaning some division of the country defined by and known to the law as a parish is, and that it would be extending their meaning if I were to say that the custom could be claimed as regards the inhabitants of several parishes. Mr. Edwards is right, I think, in his criticism of the other cases cited by Mr. Warmington. I think they all go to this, that, where a custom is asserted as regards the inhabitants of a particular parish, if the evidence goes to show that the privilege has been exercised by the inhabitants of other parishes, then the proof is inconsistent with the allegation, and the case fails on that ground. But it must be observed that, in all such cases, if the larger custom were good, the custom of the inhabitants of the adjoining parishes would be good; and there ought to have been applied for—and, if applied for, there would have been granted—leave to amend, so as to support the good custom proved. The reason why the cases failed seems to me to be that the evidence was inconsistent with the allegation, and because no allegation could be introduced by amendment so as to be sustained within the law. That brings me to the last point, which is Mr. Edwards's application for leave to amend. I am extremely unwilling to refuse leave to amend in any case, certainly in a case where the defendants have not until lately had the advantage of legal advice; but other parties besides the defendants have to be considered—the plaintiff has to be considered. The plaintiff here has been fighting his case for some little time, and the defendants have had considerable indulgence; and I am bound to see whether there is any reasonable chance of justice being defeated by my refusing the amendment, and I do not think there is. In the first place, this amendment has been made after due consideration; and I must take it for granted that counsel, in amending the pleadings, did so after having possessed himself, as well as he could, of the facts. He asks me now to strike these words out, so that the claim will stand as a claim of the custom in the said parish of Beddington and all the inhabitants for the time being of the said parish, and that parish only. It is clear to my mind now, although there is no evidence at all before me, that the evidence, when adduced, would show the custom in the inhabitants of Beddington and of the other parishes, and the result would be that I should be in precisely the same position as the Master of the Rolls was in the case of *Cox* v. *Shoolbred* (*ubi sup.*), and that I should have then to decide against the defendants because they had proved a custom larger than that claimed. Under those circumstances, I think I ought not to allow the leave to amend. The result is, that there must be judgment for the plaintiff.

Solicitors: *Crouch, Edwards, and Heron; J. D. B. Lewis.*

QUEEN'S BENCH DIVISION.

Nov. 12 *and Dec.* 7, 1895.

(Before Lord RUSSELL, C.J., GRANTHAM and WILLIAMS, JJ.)

SOUTTER *v.* RODERICK. (*a*)

Parliament—Voter—Claim—Qualification—Successive occupation—Amendment—Parliamentary and Municipal Registration Act 1878 (41 & 42 *Vict. c.* 26), *s.* 28.

The qualification of a voter was stated in the third column of his claim to be in respect of the occupation of a "dwelling-house," and the description of the qualifying property in the fourth column consisted of the names of two different houses.

Held (*Williams, J. doubting*), *that the claim must be taken to be in reality one for successive occupation, and, therefore, the revising barrister had power, under sect.* 28, *sub-sect.* 13, *of the Registration Act* 1878, *to amend, and ought to amend, the third column accordingly by substituting "houses in succession" for "dwelling-house."*

APPEAL from a decision of the revising barrister of Southwark, who amended the third column of a voter's claim by substituting "houses in succession" for dwelling-house."

The facts of the case and the arguments of counsel sufficiently appear from the judgments.

Nov. 12.—*Costelloe* for the appellant; *R. Jones* for the respondent.

Dec. 7.—The following written judgments were delivered:—

Lord RUSSELL, C.J.—This is an appeal from the revising barrister of Southwark, who allowed the claim of Alfred George Le Blonde to have his name inserted in the list of occupiers for the borough. His claim was as follows: "Name of voter, Le Blonde, Alfred George; place of abode, 3, Hamilton-square; nature of qualification, dwelling-house; description of qualifying property, 69, Richmond-road, Stamford Hill; 3, Hamilton-square." It was proved that the claimant had occupied the two dwelling-houses set out in the fourth column in immediate succession and for the qualifying period. It was objected by the appellant that the claim was invalid by reason of the omission of the word "successive" in the third column, and that the revising barrister had no power to amend the claim by inserting the word "successive," because (it was contended) it gave another and a different qualification. The barrister overruled both objections, and from that decision this appeal is brought. The first question, therefore, is, whether the claim as it originally stood was sufficient. The appellant contended that, by reason of the instructions to overseers in the Regulation Order 1889, schedule 2, part 1, s. 19 (*b*), the qualification should have been stated as "dwelling-house (successive)." The respondent relied on the case of *Hitchins* v. *Brown* (2 C. B. 25; 15 L. J. 38, C. P.) as establishing the sufficiency of the claim. In that case "house" only appeared in the third column, but in the fourth column both were fully described with the word "previously" before one of them. The barrister amended the claim by inserting "houses occupied in immediate succession." The Court held, on appeal that the

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

claim was originally sufficient, but that the amendment made it more accurate. Since that case, however, was decided the Regulation Order above referred to has been issued, and I think that, having regard to the instructions it contains, the qualification was not sufficiently described. The real question in the case is the second one, viz., had the barrister power to amend the statement of the qualification as he did? It was contended on behalf of the appellant that he had not, because it gave the claimant a different qualification from that stated. If that really is the result of the amendment, then the barrister clearly had not the power to make the amendment, and for authority on this point it is sufficient to refer to the cases of *Bartlett* v. *Gibbs* (5 M. & G. 81) and *Foskett* v. *Kaufman* (16 Q. B. Div. 279). But is that the effect of the amendment? To answer this question it is important to see what was exactly the qualification stated. It seems to me that, giving to it a reasonable construction, the qualification stated must be taken to be for successive occupation. The claimant could not qualify by occupation of two houses except by reason of successive occupation, and therefore the fair interpretation of the claim seems to me that it is one for successive occupation. It was contended that the claim might be regarded as being for occupation of one or other of the two houses during the qualifying period. But even if that be so (which I do not think), then one or other of the two houses is surplusage, and the barrister would have to amend by striking out one or other so as to make it clear in respect of which the qualification was claimed. The highest at which the appellant's argument can, in my opinion, be put is, that the nature of the qualification is insufficiently stated, and in that case the barrister had power, as it seems to me, under sect. 28, sub-sect. 13, of 41 & 42 Vict. c. 26, to amend the description of the qualification "for the purpose of more clearly and accurately defining the same." I do not think that the case of *Foskett* v. *Kaufman* assists the appellants on this point, because on the face of the claim in that case there was no ambiguity. It was a claim for occupation of one house, and it was sought to amend it into a claim for successive occupation of two houses. The case of *Hitchins* v. *Brown*, which I have already mentioned, closely resembles the present case, the only difference being the insertion of the word "previously" in the fourth column in the claim in that case. It was argued that this made an important difference, but I do not think so. The idea of "successive" occupation is not necessarily conveyed by the statement that another house was occupied "previously," and it might have been argued in that case, too, that the claim was susceptible of being regarded as a claim for occupation of one or other of the two houses. I think that case was rightly decided; but my conclusions in this case would have been the same apart from it. I think the revising barrister ought freely to exercise the very ample powers of amendment given to him by the 28th section of the Registration Act of 1878 to correct any *bonâ fide* mistake made in the list, or in any claim or notice of objection; and while (apart from sect. 24) he cannot so alter a claim as to make the qualification a new or different one from that in the claim, he ought, following the words of sect. 28 (13), to make such change in the description of the claim as may be necessary "for the purpose of more clearly and accurately defining the same." I think the amendment made in the present case falls within that description. For the reasons I have given I think this appeal must be dismissed with costs.

GRANTHAM, J.—In this case we are asked to say whether the revising barrister was right in amending the claim of the respondent when in a claim for a successive occupation he omitted to add the word "successive" after the word dwelling-house, though he properly inserted the names of the houses of his successive occupation in the fourth column. In my judgment he was right in so amending. What is the nature of the qualification for which he claims? It is "occupation" as distinguished from "ownership" or any other qualification, and is still more definitely described as "occupation of a dwelling-house." He has described all that gives him the right to vote, viz., the "occupation" of a dwelling-house and "the dwelling-house" which he occupied. First one dwelling-house and then the other during the prescribed period. By the statutory Rules and Orders 1895, recently published, it is apparent that it is correct to speak of the qualification derived from the successive occupation of two or more dwelling-houses as the occupation of a "dwelling-house" in the singular; and, as the respondent has so claimed in the third column, and has in the fourth column correctly described the qualifying property, viz., the two houses, it seems to me that he has done all that the Act requires him to do, and that the word "successive" is really surplusage. But whether so or not, the absence of the word cannot disqualify, and, if it is necessary to be inserted to comply with the rules, then the revising barrister was justified in adding it by way of amendment for the purpose of more accurately describing it. I am aware that the Court of Appeal, in the case of *Plant* v. *Potts* (1891) 1 Q. B. 262; 63 L. T. Rep. 730), which was so much relied on by the appellant, did not agree with the liberal construction I put upon the amending clause of the Registration Act (41 & 42 Vict. c. 26), s. 28, and I loyally bow to their better judgment; but, though I may have given too liberal a construction of that Act to enable me in that case to give effect to the spirit of the Act, that is no reason why I should apply a still narrower construction than has yet been given to the Act to a case differing essentially from that case. Prior to *Plant* v. *Potts* no one had suggested that the decision of the court in *Hitchins* v. *Brown* was incorrect, and as that case was not mentioned by the Court of Appeal, and the facts of that case are almost identical with this and not with *Plant* v. *Potts*, I cannot consider that case overruled. In fact, if I am wrong in the views I have given expression to, it seems to me that the special powers of amendment given in the Registration Act (41 & 42 Vict. c. 26) will be a dead letter. If we examine carefully the judgments of the Court of Appeal in *Plant* v. *Potts* I cannot but think they distinctly exclude such a case as this from the effect of their decision. The Master of the Rolls says, at page 262: "In other words, a revising barrister can only amend an insufficient description of the qualification, but cannot alter the description into a description of another qualification." Again, Lopes, L.J. says, at page 264, "After careful consideration I have

come to the conclusion that they empower a revising barrister to correct an insufficient or inaccurate statement of qualification in the third column, provided such correction does not involve a change or alteration of the qualification as it appears in the list." On authority, therefore, of previous decisions, as well as on what I believe to be a proper construction of the Act, my judgment must be in favour of the respondent.

WILLIAMS, J.—In this case the Lord Chief Justice and Grantham, J. have arrived at the conclusion that, giving to the qualification stated a reasonable construction, it must be taken to be for successive occupation, and that it cannot reasonably be read as being for occupation of one or other of the two houses. I am not at all sure myself that many a reasonable man would not read this qualification as being a qualification by occupation of a dwelling-house at 69, Richmond-road, Stamford Hill, by a person occupying, at the date of the claim, 3, Hamilton-square. I cannot but think that, if the evidence had shown a qualification by reason of occupation of 69, Richmond-road, and no sufficient successive occupation of the two houses mentioned to give a qualification in respect of successive occupation, the statement of qualification would have been properly argued to have been a reasonably clear statement of a qualification by occupation of a single dwelling-house. If so, the qualification, as stated, might reasonably be read as referring to either one of two different qualifications. If so, I doubt the power of the revising barrister to amend. He would in such case by amending not merely be more clearly and accurately defining the qualification stated; he would by the amendment exclude from the statement one of the qualifications possibly included, and therefore would be altering the description of the qualification, while the equivocal claim capable of meaning either one of the two qualifications would have been unfair to the objector as throwing on him the necessity of making two sets of inquiries. Fairness to the objector seems to be a matter which should be taken into consideration: (see judgment of Lord Esher in *Dashwood* v. *Ayles*, 16 Q. B. Div. 298.) If the claim could equally well describe either franchise, I should say it ought not to be amended. But, inasmuch as both the Lord Chief Justice and Grantham, J. think the qualification stated, reasonably read, means "successive occupation," and not a claim for occupation of one dwelling-house for the requisite period, I am not prepared to differ as to the construction of this particular claim, which is not a matter of principle or of any importance except to the particular claimant and objector; but I wish to record my dissent from the proposition that where the description of the claim is equally applicable to one qualification as to another, the revising barrister has power to amend, or ought to amend. Subject to these observations I concur in the result and judgment.

Solicitor for the appellant, *Charlton Hubbard.*

Solicitors for the respondent, *Franks* and *Timbrel.*

Nov. 27, 28, *and Dec.* 2, 1895.

(Before MATHEW, J.)

FRANCIS *v.* BOULTON. (*a*)

Marine insurance—Average adjustment—Damage to goods—Whether partial or total loss—Mode of ascertaining partial loss—Costs of conditioning.

The correct mode of ascertaining the amount of a partial loss of goods as between the underwriter and the assured on a valued policy of marine insurance is to contrast the sound value of the goods on the date of arrival with their damaged value at that date, such damaged value being the gross value which the goods have actually fetched, without deducting the charges (if any) of conditioning the goods. The percentage of difference between these gross values is the proportion of the value in the policy which the underwriter ought to pay.

The plaintiff insured with the defendant, an underwriter, by a policy on goods as interest might appear to cover the risks of transit in his lighters, and under this policy the plaintiff's lighter took on board a cargo of rice valued at 450*l. During the transit the lighter came into collision and sank, and the rice was damaged. The damaged rice was afterwards offered to the owners, who refused to accept it. It was then, with the approval of the underwriter, kiln-dried at a cost of* 68*l., and sold as damaged rice for* 111*l., being about one-third of its sound value.*

Held, (1) *that, as the rice was capable of being conditioned, there was not a total loss, but a partial loss only; and* (2) *that the amount of this partial loss was to be ascertained by comparing the sound value of the rice with the* 111*l., the sum which the damaged rice actually fetched, without deducting the* 68*l., the costs of the kiln-drying.*

The principle laid down in Johnson *v.* Sheddon (2 *East*, 581) *followed.*

COMMERCIAL CAUSE tried by Mathew, J.

The facts as stated in the written judgment of the learned judge were as follows:—

The action was an action brought against an underwriter on a policy of marine insurance, dated the 18th May 1892, to recover for a loss of goods occasioned by the sinking of a lighter in the Thames. There was also a claim for the costs of legal proceedings alleged to have been instituted at the request and on behalf of the underwriter.

The plaintiff, who was a lighterman, had effected a policy at Lloyds on goods valued at 22,000*l.* as interest might appear to cover the risks of transit in his lighters between Tilbury and Hammersmith.

The policy contained the following clause:

Warranted free from particular average unless the vessel or craft is stranded, sunk, on fire, or in collision. The collision to be of such a nature as may reasonably be considered to have occasioned damage to cargo. Each cargo on lighter to be deemed a separate insurance, but to pay warehousing, forwarding, and special charges if incurred, as well as partial loss arising from transshipment.

On the 30th Jan. 1893 the plaintiff's barge, the *Intent*, took on board 630 bags of rice to be carried to Hammersmith, and a declaration was made upon the policy, and the rice valued at

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

450*l.* The lighter in the course of her transit to Hammersmith, and while the goods were covered by the policy, came into collision with the steamer *Ullswater*, and was in danger of sinking. An attempt was made to beach her. but she filled and sank, and the rice remained under water for two tides. Notice was at once given to the underwriter, and a Mr. Frost, the representative of the Salvage Association, was employed to attend to the matter on his behalf. The lighter was floated, and after temporary repairs proceeded to her destination, where the cargo was tendered to Haig and Co., the owners. They refused to accept it. An offer was made to purchase the damaged rice for about 50*l.*, but this offer was refused, and under the advice of Frost, and with the approval of the underwriter, it was determined that the rice should be kiln-dried and then sold.

The kiln-drying cost 68*l.* 11*s.* 8*d.*, and the rice was sold as river-damaged, kiln-dried rough broken rice, and fetched 111*l.* 4*s.* 2*d.*

The present action was brought to settle disputes which arose between the plaintiff and his underwriter: (1) as to whether there had been a total loss of the goods, or only a partial loss; (2) as to the mode in which the partial loss should be ascertained.

There was also a dispute as to the costs of an unsuccessful action brought by the plaintiff, with the sanction of the underwriter, against the *Ullswater*, but as the question turned on the particular facts of the case it is unnecessary for this report.

As to certain items of these costs counsel were agreed; but the plaintiff insisted that for the costs in respect of the claims against the *Ullswater* the underwriter was alone responsible.

Lawson Walton, Q.C. and *C. C. Scott* for the plaintiff.—As to the first point, we contend that there was a total loss of the rice and not merely a partial loss. The rice had lost its merchantable character as good sound rice, and that was the test recently laid down in *Asfar* v. *Blundell* (73 L. T. Rep. 30; (1895) 2 Q. B. 196; in the Court of Appeal, 100 L. T. 61). So in *Roux* v. *Salvador* (3 Bing. N. C. 266), where hides which had been damaged, though not absolutely destroyed, were sold for a quarter of their value, it was held to be a total loss. *Lidgett* v. *Secretan* (24 L. T. Rep. 942; L. Rep. 6 C. P. 616) is to the same effect. With regard to the second point, assuming that there was a partial loss only of the goods, we contend that, in estimating the amount of the partial loss, we are entitled to deduct the cost of conditioning the rice. We have to contrast the sound value with the damaged value, and we submit that the true principle is, that the damaged value is the value which the goods would have fetched if they had been sold on their arrival in their then damaged condition. We had to pay 68*l.* for conditioning, and then we sold the goods, so conditioned, for 111*l.*, and to obtain this 111*l.* we had to pay the cost of conditioning. What the goods, therefore, were worth was the sum we actually received for them, less the cost of conditioning, that is, about 40*l.* That, we say, is the damaged value of the rice which ought to be compared with the sound value.

Joseph Walton, Q.C. and *J. A. Hamilton* for the defendant.—With regard to the first point, there was not a total loss of the rice, but a partial loss only. The case of *Asfar* v. *Blundell* (*ubi sup.*), relied on by the plaintiff, is easily distinguishable, as there the goods in question, which were dates, had completely lost their merchantable character as dates, and no amount of conditioning could have restored that character. Moreover the question in that case was not an insurance question, but a question as to whether freight had been earned. If the goods arrive in specie, but damaged, then there is not a total loss: (Arnould on Marine Insurance (6th edit.), p. 1011; per Lord Abinger in *Roux* v. *Salvador* (3 Bing. N. C. at p. 278.) In *Roux* v. *Salvador* (*ubi sup.*), the goods were so damaged during the voyage that their arrival was impossible. Here the rice got to its destination, and had not lost its character. [MATHEW, J.—Can the goods be conditioned so as to resume their original shape?] Yes:

Glennie v. *The London Assurance Company*, 2 M. & S. 371.

The damage here is only about 57 per cent., which is nothing like a total loss, and the rice was sold as rice, although damaged. *Glennie* v. *The London Assurance Company* (*ubi sup.*), which was also a case of damaged rice, shows that this was a particular average loss only. As to the second point, the proper mode of calculating the particular average loss is to contrast the sound value with the damaged value, that is, the value which the goods actually fetched, in this case 111*l.* The sound value, therefore, has to be contrasted with this sum of 111*l.*, and not with this sum less the cost of conditioning, as the plaintiff has contended. This was the principle laid down in 1802, in the case of *Johnson* v. *Sheddon* (2 East, 581), and it has ever since been followed in adjusting averages. We have to compare the price for which the goods would have sold in the market had they arrived there sound, with the price for which they actually sold, arriving there damaged: (Arnould, p. 930.) Some date obviously must be taken, and the only date that can safely be taken is the date of sale. Market values would affect damaged as well as sound values, so that the gross proceeds must be taken, for conditioning charges do not fluctuate, but market values do, and the object is to exclude fluctuations. The evidence given by the average adjusters who have been called shows that in practice the adjustment is made in accordance with these principles, and the practice in this respect is right.

Lawson Walton, Q.C. in reply.—There is nothing in *Johnson* v. *Sheddon* (*ubi sup.*) to justify the addition of the cost of conditioning. There they had to deal with charges equally applicable to rice sound or damaged; and they were not dealing with such charges as conditioning charges. He also referred to *Lewis* v. *Rucker* (2 Burr. 1167), and Phillips on Insurance, sect. 1425.

Cur. adv. vult.

Dec. 2.—MATHEW, J. read the following judgment:—[Having stated the facts as already set out, his Lordship proceeded:] It was agreed by counsel that the principles upon which the claims in this action should be dealt with should be decided by me, and that the figures should be settled in accordance with the judgment by the average adjusters for the plaintiff and the defendant respectively. With respect to the first question, namely, whether there was a total loss of the

goods, reliance was placed on the evidence of the plaintiff and Mr. Frost, who described the rice after it had been immersed for two tides, as unmerchantable as sound rice, smelling offensively, and as unfit for food. But, as against this, the defendant relied on the fact that the offer for the purchase of the damaged rice had been refused, and that Frost and the plaintiff had sanctioned the kiln-drying of the rice as the best course to be taken in the interest of all concerned. The plaintiff relied upon the judgment of Lord Esher, M.R. in *Asfar* v. *Blundell* (*ubi sup.*), *Roux* v. *Salvador* (*ubi sup.*), and *Lidgett* v. *Secretan* (*ubi sup.*); while, on the other hand, reliance was placed for the defendant on the class of cases of which *Glennie* v. *The London Assurance Company* (*ubi sup.*) most closely resembles the present. I am of opinion that there was not a total loss of the rice, and that the loss was partial only. The case is distinguished from *Asfar* v. *Blundell* (*ubi sup.*) by the fact that the rice was capable of being conditioned, and that when kiln-dried it was sold as rice and fetched about a third of its sound value. The second question, namely, the principle upon which the amount of the partial loss was to be ascertained, gave rise to considerable argument. The plaintiff's case was, that his claim in respect of the partial loss amounted to 77 per cent. of the sum insured, while the underwriter assessed the claim at about 57 per cent. It was hardly disputed that the right mode of ascertaining the percentage of liability in this case was by contrasting the sound value with the damaged value at the date of loss; and it was said for the plaintiff that the damaged value was the amount which the goods would fetch if sold on arrival in their then condition. In other words, that the damaged value should be taken to be what the goods would have fetched, less the costs and charges of kiln-drying, which would work out at about 40*l.* The defendant relied on the principles laid down in *Johnson* v. *Sheddon* (*ubi sup.*), and insisted that the correct mode of calculating the partial loss was by ascertaining the percentage of difference between the gross value of the goods when sound and when damaged, and that the sound value in this case should be compared with 111*l.* 4*s.* 2*d.*, the sum which the damaged goods actually fetched. Three gentlemen of experience as average adjusters gave evidence that this was the method of adjusting such a loss invariably adopted; and I am satisfied that in principle the practice of average adjusters in this respect is right. It is to be borne in mind that under the suing and labouring clause the underwriter is liable for costs reasonably incurred in conditioning the damaged goods, and therefore it would not be just, as between him and the assured, to calculate the loss for which he was liable on the value of the goods when unconditioned. Thus, suppose the sound value of the goods to be 1000*l.*, their damaged value unconditioned 500*l.*, and their value when conditioned 750*l.*; as the underwriter would have to pay the cost of conditioning, the loss to the owner would be 25 per cent. of the insured value. But, if the argument for the plaintiff was right, the loss would be 50 per cent. Upon this second question my judgment is therefore in favour of the defendant. I reserve the question of costs until the figures have been disposed of in the manner agreed by counsel.

Judgment accordingly.

Solicitors for the plaintiff, *Drake, Son,* and *Parton.*

Solicitors for the defendant, *Thomas Cooper* and *Co.*

Aug. 1 *and Dec.* 7, 1895.

(Before Lord RUSSELL, C.J., POLLOCK, B., and WRIGHT, J.)

BUCKLER (app.) *v.* WILSON (resp.). (*a*)

Food adulteration — Margarine — Sale not for analysis but for consumption—Jurisdiction of county justices in borough—Time for serving summons—Sale of Food and Drugs Act 1875 (38 *&* 39 *Vict. c.* 63), *s.* 14; *Sale of Food and Drugs Act Amendment Act* 1879 (42 *&* 43 *Vict. c.* 30), *s.* 10; *Margarine Act* 1887 (50 *&* 51 *Vict. c.* 29), *ss.* 6, 12.

The provisions of sect. 14 *of the Sale of Food and Drugs Act* 1875 *apply only where the article is purchased "with the view of submitting the same to analysis," and do not apply where the article is purchased for consumption or under a contract, in which case compliance with the provisions of the section is not necessary as a condition precedent to a prosecution under the Act, or under the Margarine Act* 1887.

The Guardians of the Enniskillen Union *v.* Hilliard (14 *L. Rep. Ir.* 214) *approved and followed.*

Parsons *v.* The Birmingham Dairy Company (9 *Q. B. Div.* 172) *dissented from.*

Under a contract for the supply of good fresh butter the appellant supplied and delivered to the guardians of the L. Union butter which afterwards upon analysis was found to contain 25 *per cent. of margarine. The appellant was prosecuted and convicted, under sect.* 6 *of the Margarine Act* 1887, *for selling the margarine otherwise than as prescribed by that section. The summons was served more than twenty-eight days after the purchase, and the case was heard and determined by county justices in the borough of L., which was comprised within the L. Union, and which had not a separate court of quarter sessions, and the provisions of sect.* 14 *of the Sale of Food and Drugs Act* 1875 *had not been complied with.*

Held, (1) *that the county justices had jurisdiction under sect.* 27 *of the Poor Law Amendment Act* 1867 (30 *&* 31 *Vict. c.* 106), *as the borough of L. was comprised within the L. Union, and also under sect.* 154 *of the Municipal Corporations Act* 1882 (45 *&* 46 *Vict. c.* 50), *as the borough had not a separate court of quarter sessions;* (2) *that as the justices had found that the butter or margarine was not "a perishable article," and was not purchased for "test purposes," the summons need not be served within twenty-eight days after the purchase as required by sect.* 10 *of the Sale of Food, &c., Act* 1879; *and* (3) *that, as the sale was not for analysis, but under a contract, the provisions of sect.* 14 *of the Act of* 1875 *did not apply, and notification under that section was not necessary to the prosecution.*

CASE stated by justices of the peace for the parts of Lindsey, in the county of Lincoln.

The case originally came before a court con-

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

sisting of two judges; but it was ordered to be reheard by three.

The facts of the case, as stated in the judgment of Lord Russell, C.J., were as follows:—This is an appeal on a case stated by the magistrates of Lindsey, in the county of Lincoln, from a conviction by them under the Margarine Act 1887 for selling margarine, otherwise than in a package marked "Margarine," as prescribed by sect. 6 of that Act. The facts were as follows: Upon the hearing of the information it was proved that the appellant had entered into a contract with the guardians of the poor of the Louth Union for the supply of "good fresh butter, English;" that on Saturday, the 8th Dec, 1894, the appellant, under his contract, delivered 39lb. of butter (or margarine) at the union workhouse in Louth; that on the following Monday, the 10th Dec. 1894, the butter (or margarine) was examined by the workhouse visiting committee, and 1lb. of it was, on the same day, in the absence of the defendant, divided into three parts, each part being wrapped in a separate paper. One part was taken by the master of the workhouse to the appellant's shop at Louth, and, the appellant not being there at the time, the master left it with a letter, of which the following is a copy:

Dec. 10, 1894.—At a meeting of the house committee of the Louth Union this morning the butter supplied by you was examined, and a pound of it cut into three parts; one of such parts will be sent to an analyst, one will be kept by the guardians, and the third I have been instructed to bring to you.—I am, Sir, most respectfully yours, JOHN T. CROWSON, Master.

The butter or margarine was sold by retail otherwise than in a package duly branded or durably marked in the manner prescribed by sect. 6 of the Margarine Act 1887, and the appellant did not deliver the same to the purchaser in or with a paper wrapper on which was printed in capital letters, not less than a quarter of an inch square, "Margarine." It was also proved that by the directions of the guardians one of the sealed samples of butter (or margarine) was sent by post (registered) to Dr. Muter, public analyst for the administrative county of the Parts of Lindsey, and a certificate from him was produced in which he stated that the sample of butter received from the guardians of the Louth Union for analysis, in his opinion, contained seventy-five parts of butter and twenty-five parts of margarine.

Upon the above facts it was contended for the appellant before the justices, that the justices, being county justices, had no jurisdiction to determine the case on the ground that the workhouse of the Louth Union and the place where the goods were supplied from and delivered to the purchasers, and the place where the defendant lived and carried on business, were situated within the borough of Louth, and that the proceedings should have been taken before the magistrates for the borough of Louth, and that sect. 20 of the Sale of Food and Drugs Act 1875 applied.

In answer to this the respondent contended that the justices had jurisdiction on two distinct grounds: (1) that the borough of Louth being one of the parishes comprised in the Louth Union, sect. 27 of the Poor Law Amendment Act 1867 (30 & 31 Vict. c. 106), applied to these proceedings; and (2) that, as no separate court of quarter sessions had been granted to the borough of Louth, the county justices have concurrent jurisdiction (5 & 6 Will. 4, c. 76, s. 111, repealed, but re-enacted in sect. 154 of the Municipal Corporations Act 1882).

It was also contended for the appellant that the summons had not been legally issued, and that the Margarine Act 1887 required the same steps to be taken as were required in proceedings under the Sale of Food and Drugs Acts 1875 and 1879, and that this had not been done, as the alleged offence was committed on the 8th Dec. 1894 and the summons issued and served on the 18th Jan., and returnable and heard on the 23rd Jan. 1895, and therefore more than twenty-eight days after the purchase, contrary to the provisions of sect. 10 of the Act of 1879.

In answer to this objection it was contended for the respondent: (1) that sect. 10 of the Sale of Food and Drugs Act 1879 (42 & 43 Vict. c. 30) did not apply to proceedings under the Margarine Act 1887; (2) that butter is not a perishable article within the meaning of the Sale of Food and Drugs Acts; and (3) that the butter (or margarine) in question was not purchased for "test purposes."

It was also contended for the appellant that it was necessary to the proceedings that there should be notification forthwith, as required by sect. 14 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), and also that there ought to have been an offer to divide the article in the presence of the defendant or his agent then and there, that each part should be marked and sealed, and that the letter of the 10th Dec. 1894 was not a sufficient notification as to analysis.

To this objection it was contended for the respondent (1) that sect. 14 did not apply to these proceedings, inasmuch as the butter (or margarine) was not purchased "with the intention of submitting the same to analysis."

The justices were of opinion (1) that, as justices for the Parts of Lindsey in the county of Lincoln, they had concurrent jurisdiction with the borough justices in the borough of Louth (such borough not having a separate court of quarter sessions), and that they had also jurisdiction under sect. 27 of 30 & 31 Vict. c. 106; (2) that the Margarine Act 1887 does not require the same steps to be taken as are required in proceedings under the Sale of Food and Drugs Acts 1875 and 1879; (3) that butter is not "a perishable article" within the meaning of the Sale of Food and Drugs Act; (4) that the butter (or margarine) was not purchased for "test purposes"; and (5) that sect. 14 of the Sale of Food and Drugs Act 1875 does not apply to these proceedings for the reason that the article was not purchased "with the intention of submitting the same to analysis."

The justices convicted the appellant, and imposed a fine of 5*l.*, and a sum of 1*l.* 15*s.* 6*d.* for costs.

The questions for the opinion of the court were: (1) Whether the justices had jurisdiction to hear and determine the case; (2) Whether the Margarine Act 1887 requires the same steps to be taken as are required in proceedings under the Sale of Food and Drugs Acts 1875 and 1879; (3) Whether sect. 14 of the Sale of Food and Drugs Act 1875 is applicable, the article not having been purchased with the intention of submitting the same to analysis.

Bonsey for the appellant.

Stanger, Q.C. for the respondent.

The arguments appear sufficiently from the contentions before the justices and from the judgment.

In addition to the cases referred to in the judgment, the following were cited:

Rouch v. *Hall*, 44 L. T. Rep. 183; 6 Q. B. Div. 17;
Smart v. *Watts*, 71 L. T. Rep. 768; (1895) 1 Q. B. 219;
Barnes v. *Chipp*, 38 L. T. Rep. 570; 3 Ex. Div. 176;
Harris v. *Williams*, 6 Times L. Rep. 47.

Cur. adv. vult.

Dec. 7.—The judgment of the Court (Lord Russell, C.J., Pollock, B., and Wright, J.) was read by

Lord RUSSELL, C.J.—[His Lordship, having stated the facts as already set out, proceeded:] The first point raised by the appellant was that the justices, being county justices, had no jurisdiction to hear and determine the case, on the ground that, under sect. 20 of the Food and Drugs Act 1875, the proceedings should have been commenced before the magistrates for the borough of Louth, in which was situate the workhouse "where the article sold was actually delivered to the purchaser." The section runs thus: "When the analyst, having analysed any article, shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner." It should first of all be noticed that the section merely says "may take proceedings," but, further, I think that under sect. 27 of 30 & 31 Vict. c. 106, and sect. 111 of 5 & 6 Will. 4, c. 76 (repealed, but in substance re-enacted in sect. 154 of the Municipal Corporations Act 1882, (45 & 46 Vict. c. 50), the justices clearly had jurisdiction. The second point raised by the appellant was, that margarine was a perishable article within the meaning of sect. 10 of the Food and Drugs Act Amendment Act 1879, and that under that section the summons should have been served within twenty-eight days from the time of the purchase for test purposes. The magistrates, however, found as facts that margarine is not a perishable article and that the purchase was not made for test purposes. We cannot set aside these findings, as there is no evidence before us on which we could say they were wrong. It follows that the summons need not have been served within twenty-eight days under sect. 10, and no contention was made before the magistrates that it was not served within a reasonable time. It is, moreover, at least doubtful whether sect. 10 of the Act of 1879 applies to proceedings under the Margarine Act. I now come to the substantial question raised by the appellant—viz., whether compliance with sect. 14 of the Food and Drugs Act 1875 (38 & 39 Vict. c. 63) is necessary as a condition precedent to a prosecution under the Act. Proceedings under the Margarine Act 1887 are by sect. 12 of that Act to be the same as prescribed by sects. 12 to 28 inclusive of the Food and Drugs Act 1875. Sect. 14 of the latter Act is as follows: "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller, or his agent selling the article, his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent." Now, it is clear that if that section is applicable to this case its provisions were not complied with, and the conviction by the magistrates is wrong. But is it so applicable? I think not, for the margarine in question was not purchased by the guardians "with the intention of submitting the same to analysis." It was delivered to them, as the case states, under a contract for the regular supply to them of good fresh butter. But the appellant's contention is, that a prosecution for an offence against the Act can only be maintained where a sample has been purchased whether by an officer under the Act or by a private individual with a view of submitting the same to analysis. With this contention I do not agree, though it must be confessed the question is by no means free from the difficulty which constantly arises in construing many Acts of Parliament—namely, the difficulty of reconciling several different and loosely-drawn sections. I cannot think, having regard to the scope of the Margarine Act and to the Food and Drugs Act and to the offences set out in sect. 6 of the latter and sects. 6 and 7 of the former Act, that it was the intention of the Legislature that a prosecution should be confined within such narrow limits as those contended for. For example, by sect. 7 of the Margarine Act, "every person dealing with, selling, or exposing, or offering for sale, or having in his possession for the purpose of sale any quantity of margarine contrary to the provisions of the Act shall be liable to conviction for an offence against the Act." Could anything be wider than this? And yet can it in reason be said to be necessary that, for the purposes of a prosecution for "exposing, or offering for sale, or for having in his possession for the purpose of sale," a sample shall have been purchased for the purpose of analysis and analysed as described in the Act (sect. 14)? The Act does not limit the initiation of a prosecution to the purchase of a sample with a view to analysis; and, having regard to the offences the Margarine Act was aimed at and to its preamble, I cannot think it was so intended. The chief difficulty is raised by sects. 20 and 21 of the Food and Drugs Act 1875, which, dealing generally with proceedings under the Act, certainly at first sight seem to imply that the formalities prescribed by sect. 14 have taken place. It seems to me, however, that the effect of sect. 21 is merely to make the production of a certificate of an analyst under sect. 14 of itself sufficient evidence of the facts therein stated. There is nothing in the Act to prevent the proof of an offence by other satisfactory evidence, nor is it necessary that the purchaser should obtain the certificate of the "public analyst" except where he purchases "with an intention" of submitting to analysis. Sect. 12 merely gives him the right on certain payments to claim an analysis from the public

analyst. Finally, it may be pointed out that by sect. 28 of the Food and Drugs Act 1875, nothing in the Act is to "take away any other remedy against an offender under this Act." On this part of the case two decisions were cited to us—one, *Parsons* v. *Birmingham Dairy Company* (9 Q. B. Div. 172), in which Field and Cave, JJ., not expressly, but inferentially, decided that sect. 14 applies to every purchaser, whether purchasing with the intention of obtaining an analysis or not; the other, *Guardians of Enniskillen* v. *Hilliard* (14 L. Rep. Ir., 214), in which Dowse, B. and Andrews, J. expressly dissented from that decision. I wish to say that I agree with the reasoning of the learned judges in the Irish case, and I entirely adopt the view of the Act expressed by them. It seems to me that to adopt the contention of the appellant in this case would be to largely restrict the operation of a salutary Act, and to exclude that class of cases of which the present is an example, where there is a contract for the delivering of provisions within the Act, which may extend over a considerable period of time, and also the class of cases in which provisions are purchased from time to time in small bulk without any suspicion at the time of purchase of any deceit being practised by the seller. I cannot think this is the true construction of the Act. The appeal will, therefore, be dismissed, with costs.

Appeal dismissed.

Solicitor for the appellant, *E. H. Wyles*, for *John Barker*, Grimsby.

Solicitors for the respondent, *Kime* and *Hammond*, for *Porter Wilson*, Louth.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Thursday, Dec. 19, 1895.

(Before WILLIAMS and KENNEDY, JJ.)

Re DURNFORD; *Ex parte* DURNFORD. (*a*.)

Bankruptcy—Discharge—Terms of order reconsidered—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 104.

A debtor, against whom an order had been made as a condition of his discharge that he should file an annual statement of accounts and set aside all income over 200*l. a year for his creditors, had endeavoured to obey the order, but had at the end of ten years been unable to produce anything substantial for his creditors, and now applied for an unconditional discharge.*

Held, that the discharge ought to be granted unconditionally subject to payment over of a small sum which was due under the existing order, as not only had the debtor earned his discharge free from conditions, but the interests of the State demanded it.

THIS was an appeal from the decision of the judge of the Halifax County Court. The debtor had formerly carried on business as a solicitor in Halifax, and in the year 1885 he was adjudicated bankrupt with liabilities amounting to 2000*l.*, the only creditors being the bankrupt's partner and his London agent. The official receiver had reported under sect. 8 of the Bankruptcy Act 1890, (*a*.) that the bankrupt had omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy; (*b*.) that the bankrupt had brought on his bankruptcy by rash and hazardous speculations; (*c*.) that the bankrupt had on a previous occasion made an arrangement with his creditors. On the 31st March 1886 the court granted the bankrupt his discharge upon the terms that he should file a proper statement of his accounts every year, and should pay over to the trustee in bankruptcy the whole of his income exceeding 200*l.* a year. The accounts had been duly filed, and the bankrupt had done all in his power to obey the order, but no substantial surplus had been shown until the present year. The bankrupt had now obtained the post of managing clerk to a firm of solicitors at a salary of 300*l.* a year, rising to 400*l.* a year.

The official receiver applied to the County Court for the payment to him of the sum of 17*l.*, being the amount due from the bankrupt under the above order down to the 31st March 1894. The Court made the order, and the bankrupt appealed.

Muir Mackenzie for the appellant.—The bankrupt has been sufficiently punished already; for ten years he has borne the burden of this order, and has done practically what he was told, and has worked hard to retrieve his position. The policy of the law is not to punish individuals, but to benefit creditors. He is quite unable to pay this sum any more, as he has a wife and children, and has had to keep up a certain appearance.

H. Sutton for the official receiver.—I am ready to submit to any order the court may think fit to make.

Cancellor, for a creditor.—The order ought to be supported. The interests of the creditors ought first to be considered. He referred to

Re Tobias, 64 L. T. Rep. 115; (1891) 1 Q. B. 463;
Re Bullen, 5 M. B. R. 243, C. A.

Mackenzie, in reply, cited

Re Inman, 6 L. T. Rep. 665.

WILLIAMS, J.—Ten years ago the debtor was subjected to this order, and since then he has been endeavouring to earn his living and to recover his position. He is entitled to our sympathy, as his conduct has been very creditable, but notwithstanding his efforts he has been unable to earn anything substantial over the 200*l.* a year. It is not to the interest of the State that a citizen should remain under a burden such as this. So far as the debtor is concerned there is no reason why this penal order should remain; but creditors have to be considered, and they must not, of course, be deprived of any substantial dividend that might come to them. But, though the debtor's position has improved, I still think that if we were to make any alteration in the amount which has been fixed, then any surplus that the bankrupt would be likely to earn would be too small to be of material advantage to the creditors. I am therefore of opinion that we should be acting in their best interests in making an order which the interests of the State demand, and the bankrupt has earned, and in granting to this man an unconditional discharge, subject to the payment

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

of the sum of 17*l.* within three months, and the costs of this application.

KENNEDY, J.—I agree.

Unconditional discharge granted.

Solicitor for the appellant, *Durnford.*

Solicitors for the respondent. *Eastwood* and *Champernowne.*

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

CROWN CASES RESERVED.

Saturday, Nov. 23, 1895.

(Before Lord RUSSELL, C.J., MATHEW, WILLIAMS, WRIGHT, and BRUCE, JJ.)

REG. *v.* JONES AND ANOTHER. (*a*)

Criminal law — Practice — Indictment — Act of indecency between two male persons — One person charged alone with committing act with another—Procuring commission of act of indecency—Male person charged with procuring commission of act with himself by another—Criminal Law Amendment Act 1885 (48 & 49 *Vict. c.* 69), *s.* 11.

It is not necessary in order to convict a male person under sect. 11 *of the Criminal Law Amendment Act* 1885, *of an act of gross indecency with another male person, that such other male person should also be charged with and convicted of such act of indecency.*

It is an indictable offence under sect. 11 *for one male person to procure the commission by a second male person of an act of gross indecency with himself the first mentioned of such persons.*

CASE stated for the opinion of the Court by Wills, J., as follows:—

Robert Jones and Harry Lewis Bowerbank were tried before me, at Exeter, on the 13th Nov. 1895, on an indictment containing the following counts:

1. That Robert Jones, on the 6th Sept. 1895, with force and arms at the parish of Littleham-cum-Exmouth, in the county of Devon, being a male person, unlawfully did commit an act of gross indecency with another male person to wit, Harry Lewis Bowerbank, against the form of the statute in such case made and provided.

2. That the said Harry Lewis Bowerbank, on the same day and in the year aforesaid, in the county aforesaid, with force and arms at the parish aforesaid, in the county aforesaid, being a male person, unlawfully did commit an act of gross indecency with another male person to wit, the said Robert Jones, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

3. That the said Robert Jones, on the same day in the year aforesaid, at the parish aforesaid, in the county aforesaid, being a male person, unlawfully did procure the commission by a male person to wit, the said Harry Lewis Bowerbank, of an act of gross indecency with another male person to wit, with him the said Robert Jones, against the form of the statute in such case made and provided.

Mr. Howland Roberts, the counsel for the prosecution, offered no evidence against Bowerbank, and a verdict of not guilty was returned in respect of the second count. The trial against Jones then proceeded. Bowerbank was called as a witness, and a general verdict of guilty was returned against Jones, who was sentenced to nine months imprisonment with hard labour, which he is now undergoing.

Mr. Foote, of counsel for the prisoner, took, at the close of the case for the prosecution, the following objections:

1. That the prisoners being charged and tried on the same indictment the jury could not, having acquitted Bowerbank on the second count, convict Jones on either the first or third count, the offences charged being joint, and requiring the participation of both prisoners in the act.

2. That the third count was bad, and should have been quashed or withdrawn from the jury, on the ground that it is not made by the act an indictable offence for one male person to procure the commission by a second male person of an act of indecency with himself the first of such male prisoners.

I was of opinion with regard to the first objection that the offence charged was not a joint one, and that it was quite possible in respect of such an indictment to have evidence which would establish the case against one defendant and not against the other, though the act constituting the crime might involve the participation of both.

As to the second objection I expressed no opinion, but reserved both points.

Judgment has been entered upon each count. As there were no merits in the objections, and the case was clearly established, I did not respite judgment.

The question for the Court is whether the conviction is to stand upon either the first or third count.

Sect. 11 of the Criminal Law Amendment Act 1885 enacts as follows:

Any male person who, in public or private, commits or is party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

No one appeared in support of, or against the conviction.

Lord RUSSELL, C.J.—Two questions appear to be made in this case. The first is raised upon the first count of the indictment, while the second question is raised upon the third count. The first count charges that Robert Jones in connection with whom this case is stated on the 6th Sept. 1895, being a male person, unlawfully did commit an act of gross indecency with another male person to wit, Harry Lewis Bowerbank. The objection taken by the learned counsel at the trial was that the two prisoners being charged and tried upon the same indictment, and Bowerbank, with whom the offence was alleged to have been committed having been acquitted, the prisoner Jones could not be convicted of an offence with Bowerbank. It does not appear, however, on the face of this indictment that the transaction or offence charged against Bowerbank in the second count of the indictment is the same as that alleged in the first count. The point is therefore reduced to this, that we are asked the question; Can a male person be charged of a gross act of indecency with another male person without that other person being charged in respect of such act as well? There is really nothing in the point,

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

and it seems to me that he can. The second point is raised on the third count, which charges that Jones did procure the commission with himself of a gross act of indecency by another male person, and the point is that upon a proper construction of the 11th section of the Criminal Law Amendment Act 1885, the procuration must be of the commission of an act by someone else, with someone other than the person charged. That does not seem to be the right construction of the section at all however. The section enacts that any male person who procures the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanour. Why should not the man charged with the offence himself be that other male person? The language of the section is equivalent to saying, "with the party charged, or some other person." There is no substance in either of the points raised by the case, and the conviction must therefore stand.

MATHEW, WILLIAMS, WRIGHT, and BRUCE, JJ., concurred.

Conviction affirmed.

Saturday, Nov. 23, 1895.

(Before Lord RUSSELL, C.J., MATHEW, WILLIAMS, WRIGHT, and BRUCE, JJ.)

REG. *v.* GAUNT. (*a*)

Criminal law—Common assault—Jurisdiction of justices to commit for trial—Proceedings not authorised by party aggrieved—Jurisdiction of grand jury to find true bill—24 & 25 *Vict. c.* 100, *s.* 46.

An indictment for a common assault may be preferred by a person other than the person aggrieved or someone on his behalf.

Where proceedings had been instituted before justices in respect of a common assault without the authority of the person assaulted, and the justices committed the defendant in such proceedings for trial under 24 & 25 *Vict. c.* 100, *s.* 46, *and a true bill was found by the grand jury:*

Held, that the grand jury had acted within its jurisdiction in finding a true bill, and that the defendant had been rightly put upon his trial pursuant to such finding.

CASE stated for the opinion of the court by the Deputy-Chairman of the Huntingdon Quarter Sessions as follows:—

At the General Quarter Sessions of the Peace in and for the county of Huntingdon held at Huntingdon on the 15th Oct. 1895, Thomas Gaunt was tried and convicted upon an indictment of which the following is a copy:

County of Huntingdon (to wit).—The jurors for our Lady the Queen, upon their oath, present that Thomas Gaunt, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-five, in and upon one Victor Grantley did make an assault, and him, the said Victor Grantley, did then beat, wound, and ill-treat, and other wrongs to the said Victor Grantley then did to the great damage of the said Victor Grantley, against the peace of our Sovereign Lady the Queen, her Crown and dignity.

On the prisoner being asked to plead he declined to do so on the advice of his counsel, who moved to quash the indictment, and contended that the court had no jurisdiction to try the indictment upon the ground that the proceedings before the justices in petty sessions had not been taken by or on behalf of Victor Grantley, or by his authority, and that an indictment for a common assault could only be preferred by the person aggrieved, or by someone on his behalf.

It appeared that on the 19th Aug. the prosecutor, from information that an assault had been committed upon Victor Grantley, caused Victor Grantley to be medically examined. The following is a copy of the medical certificate:

I hereby certify that I have this day, in company with Sergeant Griffin, examined an idiot youth at the residence of Mr. Thomas Gaunt. I find the youth well nourished, clean and free from bruises or excoriations on the limbs and trunk. He has, however, a couple of black eyes, the bruises evidently having been inflicted three or four days ago, and which he accounts for by a fall out of his carriage. This story is quite consistent with the appearance and situation of the bruises.—D. MCBITCHIE, M.B.—Aug. 19, 1895.

On the 21st Aug, 1895 the following information was laid by James Griffin, a police-sergeant of the county of Huntingdon:

Borough of Huntingdon (to wit).—The information of James Griffin of Huntingdon, in the county of Huntingdon, sergeant of police, by and on behalf of Victor Grantley, taken this 21st day of August 1895, before the undersigned, one of Her Majesty's justices of the peace, acting at Huntingdon, in and for the said borough, who saith that one Thomas Gaunt, of the parish of Saint Mary, in the said borough, on the 16th day of August instant, at the parish aforesaid, did unlawfully assault and beat one Victor Grantley, of the said parish, contrary to the statute in such case made and provided. — Taken before me (Signed) GEORGE THACKRAY.—(Signed) JAMES GRIFFIN.

Upon this information a summons was issued under 24 & 25 Vict. c. 100, s. 42, and duly served on the defendant.

At the hearing of the information on the 29th Aug. the defendant appeared, and, after hearing the evidence both on the part of the informant and of the defendant, the said Victor Grantley being called on behalf of the defendant, the justices committed the defendant for trial under the 46th section of 24 & 25 Vict. c. 100, on the ground that the assault was a fit subject for a prosecution by indictment.

On behalf of the defendant it was contended that, as Victor Grantley was over the age of fourteen years, which was proved, and had not authorised the said James Griffin to institute proceedings before the justices on his behalf, that the justices had no jurisdiction whatever either to convict or to send for trial, and that the bill of indictment found by the grand jury ought to be quashed, and counsel quoted the case of *Nicholson v. Booth* (57 L. J. 43, M. C.).

It appeared at petty sessions, and also during the trial that, Victor Grantley was not an idiot or a person of defective mind, but was paralysed in the lower part of his body, and was also subject to epileptic fits; but he was called and examined as a witness on behalf of the defendant. I declined to quash the indictment, being of opinion that, as the indictment had been found by the grand jury, it was the duty of the court to proceed with the trial. A plea of not guilty was entered, and the defendant was convicted.

I desire the opinion of the court as to whether

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

the objection taken by the defendant's counsel was valid; if so, the conviction is to be set aside, otherwise to stand.

By sect. 42 of 24 & 25 Vict. c. 100, it is enacted that,

Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence.

Sect. 46 enacts:

Provided, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is for any other circumstance a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same.

J. W. Cooper, on behalf of the defendant, submitted that it was only upon the information of the party aggrieved or someone acting on his behalf, that the magistrates could act under 24 & 25 Vict. c. 100, s. 46, and that no such information having been laid in the present case, the magistrates were wrong in committing for trial. That the committal for trial was therefore bad, and all subsequent proceedings were also bad, being founded upon the committal by the magistrates.

No one appeared in support of the conviction.

Lord RUSSELL, C.J.—This is an application to quash an indictment which has been regularly found by the grand jury attending the Quarter Sessions of Huntingdonshire. As far as I have been able to follow the argument it is of this nature: It is said that this is a case in which a charge of assault is preferred; and that therefore the charge must be preferred by or on behalf of the person aggrieved under 24 & 25 Vict. c. 100, s. 42; that the charge in this case was not in fact preferred by or on behalf of the party aggrieved, and therefore the magistrates were wrong in sending the defendant for trial. Now, even if that were so, a true bill of indictment has been found by the grand jury upon evidence which was satisfactory to them; and the offence not being an offence within the Vexatious Indictments Act, what took place before the magistrates may be left entirely out of the question. The case which was cited before the quarter sessions is no authority upon the present case; and on the short grounds I have stated it seems to me the conviction must stand.

MATHEW, WILLIAMS, WRIGHT, and BRUCE, JJ., concurred.

Conviction affirmed.

Solicitors for the defendant, *Hunnybun* and *Son*, of Huntingdon.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 16 *and* 17, 1895.

(Before LINDLEY, SMITH, and RIGBY, L.JJ.)

Re THE EARL OF STRAFFORD AND MAPLES. (a)

APPEAL FROM THE CHANCERY DIVISION.

Settled land — Sale by limited owner — Improvement rentcharge—Release of rentcharge—Exoneration of part of settled land—Consent of incumbrancers — Power of tenant for life — Improvement of Land Act 1864 (27 *& 28 Vict. c.* 114), *ss.* 15, 68, 69; *Settled Land Act* 1882 (45 *& 46 Vict. c.* 38), *ss.* 5, 30.

The tenant for life of settled land, which was subject to an improvement rentcharge, created under the Improvement of Land Act 1864, *agreed to sell, under the powers conferred upon him by the Settled Land Act* 1882, *a portion of the settled land free from incumbrances. The vendor and the incumbrancers undertook to execute a deed of exoneration of the charge under sect.* 5 *of the Act of* 1882, *but the purchasers required the consent of the Board of Agriculture (the successors of the Land Commissioners) as provided for by sects.* 68 *and* 69 *of the Act of* 1864.

Held, that there was nothing in sect. 5 *of the Act of* 1882 *which was inconsistent with sect.* 68 *of the Act of* 1864; *that the objection of the purchasers had been fully met; and that a good title had been shown.*

Decision of Kekewich, J. (ante, *p.* 440) *reversed.*

ON the 4th June 1895 the Earl of Strafford, tenant for life of the Wrotham Park estate, in Middlesex, consisting of about 4533 acres, entered into an agreement, under the powers conferred upon him by the Settled Land Act 1882, with F. Maples and others for the sale to them of a part of the estate, consisting of about 34 acres, free from incumbrances, subject to a certain tenancy.

The whole of the Wrotham Park estate, and the fee simple thereof, had by an absolute order, dated the 11th Feb. 1886, under the hands and seals of the Land Commissioners, in pursuance of the Improvement of Land Act 1864 (27 & 28 Vict. c. 114), been charged with the payment to R. Arkwright and others of the annual sum of 1265*l.*, payable half-yearly, for the term of twenty-five years, being a proportionate repayment of the capital sum of 22,147*l.* with interest. No part of the rentcharge was ever apportioned to the premises agreed to be sold, nor had they been released from the charge.

On the 11th June 1895 the vendor submitted to the purchasers a draft deed of exoneration of the premises agreed to be sold of the above charge, which deed the incumbrancers had covenanted to join in the vendor in executing.

The purchasers took the objection that, the rentcharge having been created under the Improvement of Land Act 1864, a release of any part of the hereditaments thereby charged must be effected in manner expressly provided by that Act, and in particular by sects. 68 and 69.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Those sections provide that, if the owner of land charged under the Act is desirous of selling a part of such land, the commissioners (now represented by the Board of Agriculture) may, as therein set out, release from such charge any part of the land, every such release to be made by an order under the hands and seals of the commissioners.

The purchasers, therefore, contended that without the consent of the Board of Agriculture the proposed deed of exoneration would not be an effectual release of the property sold under the Act of 1864, or the Settled Land Act 1882, or otherwise.

The vendor declined to apply to the Board of Agriculture, and alleged that on the execution of the deed of exoneration the premises sold would be released from the charge without the sanction of the board by virtue of the provisions contained in sect. 5 of the Settled Land Act 1882.

The purchasers refused to complete. Thereupon the vendor took out a summons, under the Vendor and Purchaser Act 1874, asking for a declaration that upon the execution of the deed of exoneration, without the consent of the Board of Agriculture being obtained, a good title had been shown to the premises in accordance with the terms of the contract of sale.

The summons was adjourned into court, and came on to be heard before Kekewich, J. on the 31st Oct. and the 1st Nov. 1895, when his Lordship decided (73 L. T. Rep. 440) that, although the Settled Land Act 1882, s. 5, had given large powers to limited owners, it had not impliedly repealed or overruled the provisions of sect. 68 of the Improvement of Land Act 1864; that the purchasers' objection was valid, and their requisition had not been satisfactorily answered; and that, therefore, the consent of the Board of Agriculture must be obtained to the proposed deed.

From that decision the vendor now appealed.

Bramwell Davis, Q.C. and *Pattisson* (with them *F. E. Farrer*) for the appellant.—There is no substance in the objection taken by the purchasers in this case; it is purely a conveyancer's objection. Sect. 68 of the Improvement of Land Act 1864, upon which the purchasers rely, is permissive merely, and not imperative. The word "may" is used. The section empowers the commissioners to release or apportion against the will of the incumbrancers; if their consent is obtained as here, application to the commissioners is unnecessary. In the state of the law at the time of the passing of the Act of 1864, it was necessary to provide some authority (the tenant for life having none) to enable the incumbrancers on a release of a part of the land charged to recover the whole amount out of the unreleased land:

> Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 10: *Booth* v. *Smith*, 51 L. T. Rep. 742; 14 Q. B. Div. 318.

This is the object of sect. 68, as is shown by sect. 70 of the Act of 1864, which provides that every charge which is released shall be recoverable out of the lands which shall not by the order of release be released therefrom. Its object is not to prevent an incumbrancer releasing if he chooses by deed, and taking the consequences of that release. [They also referred to sects. 15, 25-28, 49-60, and 65, 66, 67 of the Act of 1864.] The vendor and the incumbrancers are enabled, by virtue of sect. 5 of the Settled Land Act 1882, to release the land by their proposed deed: (Key & Elphinstone's Conveyancing, edit. 4, vol. 2, p. 688, note *a*.) The matter has not been considered in many cases, but there is one case in which it was decided that a charge such as this was shifted under the powers conferred by the Settled Land Act 1882, s. 5:

> *Re Howard's Settled Estates*, 67 L. T. Rep. 156; (1892) 2 Ch. 233, 236.

Warrington, Q.C. and *Medd* for the respondents.—The real question which the court has to determine is that one, and that one alone, which was dealt with by Kekewich, J., namely, whether sect. 5 of the Settled Land Act 1882 has any application to a case like the present. The court has not to decide a question of an absolute release of an incumbrance under sect. 5 of the Act of 1882, but whether a statutory charge created by the Land Commissioners themselves, and subject to the statutory regulations of the Act of 1864, can be released without the consent of the Board of Agriculture, who are the successors of those commissioners. Sect. 15 of the Act of 1864 provides that, if the commissioners shall think fit to entertain an application to sanction proposed improvements, they may cause the land to be inspected and examined by an assistant commissioner, or a surveyor, or engineer, who is to examine the proposals contained in the application and report as to whether in his opinion the proposed improvements will effect a permanent increase of the yearly value of the land exceeding the yearly amount proposed to be charged thereon, and that such other inquiries may be made as the commissioners may think fit. Sect. 25 provides that, if the commissioners find the proposed improvements, or any part thereof, with or without any alterations required by them, will effect such increase in yearly value, they shall sanction such improvements or such part thereof as they shall think expedient. The release or apportionment of charges so created are carefully hedged in with restrictions by the Act which must be observed. Then there is the provision in sect. 68, that no lands shall in consequence of release or apportionment be charged with any greater amount than that to which in the opinion of the commissioners they have been durably benefited. Without the sanction of the commissioners the successors of the incumbrancers would not have notice of the release, for it would not be registered under sect. 69. They would therefore not be bound. The restrictions placed by the Act of 1864 upon the powers of limited owners and incumbrancers have not been repealed by sect. 5 of the Settled Land Act 1882. Sect. 30 of that Act specifically recognises the existence and extends the powers of the Act of 1864. Moreover, under sect. 16 of the Tithe Act 1842, which is incorporated by the Improvement of Land Act 1864, and which provides a remedy for enforcing payment of a contribution to a rentcharge, the purchasers may be called upon to contribute to the payment of the present charge by the owners of the unsold land unless the charge is properly released. We submit, therefore, that this charge cannot be released without the sanction of the Board of Agriculture.

Bramwell Davis, Q.C. replied, at the desire of the Court, on the point raised concerning sect. 16

of the Tithe Act 1842. He referred also to the Tithe Act 1891.

LINDLEY, L.J.—This is an appeal from a decision of Kekewich, J., by which on a vendor and purchaser summons, he being of opinion that the execution of the draft deed of release, to which I will presently refer, would not release the hereditaments comprised in the contract from the charge mentioned in the draft, declared that the respondents' requisitions had not been sufficiently answered. That means that a certain objection taken by the purchasers of some land which has been sold is a good objection. The case stands thus: It appears that in 1886, by an order made under the Improvement of Land Act of 1864, by the commissioners who were appointed by that Act, a certain annual rentcharge was charged on property belonging to the Earl of Strafford. The amount of that rentcharge was considerable, 1200*l.* odd, and the property charged with it was large. In 1895 the Earl of Strafford contracted to sell thirty-four acres, being a portion of the land charged with that improvement rentcharge to purchasers. He purported to be able to convey the land so agreed to be sold free from this improvement rentcharge, and he purported to do that under sect. 5 of the Settled Land Act 1882, to which I will call attention presently. The purchasers' objection is, that the vendor cannot make them a good title to the thirty-four acres charged with this improvement land charge without the approval of the Land Improvement Commissioners, now the Board of Agriculture. That is the substantial objection. The objection was a serious one, and it was in effect that sect. 5 of the Settled Land Act 1882 did not enable a tenant for life alone to sell land freed from such improvement rentcharge. The vendor took the opposite view, and a summons was issued which came on before Kekewich, J., and he held that the objection was a good one—in other words, that the tenant for life was not able to make a good title to part of a larger portion of land which is subject to an improvement rentcharge under the Act of 1864. First of all I will refer to the Settled Land Act 1882. Sect. 5, on which this case to some extent turns, runs in this way: "Where on a sale" (I leave out some words) "there is an incumbrance affecting land sold . . . the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold . . . and by conveyance of the fee simple or other estate . . . make provision accordingly." According to the language of that section, on a sale a tenant for life of settled land may, with the consent of the incumbrancer, charge that incumbrance on any other part of the settled land in exoneration of the part sold. Now that is an additional power given to the tenant for life who has power under sect. 3 of the same Act to sell the settled land. We all know that one of the main objects of the Settled Land Act 1882 was to facilitate sales of land, and it gave a tenant for life enormous powers, and amongst others the power to sell land of which he was only tenant for life, notwithstanding the subsequent limitations. It was felt that there might be a difficulty about incumbrances, so it was enacted by sect. 5 that the tenant for life might do that which I have just mentioned. Nothing can be clearer than the language which occurs in sect. 5 of the Settled Land Act 1882, and I think it lies on anyone who says that that section does not mean what the words apparently do mean, to show to what extent, if any, those words ought to be restricted. The purchasers say here that a rentcharge created under the provisions of the Land Improvement Act 1864 is not an incumbrance within sect. 5 of the Settled Land Act 1882. Why is it not? The reason that is alleged is, that if you look at the Land Improvement Act 1864 you will find that these charges are made charges by the statutory commissioners, whose duty it is to consider the interest of everybody whose property is charged, and who have power to consider all the circumstances. Reference is made to sect. 68, and it is said that whenever a rentcharge has to be apportioned it can only be done by the commissioners, subject to the conditions therein referred to. The question really turns more upon sect. 68 than any other section, and I will refer to that without going through or referring to the various sections that have been read, and which I do not think it necessary to deal with. I will notice the argument on the Tithe Act by-and-by. Sect. 68 assumes the existence of a statutory rentcharge created under the earlier sections of the Act, and it provides that if at any time the owner of land charged under the Act is desirous of selling or disposing of such land, and in certain other events therein specified, the Inclosure Commissioners—now, as I have already pointed out, the Board of Agriculture—"may," with the consent of the landowner, and with due notice to the grantee of the charge and other parties as therein set out, either release from such charge any part of the land charged therewith, or apportion such charge so that a separate and distinct charge may become charged on the part which the landowner is desirous of selling or disposing of, and the part intended to be retained by him, or on any other separate parts of the land. This is what the commissioners may do: They may either release from the charge any part of the land charged, or they may apportion such charge. Then there follows this proviso: "Provided that no lands shall in consequence of any such apportionment or release become charged with any greater amount than that to which in the opinion of the commissioners they have been durably benefited by the improvements in respect of which such charge was created." Then comes sect. 69, which provides that every such apportionment or release—that is, every such apportionment or release made by the commissioners—is to be made by an order under the hands and seal of the commissioners, and registered as therein mentioned. Let us consider what that section does. It says nothing at all about what the owner of the incumbrance can do himself. The owner of the statutory rentcharge is the owner of the incumbrance, and, if he deems fit, one cannot see why he should not release it. There is nothing there to prevent him from doing so, or to prevent him from releasing part of the land charged if he chooses to take the consequences. One of those consequences might be that, by releasing part of the land, he might release the whole, and he might, I suppose, if he chose, release the whole. Under Lord St. Leonards' Act (22 & 23 Vict. c. 35) the land might be apportioned, but if the incumbrancer chooses to release the whole, there

is nothing against it. The object of sect. 68 is not to fetter the owner of the charge, but to confer on the commissioners powers which, but for that section, they would not have had at all, and which powers, be it observed, can be exercised adversely to the persons interested in the estate. The duty is intrusted to the commissioners to look after the interests of those who have charges. The proviso to the section is all-important. If the commissioners are exercising their powers, then they are to take care that no lands shall, in consequence of any apportionment or release made by them, become charged with any greater amount that that for which, in the opinion of the commissioners, the lands have received benefit. The owner of the rentcharge could not throw on the land which he chose to release the whole of the rentcharge which was charged on the land released, and on the land not released. Of course, he could not do that by himself. That could only be done with the consent of those who are interested in the whole of the land charged. The commissioners, however, can do that, and that is a very important thing. Now let us pass from that section, and let us see what there is in that section inconsistent with sect. 5 of the Settled Land Act 1882. I cannot myself see anything. I do not see what there is in the power given to the commissioners inconsistent with the subsequent legislation giving a tenant for life power to sell land free from incumbrances. Why should he not do so with the consent of the incumbrancers? He cannot do what the commissioners can do; that is another matter. But when you come to apply sect. 5 of the Settled Land Act 1882 to these lands, you find that, upon the sale, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold. I do not mean to say that the tenant for life can give a statutory charge to take priority over all other charges. If the incumbrancer chooses to take the charge, he will take it as an ordinary charge, subject to priorities and everything else. That would be quite another matter. It does not concern anyone but the incumbrancer. If he chooses to consent it can be done, but if he does not consent it cannot be done by the tenant for life. Now, it is said that there is something in the Settled Land Act 1882 which is inconsistent with that, and reference is made to sect. 30. As I read that section it merely enlarges the improvements which can be made under the Act of 1864 without referring to sect. 5 of the Settled Land Act 1882—that is to say, there are two methods of improving lands: One under the Act of 1864 through the medium of the commissioners, now the Board of Agriculture. Their powers are increased by sect. 30, and that section does not refer to sect. 5 at all. Nor is there any valid argument deducible from the repealing section of the Act. There are certain sections of the Act of 1864 modified by that repealing section and the schedule; but there is nothing there to curtail the power given by the tenant for life. And it appears to me that, if we were to deny to the tenant for life the power to release the land under sect. 5, we should be doing that which is the last thing the Legislature contemplated. We should be hampering the tenant for life who exercised that power of sale, which is given to him by sect. 3, and which is the cardinal power given by the Settled Land Act 1882. Now, Mr. Medd has made a point which I thought was entitled to some attention. He says that the purchasers will not be safe in completing the purchase with such a deed of release as is tendered to them, because, he says, they may be called on to contribute to the payment of this rentcharge by the owners of the unsold land. He refers to sect. 16 of the Tithe Act of 1842, which, he says, and says truly, is incorporated by the Act of 1864. When you look at the Tithe Act 1842 it does not assist his argument at all. You have two things that are both subject to the tithe-rentcharge. The case will not arise. It seems to me that Mr. Medd's clients have a perfectly good titte discharged from the whole of this statutory rentcharge. The release is effected with the consent of the owner of that rentcharge; and the point that Mr. Warrington put, that, notwithstanding this conveyance, the owner of the rentcharge could come down on the land, seems to me utterly untenable. It is very true that the draft does not contain any express words of release by the owner of the rentcharge. If that was all, I do not think we should have had any summons, or, indeed, any appeal. That is not the point. The point is this: If the parties chose to execute a deed in that form, which they are content to do, would the purchasers have run this inconceivable risk? It seems to me that they would have a perfectly clear and good title to the lands they have agreed to purchase perfectly discharged and not affected. I think, therefore, that the appeal must be allowed with costs.

SMITH, L.J.—I agree. I have nothing to add.

RIGBY, L.J.—In deference to the opinion of the learned judge in the court below, although I should otherwise be content to rely entirely on the judgment which has just been delivered by Lindley, L.J., I should like to add a few observations. The Act of 1864 was a very beneficial one, enabling limited owners to charge the lands of which they were limited owners with rentcharges for specified improvements. Of course that proceeding was effectually safe-guarded, and the course adopted was to create a jurisdiction in the commissioners—now represented by the Board of Agriculture—who were to see that the improvements were improvements such as would enhance the value of the estate and the lands charged. Therefore all persons interested, including incumbrancers, would understand exactly the value of the improvements before they sanctioned the rentcharge. Passing over the other sections of the Act which appear to me immaterial, or not sufficiently material to require separate consideration, it appears that the Legislature thought that a rentcharge of that kind, extending over, it may be, a large property, might seriously hamper owners of lands in dealing with their properties, and sect. 68, as I understand it, makes the commissioners—now, as I have observed, represented by the Board of Agriculture—the tribunal for redressing any undue interference with the owners of lands in dealing with their estates. It enables them, on the application of an owner in specified cases—one being where the owner is desirous of selling a portion of the land—to reconsider the position of things and inquire whether it is neces-

sary that the whole of the rentcharge should remain charged, as it is by the absolute order made in the first instance. If they find that, consistently with the interests of the owner of the rentcharge and the other persons concerned, they may release a portion, they have jurisdiction to do so. It is a jurisdiction carefully hedged about no doubt, but still a jurisdiction which they can exercise *in invitum* notwithstanding the resistance of the owner of the rentcharge, and notwithstanding, as I read the section, the resistance of other persons interested on the ground that no harm would be done them. They may apportion the rentcharge, or they may release a portion of the land from it and charge the whole on the other part of the property, although the property may have gone into different hands since the creation of the rentcharge. One portion, as the section itself contemplates, may be in the ownership of one person or one set of persons, and others may have got into different ownerships. Obviously the very reasonable, and obviously the very necessary, thing is, that in what they do as a tribunal of reference to act between the parties whether they consent or not is that they shall be limited in this way substantially, so that they are not to throw on any one part of the property a greater burden than corresponds to the benefit which is derived by that part of the property. Sect. 69 is merely directory—stating how the matter is to be carried into effect. I do not think for a moment that sect. 68 interferes with that liberty which the owners of a rentcharge under the Act had in common with all other owners of property dealing with their own property — of course, not with anyone else's—as they think fit. And in argument it was found impossible to press the matter so far as to say that, if you have an owner of the land, a fee simple owner of the land, or persons making up the fee simple on the one side and the owner of the rentcharge on the other, they might not agree as they pleased. That involves this, that the owner of the rentcharge may, if he thinks fit, release his charge without going to the tribunal appointed by the Board of Agriculture. It entitles him to do that which his power of ownership alone is sufficient to enable him to effect, and if he cannot release the whole charge he may release part. I do not mean to say that he can affect the interests of parties who do not consent and whose interests may be affected. I do not mean to say that he can increase the burden imposed on any part of the land. But I take it that it is clear that he can release, notwithstanding any of the provisions of the Act of 1864, any part of the lands from his rentcharge. Then, if he can do that of his own free will, he may do it when he is asked to do it by a person who has power to sell lands on the occasion of a sale. Now, when we come to the Settled Land Act 1882, what do we find to be the scheme of that Act, speaking generally. It was an Act of great boldness and of great scope. But I think that the provisions of it, when carefully considered, do point to this, that a tenant for life (or the persons having the powers of a tenant for life under the Act) is for certain most important purposes to have a power as extensive as that which an owner in fee simple has. He may sell the land. If he can do that, an owner in fee simple can do no more. It by no means follows that he can be converted into an owner in fee simple by the Act. He is not, but he can sell the land, and by the Act provision is made for securing the purchase money for the benefit of those who are beneficially entitled under the settlement. When the Legislature have got so far as that; when they have made him for the purposes of the sale as capable of disposing of the whole of the property as if he were the owner in fee simple of it, then you find, as we do in sect. 5, a provision that he may, with the consent of the incumbrancers, in any case make an arrangement for releasing the part sold free from the incumbrances, and may always, with the consent of the incumbrancers, do that in exoneration of the property that remains unsold. I ask myself why should he be treated as having a less power for that purpose than if he were the owner in fee simple? And I can see no answer to that except that he should have all those powers just as he had the entire power of sale. The question now is, whether there is anything in the Act of 1864 that prevents that *primâ facie* application of sect. 5 of the Settled Land Act 1882, which the words certainly seem to force upon us. It appears to me that that question is already answered by the consideration that under the Act of 1864 itself the incumbrancers may, if they choose, release any part of the property charged. By saying this I do not mean for a moment to assert that by releasing one portion of the property they could, or that they, in conjunction with the landowner could, make an additional charge in the nature of a rentcharge under the Act of 1864 with all its advantages and priorities over the other lands. But it appears to me that they do not lose that portion which is already charged. It is for them to consider in any case whether they have not got a sufficient security already on the parts which remain unsold, and whether, with the assistance of the tenant for life selling under the powers of the Settled Land Act 1882, they may not have that supplemented so far as to make it a perfectly satisfactory security. Of course, if there is any doubt on those facts, the incumbrancers will take very good care not to consent. They cannot be obliged to consent. The Act never intended that they should be obliged to consent. If they do not consent, the only result will be that possibly there will be a sale of land subject to the rentcharge, or such portions as may be available, or the vendor will be driven to go to the Board of Agriculture in a proper case, and ask them to exercise the powers given to them by sect. 68. The owners of the rentcharge, seeing their way to a sufficient security for themselves consenting to release the lands if sold, I can see no reason why they should not be allowed to do it. Sect. 30 of the Settled Land Act 1882 somewhat extends the powers of the Act of 1864, and so far as my attention has been called to the matter it in no way repeals any part of that Act. The very fact that the Legislature had in mind, while passing the Act of 1882, the fact that there was a method of creating rentcharges upon land by limited owners by the intervention of the Board of Agriculture, rather leads me to the conclusion that, when by sect. 5 they did not make any exception with regard to the Act brought to their attention, they did not mean to do so, so far as any argument can be drawn from the absence of it. Now here we have the simple question, have the owners of this rentcharge released the land

proposed to be sold from the rentcharge? We have no question to consider as to the effect of that release. I think it is plain from the Act that, as regards persons beneficially entitled under the settlement, the tenant for life can give a charge on the properties which remain unsold. Whether it goes further, or not, is not a matter that has now to be determined. It would be difficult, perhaps, to establish whether it does go further. But that is a question for the consideration of the incumbrancers, and for their consideration alone. When we have the fact that they are prepared to execute a deed for the purpose of exonerating the property that is being sold, I say that that will effectually release the land, just as much as if it was done outside the court altogether on any occasion agreed upon between the owners of the land charged and the owners of the rentcharge. They can release, and by such agreement they do release. With regard to Mr. Medd's point about contribution, to my mind that would be a very good point if the first one were established that there was no effectual release. But then it would not be wanted. If there is no effectual release the land is charged, and that is enough. If there is an effectual release there can be no right to contribution, because that right only exists between the owners of land subject to a common charge, and therefore each in equity is entitled to contribution. The Tithe Act 1842 gave a summary remedy for a contribution in the case of those persons who had paid the whole amount of a tithe-rentcharge, or a greater proportion than their lands ought properly to bear—in fact, giving the same remedy against others as the tithe-owner himself would have had. But that would not enable any of them to get contribution from a person whose lands were not subject to the tithe-rentcharge. Nor need any action of that sort be apprehended here, if we are correct in holding that there is a release of the lands sold under this statutory provision. I think that the objection on the part of the purchasers is fully met, and that a good title so far as this matter is concerned is made. That being the only point that, indeed, has or could be made, I think that the decision of Kekewich, J. is wrong, and that this appeal ought to be allowed, and with costs.

Appeal allowed.

Solicitors for the appellant, *Farrer* and *Co.*

Solicitors for the respondent, *Valpy, Chaplin,* and *Peckham.*

Dec. 9, 10, *and* 16, 1895.

(Before Lindley, Smith, and Rigby, L.JJ.)

Harbin *v.* Masterman. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Administration—Annuity—Distribution of residue—Jurisdiction—Provision for annuity—Opposition by annuitant—Solicitor—Useless appeal—Costs—Order LXV., r. 11.

Where ample provision is made for the payment of an annuity which is given by the will of a testator, the court in the administration of the estate has jurisdiction, which it has for a long time uniformly exercised, to order the residue of the estate to be distributed among the residuary legatees; and this course will be adopted even in a case where the annuitant opposes.

Decision of Stirling, J. affirmed.

The solicitor of an appellant was ordered, under Order LXV., r. 11, *to indemnify his client against the costs of an appeal which, in the opinion of the court, was not prosecuted in the interests of the client, but for the solicitor's own purposes.*

John Francis Duncan by his will, dated the 5th July 1860, after making certain dispositions not material to be mentioned, bequeathed all the residue of his personal estate to trustees upon trust that they should either permit the moneys, stocks, funds, and securities constituting the same, to remain in their then state of investment, or to vary them, and to pay certain annuities therein mentioned. The testator then directed that in case the annual income of the trust funds should not be sufficient for the payment of the whole amount of the annuities in any year, the trustees, when and so often as the same should happen, should apportion the deficiency between and amongst the annuitants according to the amount of their respective annuities, and so as that the same should rateably abate accordingly. The testator then directed that the trustees should, in every year after his decease, invest the surplus income, if any, of the trust funds whether such surplus should arise from the falling in or determination of any annuity or annuities therein-before given or otherwise, and from and after the decease of the survivor of the annuitants should sell, dispose of, and convert into money all such part of the trust funds (and the accumulations thereof respectively as should not actually consist of cash), and stand possessed of the moneys to arise from such sale, disposition, and conversion, and also of such part of the trust funds and the accumulations thereof respectively as should not consist of actual cash,

In trust to pay and divide the same into the several public charities hereinafter named, according to the amount set opposite their respective names; that is to say, to the treasurer for the time being of an institution known by the name of the London Orphan Asylum, for the reception and education of destitute orphans, established in London, 100*l.*; to the Public Dispensary, Carey-street, near Lincoln's-inn, 100*l.*; to the Royal Free Hospital, Gray's-inn-road, 100*l.*; to the King's College Hospital, Carey-street, Lincoln's-inn, 100*l.*; and to an institution called [here followed a blank in the will], under the patronage of the late Lord Mayor of London, Alderman Wire, the sum of 100*l.* for the benefit of persons afflicted with paralysis.

The testator died in Jan. 1865.

In April 1865 a bill was filed by his executors for the administration of his estate.

The suit came on upon further consideration before Wickens, V.C. on the 12th and 14th July 1871, when the learned Vice-Chancellor, without deciding as to the future rights of anyone to the accumulations, decided (25 L. T. Rep. 200; L. Rep. 12 Eq. 559) that the charities were entitled to the whole of the surplus in equal shares, but that the accumulations, as directed by the will, must continue until further order.

A petition was subsequently presented by the next of kin of the testator, asking whether they were entitled to the accumulations which had arisen since the expiration of twenty-one years from the death of the testator, and if so, whether

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

they were entitled to require immediate payment thereof.

It was decided by Stirling, J. (and his decision was affirmed by the Court of Appeal, and ultimately by the House of Lords, 72 L. T. Rep. 431; (1895) A. C. 186), that the charities, not the next of kin, were entitled to the whole of the accumulations of income, and to have the accumulations stopped, and to be paid the surplus income of each year as it accrued.

By an order made at chambers on the 9th June 1894, upon the application of one of the charities, all the annuitants except one—Mrs. Venables, entitled to an annuity of 150*l.*—by their solicitors consenting to accept the provision made by the order for their respective annuities in full satisfaction thereof, and the charities by their solicitors also consenting, it was ordered that the funds in court should be dealt with as directed in the schedule to the order, but that when any of the annuities provided for in such schedules should fall in, regard was to be had in apportioning the entire funds on such accounts respectively not only to the directions contained in the order of the 12th July 1871 as to apportionment, but also to the fact that the funds carried over by this order were wholly derived from pure personalty; and by the schedule certain funds were carried over to the account of the several annuitants.

The charities then petitioned for the payment of the funds in court to them, other than the sums set apart to answer the annuities. Mrs. Venables alone opposed on the ground that the whole of the funds ought to remain in court during her life.

In June 1895 the petition came on to be heard before Stirling, J., and on the 18th June his Lordship delivered the following considered judgment:

STIRLING, J.—This is a petition asking that certain funds in court to the credit of the action to the account of the residuary legatees may be paid out to the residuary legatees—putting it shortly. The question arises as to whether any and what proportion of those funds ought to be paid out. It is conceded on all hands that a portion of them ought to be paid out, namely, that portion which has arisen from accumulations, pursuant to an order of the court to which I will call attention presently. But it is said that no further portion ought to be paid out having regard to the rights of the annuitants under the will of the testator whose estate is being administered in this action. Now the will is one which has been before the court on more than one occasion, and has been construed by the court, and the construction which has been put upon it is embodied in formal declarations. [His Lordship read and commented on the material provisions of the will, and continued:] Now, it was decided in the year 1871 by Wickens, V.C. that, according to the true construction of the will of the testator, the bequest of the residuary estate therein contained operated as a trust in favour of the five charities named, and that subject to certain declarations mentioned in the order the five charities were entitled to the residue of the testator's personal estate. Previous to that, by an order made by Stuart, V.C., the fund had been carried over in the suit to answer the several annuities. These were sums of consols that were carried over to separate accounts to insure the annuities. Wickens, V.C. was of opinion that, although the annuities were as matters then stood amply provided for, he was not at liberty to pay out the fund. In his judgment, which is reported in 25 L. T. Rep. 200; L. Rep. 12 Eq. 559, 564, he says: "As regards the pure personalty and the accumulations, I hold that they were well given to the five charities equally. But having regard to the frame of the will, though the annuities are amply secured, I do not think that I can order a division of the fund at present. If the residuary legatees were five individuals I should probably do so, there being nothing in the Thellusson Act to prevent it. But the legatees being charities, am I entitled to stop the accumulations?" Then he held that the proper course was not to stop the accumulations, but to direct accumulation until further order. Accordingly it was ordered that the ultimate residue of certain bank dividends, or the residue thereof prior to the carrying over, should be carried over to the account of the residuary legatees, and that the cash so to be carried over should be invested in like securities, and all accumulations of interest should be laid out in like manner until further order. That order was made in 1871. At that time the next of kin of the testator had been found. He was entitled to certain impure personalty which did not pass by reason of the Statute of Mortmain to the residuary legatees, and it was held that the Crown was entitled to the residue so far as it consisted of proceeds of real estate, or was otherwise connected with an interest in land. That proportion of the fund was paid out to the Crown. Subsequently the next of kin of the testator were found, and they by means of a petition of right have recovered from the Crown the fund which was paid over under the order of 1871. So matters went on until the expiration of twenty-one years from the death of the testator, and then in the year 1893 a petition was presented which came before me, and upon which an order was made, dated the 9th Dec. 1893, still further construing the will. The operative part of the order is this: [His Lordship read it and continued:] That order was affirmed by the Court of Appeal, and also by the House of Lords. The present petition is presented in consequence of that order. As I have already said, it is not disputed that so much of the fund in court as consists of accumulations within the meaning of that order ought now to be paid out to the charities. Now, in the year 1894, by an order made at chambers on the 9th June upon the application of one of the charities, this provision was made as regards certain of the annuitants. [His Lordship read the order and continued:] Those amounts so ordered to be carried over are sufficient to pay the annuities in full if invested in Two-and-a-Half per Cent. Consols. Nine of the annuitants, therefore, have been disposed of, and they accept the provision which is made by the order in full satisfaction of their annuities. But Mrs. Venables, who is one of the annuitants, did not consent to accept the provision which was made by the order in satisfaction of her annuity, and stood upon her rights. The order, so far as it provides for her, directs that the fund should be carried over, and the proceeds of funds invested in the purchase of 6000*l.* Two-and-a-Half per Cent. Annuities, and the dividends on those annuities were to be paid during the life of Mrs.

Venables to her, or until further order. That sum of 6000*l.* is just enough at that rate of interest to provide the 150*l.* Now, upon the present occasion Mrs. Venables appears and opposes any further payment out of court of the corpus of the fund, and it becomes necessary to consider what are her rights. This is not the ordinary case of a gift of an annuity followed by a gift of residue. Mrs. Venables is no doubt an annuitant. She takes 150*l.* a year during her life under the will of the testator. But that annuity is to be paid out of the income of the testator's residuary estate, for it has been declared by the order of the 9th Dec. 1893, which I have read, that the annuities given by the will of the testator are payable out of income and not out of capital of the clear residue of the personal estate of the testator at the time of his death. Therefore she is an annuitant whose annuity is payable solely out of income of the residuary estate of the testator, and not out of capital. What are the rights of the annuitant? In the ordinary case of an annuity given by will and followed by a gift of residue the rights have been ascertained by the practice of the courts. The mode of dealing with such a case is pointed out by North, J. in *Re Parry; Scott* v. *Leak* (61 L. T. Rep. 380; 42 Ch. Div. 570). Summing up the whole of the law at page 584 of 42 Ch. Div. he says. "I think the annuitants are entitled to have such a security as will make it practically certain that the annuities will be fully paid. Of course the appropriation of part of the assets will not release the rest of the estate. Recourse might still be had, if necessary, to the rest of the estate. But, in my opinion, the proposed appropriation of a mortgage upon a freehold estate, notwithstanding that it is theatrical property, will be an amply sufficient security." Therefore the right of an ordinary annuitant is to have such a security set apart to answer the annuity as will make it practically certain that the annuity will be paid. And that is so in a case in which the appropriation of part of the assets does not release the rest of the estate. Now, here the annuitant, Mrs. Venables, has no right to resort to capital. Her annuity is to be paid solely out of income. But it seems to me that, subject to that, the general principle applies. She would be entitled to have such a portion of the corpus appropriated for the payment of her annuity as would make it practically certain that her annuity would be paid. That seems to me to be her right and no other. That being so, what ought to be done in order that it may be made practically certain that her annuity, however long she may live, will be paid out of income? The lady is said to be aged fifty-two, the fund which has been set apart by the court to answer the claim is 6000*l.*, invested in Two-and-a-Half per Cent. Annuities, yielding the exact sum which is required. In 1871 Wickens, V.C. was of opinion that the annuity was amply secured, although it was then invested in ordinary consols in such a way as to yield a proper amount. But since then events have happened. In 1888 the Legislature created a new stock, which was to be applied in paying off the old Consols. That new stock is not redeemable till the 6th April 1923, but after that time it is to be redeemable by Parliament on such notice, at such time or times, and in such sum or sums as Parliament may direct. That is the provision. That is twenty-eight years hence, and it is possible certainly that the annuitant may survive that period, and it is possible—one knows not what may happen at so distant a date—that some alteration may take place after 1923 with respect to what are now called New Consols. Having regard to the experience which has been acquired since the year 1871, when Wickens, V.C. expressed his opinion on the subject, it seems not unreasonable that there should be some further provision in favour of the annuitant than to have in court the bare sum of 6000*l.* which, as matters now stand, is sufficient. It is offered on behalf of the residuary legatees to have in court a further sum of 2000*l.*, which will make in the whole 8000*l.*, so that, if the interest is reduced to 2 per cent. by the Legislature hereafter there will still be amply sufficient for a sum of 160*l.*, that being more than enough to pay the annuity. That seems to me to be a reasonable course. Then there are one or two points in the argument which perhaps I may notice. It was said that the lady was bound by what had already been done by the court to accept what had been done by the court in her favour as a complete provision. It does not seem to her that that is the true construction of the order. The first order made was one of the 25th May 1868, by Stuart, V.C., by which a certain sum of consols was carried over to the annuity account of the annuitant, and it was directed that the interest to accrue due on the annuities to be so carried over should be paid to the annuitant in satisfaction of the annuity bequeathed to her. Mrs. Venables was not present on that occasion. She subsequently obtained an order for payment to her of the annuity which was being provided for her. Then it is suggested that, by coming in and accepting payment of the fund which was appropriated by the court in this way she has precluded herself from obtaining anything else. I do not think that that is the true view of the order. It is simply an administrative order making provision for the payment of the annuities. As North, J. observed in the judgment in *Re Parry; Scott* v. *Leak* (*ubi sup.*), which I have read, the appropriation of part of the assets of the testator in that case did not release the rest of the estate. So it seems to me that the appropriation of this particular part of the assets for making provision out of the income of it for payment of the annuity did not release the rest. That left the rights of this particular annuitant unaffected. That, I think, is perfectly clear by what has been done subsequently in the suit, because similar provisions are made for all the rest of the annuitants. As I have already pointed out, in the year 1894 the bargains were entered into with the other nine annuitants by which they did bind themselves to accept the provision then made in satisfaction of their annuities. After the passing of the Act of 1888 by reason of which the income arising from the consols became insufficient for the payment of the annuities in full, the residuary legatees themselves took out a summons to make up the annuities in full, and they got nine of the annuitants to enter into a bargain with them that the provision then made should be final. Mrs. Venables declined to make any such arrangement and stood on her rights, and she was entitled so to do. It does not seem to me that anything which has happened up to the

present time has deprived Mrs. Venables of her right to have her annuity paid out of the income of the fund. Now it is pointed out that an offer was made to give a charge on the corpus of both of the funds in court to answer Mrs. Venables' annuity and of the reversion which belongs to the residuary legatees of the fund which had been appropriated to answer the other annuities. Mrs. Venables declines that. She says: "My annuity is solely payable out of income. I stand on my strict rights, and I desire that proper provision may be made for the payment of my annuity by means of income." I think that she is entitled to do that. I say nothing as to what may happen on the death of any one of the other annuitants. No doubt the question will then arise as to whether the residuary legatees will be entitled to the fund carried over to answer the other annuities, subject to the bargain I have mentioned. The same principle I apprehend will apply, that is to say, that Mrs. Venables' annuity may be in the future a payment out; but events may occur during the lives of any one of the other annuitants and further experience may show that the appropriation is insufficient, and the court will be perfectly free when the event arises on the death of any annuitant to deal with the funds which are standing to the credit of any annuitant having regard to the rights of Mrs. Venables, the annuitant with whom I have to deal on this occasion, as to the court may seem right. I do not by any expression of opinion on this occasion, or by anything in the order, intend to prejudice whatever may be done when such event arises. That being my view of the rights of Mrs. Venables, the annuitant who has not consented to anything, and of the mode in which her rights are to be satisfied, the order will be accordingly; that is to say, 2000*l.* will be left in court to the account of the residuary legatees not to be paid out without notice to the annuitant, and they in accordance with the decision of the House of Lords will in the meantime, and until further order, receive the income from that fund. All the rest of the funds in court standing to the credit of the residuary legatees I think may safely now be paid to them just as Wickens, V.C. directed the impure personalty to be paid over to the Crown in the year 1871.

From that decision Mrs. Venables now appealed.

Graham Hastings, Q.C. (with him *Johnston Edwards*) for the appellant.—Stirling, J. had no authority under the terms of this will to order the residue to be distributed, even though his Lordship set aside enough, and indeed more than enough, to answer the annuities. The learned judge decided this case on the authority of

Re Parry; Scott v. *Leak*, 61 L. T. Rep. 380; 42 Ch. Div. 570.

But I say that North, J. in that case neither decided, nor intended to decide, anything of the kind that has been decided here. The appellant has a charge on the whole capital, and is really in the position of a mortgagee of the fund. There is no power under the will to distribute the residue until the annuitant is dead. [RIGBY, L.J.—You may be right in saying that the executors would have no power to do so, but it is a strong thing to say that the court has no power.] Where would the court get its power from if the will does not give it? [RIGBY, L.J.—In *Saunders* v. *Vautier* (Cr. & Ph. 240) the court assumed a jurisdiction, though contrary to the terms of the will,] Yes, but *Saunders* v. *Vautier* (*ubi sup.*) has never been applied to capital. The court only has jurisdiction to order the residue to be distributed before all the annuitants are dead if all parties consent. Authority there is none which says that, if the court sets aside sufficient to meet the annuities, then the residue may be distributed. [RIGBY, L.J.—Do you question the practice of the court, or the antiquity of the practice, in so doing? See *King* v. *Malcott* (9 Hare, 692, at p. 696.] No; but the practice exists simply because annuitants have not objected. The jurisdiction has never before been contested; it has been acquiesced in. [*Fischer*, Q.C.—In 1734 Lord Talbot, in the case of *Slanning* v. *Style* (3 P. Wms. 334, at p. 336) established the practice.] That case, I submit, does not touch the point. The passage on which my friend relies is not applicable to the present case. The distribution of the residue may take place with the consent of the annuitant, but it cannot be done in the face of opposition. The rest of the assets constituting the residue are the security of the annuitant, and the annuitant may object to those assets being paid away:

Weatherall v. *Thornburgh*, 39 L. T. Rep. 9; 8 Ch. Div. 261, 270.

[SMITH, L.J.—Does not the court assume what is best for all parties?] The court may have over and over again ordered the residue to be distributed on the assumption that all parties consented. But, if there is any opposition, then the court has no right in the face of that opposition to pay the residue away.

Fischer, Q.C. (with him *Samuel Dickinson*) for the respondents, the London Orphan Asylum. [LINDLEY, L.J.—Can you throw any light on the practice of the court by reference to authorities?] *King* v. *Malcott* (*ubi sup.*) appears to be the case that does so best. But the rule of the court to make provision by setting aside sufficient to satisfy annuities has been recognised by the House of Lords:

Prendergast v. *Lushington*, 5 Hare, 171; on appeal, 3 H. of L. Cas. 195, at p. 222.

[LINDLEY, L.J.—Is there any case where the residue has been ordered to be distributed in the face of opposition?] No, I know of no such case, but there is a case in which the point was discussed:

May v. *Bennett*, 1 Russ. 370.

The point came also before the Appeal Court in

Booth v. *Coulton*, L. Rep. 5 Ch. App. 684.

[RIGBY, L.J.—*Boyd* v. *Buckle* (10 Sim. 595) seems to make it abundantly clear that deficiency of income may be made good out of the capital of the residue.] The annuitant can follow the assets paid over no doubt. [LINDLEY, L.J.—No reference appears to be possible to a case in which the practice has been followed in spite of opposition; and the question is whether the appellant is right in saying that it cannot be done in such a case.] I can find no case. But is it to be supposed that the long-established practice of the court is all wrong? It has been perfectly uniform. What has been the object of the court in all these cases was pointed out by North, J. in

Re Parry; Scott v. *Leak* (*ubi sup.*).

The appellant's annuity is not only sufficiently, but amply, provided for, and her opposition is therefore absolutely groundless. He referred also to

Simmons v. *Bolland*, 3 Mer. 547.

H. Fellows for the respondents, the Royal Free Hospital.—I also have failed to find any direct authority, and no doubt it is because this extreme point has never been put before the court previously. There is no case nearer than those that have been cited. This is not the case of a mortgage. There is not even a charge in terms. It is a case of administration. The practice of the court is to set aside sufficient funds to satisfy annuities, whether in the absence of the annuitants, or with the consent of the annuitants, or even in the face of the opposition of the annuitants.

Hadley for the respondents, King's College Hospital and the Public Dispensary.

Buckley, Q.C. and *T. B. Napier* for the respondents, the National Hospital for the Paralysed and Epileptic.

Johnston Edwards in reply.—All the cases cited are distinguishable because, according to the judgment of the House of Lords in the present case, all the annuities are chargeable only on the income of each year. The annuitants have no right against the capital.

Cur. adv. vult.

Dec. 16, 1895.—The following judgments were delivered:—

LINDLEY, L.J.—In this case there is an appeal, nominally in the name of Mrs. Venables, against an order made by Stirling, J., directing certain funds to be paid over to some charities, which are residuary legatees. The direction for distribution is made, although there are annuities, or rather there is one annuity, charged upon the residuary estate, and still payable to Mrs. Venables. Under orders which I need not refer to, a sum of 8000*l.* in Consols has been set apart to answer Mrs. Venables' annuity. The amount of that annuity is 150*l.* a year. In the judgment of Stirling, J. that was an ample sum to be set apart to provide for the annuity, and the appellant's counsel did not really contend the contrary. It is obvious upon consideration, having regard to the age of the lady and the amount of the annuity, that 8000*l.* is quite ample. But Mr. Graham Hastings, for the appellant, argued that Stirling, J. had no jurisdiction to order the residuary estate to be divided, inasmuch as Mrs. Venables' annuity was charged upon the whole residuary estate. The will which gave her the annuity, and gave the charities the residuary estate, is worded in this way—after payment of the annuity the residue is to be divided. Mr. Graham Hastings' point was, that the annuity had not been paid and would not be paid until Mrs. Venables' death, and that upon the terms of the will there was no jurisdiction in the court to order the residuary estate to be distributed until after her death. Now, according to the strict language of the will, that no doubt is so. But what is the meaning of a will which charges a residuary estate with a legacy or several legacies, and then directs that upon the death of the annuitants the residue is to be divided? As between the annuitants on the one hand, and the residuary legatees upon the other, it is a gift of the residue subject to the payment of the annuities. And if the annuities are released, or ample provision is made for the payment of those annuities, it has been the invariable practice of the court to let the residuary legatees have what is theirs. But of course the division is subject to an ample provision for the payment of the annuities. I confess that it took me by surprise to be told that there was no jurisdiction to make any such order as is asked for here, and that the court had never done it in face of opposition, That the court has been in the habit of doing it ever since Lord Talbot's time is obvious from the cases. Speaking from my own recollection—and my brother Rigby confirms me—it has been done scores of times. But we are not prepared to say that we recollect a case where it was done in spite of opposition. Here the opposition is an opposition of a dog-in-the-manger kind, there being ample to provide for the annuity of Mrs. Venables. Mr. Fischer referred us to a great many authorities which supported that view of the practice of the court, and, in addition to those decisions which have been cited, there are one or two more. There is more particularly the case of *Fryer* v. *Buttar* (8 Sim. 442), which might have been referred to, and which I will name, without going through it. But there was considerable opposition there, although not actually to the distribution of the ultimate residue. The view taken by Stirling, J. in the present case is the common-sense view, and it is, as I have already said, supported by the uniform practice of the court, and that is to let the residuary legatees have what is theirs, subject to setting aside a sufficient amount for the payment of the annuities. Of course, if in some unforeseen event it should become necessary for the annuitant to have recourse to the capital so set apart, she would be entitled to do so. But to suppose it is conceivable in any case, except the insolvency of the country, which is a contingency the court never contemplates, that she will not be paid her annuity in full is perfectly idle. So far there is no difficulty, and it was not because any of us felt a difficulty that we omitted to give judgment when the argument was concluded. But there was a question that occurred to us about the costs of this appeal which required care, and I will now say what I have to say about that point. The appeal will be dismissed with costs. But in these cases there is always a discretion in the Court of Appeal as to the orders it ought to make with reference to the question of costs, and I think the court is bound to see that its orders are not necessarily oppressive. It appears to me that in this case there really was no sensible reason for all parties appearing by separate solicitors. It is well known that only two counsel on each side can be heard here. I think it would be oppressive to allow more than one set of costs. What I am prepared to do (and my colleagues agree with me) is to exercise our discretion on this occasion as we did before, and give the costs to the party who has the conduct of the cause. There will be one set of costs to be paid by the appellant, and the others must pay their own costs. They are perfectly justified in employing their own solicitors if they like, but this is not a case where it was necessary for five sets of counsel to be instructed in order to protect the rights of the residuary legatees. Then I have to say

this: It appeared to us, when we understood this case, that this appeal could not have been *bonâ fide* brought by, or in the interest of, Mrs. Venables, and we took upon ourselves the responsibility of communicating with the official solicitor and directing him to see Mrs. Venables to ascertain whether this appeal was brought by her, and in her interest, she understanding that there was amply sufficient in court to provide for her annuity. We have ascertained that this appeal is really the appeal of her solicitor, Mr. Hood-Barrs, in her name. There is one other piece of information I will mention. The official solicitor has given us a letter purporting to be signed by Mr. Hood-Barrs, which is to this effect that it is his appeal—that he intends fighting this case to the House of Lords, and that he is to have the benefit of the appeal, if there is any benefit. Under those circumstances it does strike us that it is for him to show us why we should not make an order that he should pay the costs.

SMITH, L.J.—I entirely agree.

RIGBY, L.J.—I also agree.

Hood-Barrs, in person, then addressed the court.

LINDLEY, L.J.—We have now to consider whether this is a case in which an order ought to be made against the appellant's solicitor in person to indemnify his client against the costs of this appeal. We know now from Mr. Hood-Barrs' own statement the whole history of this case, and what this appeal is really for. It is now perfectly obvious that the suspicion which we had, when counsel first addressed us on the merits, is well founded—that this appeal cannot be fairly or properly regarded as an appeal brought in the interests of Mrs. Venables, but the object of the appeal is to compel the charities to come to some terms with Mr. Hood-Barrs, especially with respect to certain costs, as to some of which he has given his own personal guarantee. That explains his letter to Mrs. Venables which he admits is correct, and two passages of which I will read. The first relates to other matters. Then he says: "With regard to the appeal about which I wrote you, as I have said, you will incur no liability whatever. Whatever liability there is will be with me. I hope ultimately to get a settlement of the appeal which will be beneficial to me"—that is, I will take the burden of the appeal on myself and at the same time any benefit. That expresses in a few words the real truth of the matter. It is perfectly obvious to us that, although Mrs. Venables has so far authorised and approved of this appeal as to render her responsible for the costs, yet, when we come to look at the matter as between her and her solicitor, it is equally obvious that she is a mere puppet in his hands, and that this appeal is brought by him for his own purposes and not in the interests of Mrs. Venables at all. Now, Mr. Hood-Barrs has thought proper to cast aspersions on the conduct of the official solicitor. All that I can say is, that we are responsible for his going to Mrs. Venables. We were convinced—or, at all events, strongly of opinion—that this appeal was not an appeal brought by her in her interests—in other words, we did not believe that the real object of this appeal was its apparent object, namely, to get for her a better security for her annuity. It was quite obvious that it was our duty, having that opinion, to take care that a suitor of the court was not made liable for considerable costs (I do not say anything about half her income) for a purpose with which she had really nothing whatever to do. I think that not only were we justified, but that we should have failed in our duty if having that view we did not investigate the matter by sending the official solicitor to inform us more about it. The official solicitor goes as the officer of the court; he is not a solicitor for the client—nothing of the sort. He has performed his duty in a way that at least has given us perfect satisfaction. We should be failing in our duty if we did not apply to this case the power which is to be found in Order LXV., r. 11: "If in any case it shall appear to the court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the court or judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person," and so on. If there ever was a case in which that order ought to be applied, this is one. The charge against Mr. Hood-Barrs, which he has proved up to the hilt by his own statement, is, that this appeal is not brought for the benefit of his client, but that it is brought for the ulterior purpose of benefiting himself in this sense—to compel these charities, if he can, to come to some arrangement with him which they are not in the least bound to do, and which he has no right to impose. It is very nearly, if not quite, justifiable to say that it is a blackmailing appeal. As to the form of the order, the appeal will be dismissed with costs—one set of costs—to be paid by the appellant, and to be repaid to her by Mr. Hood-Barrs personally. In other words, he is not to be entitled to any costs from his client. It must follow the terms of Order LXV., r. 11.

SMITH, L.J.—I am entirely of the same opinion. The question which the court has now to determine is, whether it does appear to the court that "costs have been improperly or without any reasonable cause incurred" in this case. If the court comes to that opinion, power is given to the court, under Order LXV., r. 11, to call upon the solicitor of the client to show cause why the costs should not be disallowed, or why he should not repay the costs which have been incurred by the client. I wish shortly to state how the matter appears to me. The testator made a will, and controversy arose as to the construction of that will. My brother Stirling put a construction upon it. This court afterwards put the same construction upon it, and the House of Lords has held that the construction put upon it by my brother Stirling, and this court, was right. I do not for a moment say that that litigation, which as I understand was undertaken on behalf of the next of kin, who were the appellants all through in this court, and in the House of Lords, was not a proper litigation for Mr. Hood-Barrs to undertake. I do not say that in any shape or way up

to the judgment in the House of Lords, which was given in March 1895, any complaint can be made of Mr. Hood-Barrs in the matter—none whatever. What we have to determine is, as to what took place after March 1895 when the judgmemt of the House of Lords was given. Now what happened? The judgment of the House of Lords affirmed that certain charities, five in number, were entitled to the corpus of the property—I am putting it shortly—subject to certain annuities. The House of Lords gave judgment for the respondents with costs against the appellants there, who were Mr. Hood-Barrs' clients. It seems to me that Mr. Hood-Barrs after that judgment had been given against his clients did all he could to get these charities to forego their costs. That seems to me to be all right. But he could not get them to agree to that, and they were within their rights in saying, "We will not forego the costs." Then what happened? The charities want to get the property to which the House of Lords said they were entitled. That property was invested at that time in consols in court in the administration of the testator's estate. What the charities did was this: They took out a summons before my brother Stirling to get an order that the corpus should be paid out to them in the shares to which they had been adjudged entitled under the judgment of the House of Lords, but, of course, subject (I do not forget what Mr. Hood-Barrs said about making provision for the annuities) to such part of the corpus being set aside as would fully secure the annuities having a charge upon the corpus. What did my brother Stirling do? He took into consideration the circumstances as regarded Mrs. Venables, and no doubt as regarded the other annuitants—none of whom appeal against Stirling, J.'s order—and he said, "If I set apart 8000*l.*, and keep that in court for the purpose of satisfying your annuity I am perfectly certain you will have your annuity of 150*l.* a year as long as you live." I am perfectly satisfied that my brother Stirling was right in that, and nobody can hear what I am saying without being satisfied that the order of my brother Stirling was a just order to make as between the annuitants on the one part, and the charities on the other, who were entitled to the residue of the corpus. But now comes the difficulty with regard to Mr. Hood-Barrs. Mr. Hood-Barrs could not get the charities to agree to forego the costs; so he goes to Mrs. Venables, who is a lady certainly not in affluent circumstances, and he gets her name for the purpose of appealing against that order of Stirling, J. It certainly did appear to me, when Mr. Graham Hastings was arguing this case on behalf of the appellant, that it was a senseless appeal, and one which nobody could have brought unless he or she had been ill advised, or was perverse or obstinate. I certainly did come to that conclusion when I heard Mr. Graham Hastings upon the point that this was not in substance Mrs. Venables' appeal. Now what was the court to do? It struck me—and I use a word which I have used before to-day, as no other word will properly describe it—as cruel, in such an appeal as this, as we had to dismiss the appeal, that we should make this unfortunate appellant pay the costs. She has only a small annuity of 150*l.* a year, and the costs in this court could not be otherwise than heavy when the appeal was dismissed. What did we do? We have an officer of this court (I wish to say something about him) who is called the official solicitor. In my judgment, the official solicitor is appointed official solicitor to the court in order that a judge may communicate with him when he sees before him certain matters which he wants investigated, and as regards the absolute accuracy of which counsel is not instructed, and has no knowledge whatever. It is then the duty of the judge to communicate with the official solicitor in order that the judge may be informed as to where the real truth of the case lies. In this case, Mr. Hood-Barrs chooses to apply the term "dirty work" to what the official solicitor has done. But I say—and I say it emphatically—that that term ought not to be applied, because the official solicitor has faithfully carried out our orders, which orders, considering the position in which we were placed, we were bound to give. Then we find out it was not Mrs. Venables' appeal. It is all very well to say that she had given instructions to Mr. Hood-Barrs, but what interest has Mrs. Venables in appealing to this court? She had her 8000*l.* capital set apart for her for the rest of her life, which sum was more than sufficient to pay, whatever might happen, her annuity of 150*l.* a year. Now Mr. Hood-Barrs comes and tells us—and I have no doubt accurately—the attempts he had made to settle after he was defeated in the House of Lords. He could not get a settlement, and, as has been pointed out by my brother Lindley, this appeal is not brought in the interests of Mrs. Venables at all. It was perfectly immaterial to her, except as regards costs, which way it went; but it was brought for the purpose of coercing, if Mr. Hood-Barrs could, these charities to come to his terms. In the letter of the 9th Nov. 1895 he says, "I hope ultimately to get a settlement of the appeal which will be a benefit to me." If there ever was a case in which rule 11 of Order LXV. should be put into force it appears to me to be this; and I think that the order which my brother Lindley has mentioned ought to be made.

RIGBY, L.J.—I will assume for the purposes of my judgment in this case that the conduct of Mr. Hood-Barrs, down to the time when the order was made by Stirling, J. for setting aside a sum to provide for Mrs. Venables' annuity, was not only justifiable, but from the point of view of his client altogether beneficial to the client, and that in every respect, down to that period, he was free from blame. The order made was that 8000*l.* Two-and-a-Half per Cent. Annuities should be appropriated to meet an annuity of 150*l.* a year payable to a widow during the term of her life. It was not mentioned in the order that in the improbable—one might almost say the impossible—event of the annuity ever being larger than the income produced by that 8000*l.* the annuitant could have recourse to the 8000*l.* capital. But at any rate it was shown in argument addressed to us that the charities offered to have that made clear upon the face of the order; and that that offer, for reasons which we now perfectly comprehend, was declined. I say this because from Mr. Hood-Barrs' own statement it becomes abundantly clear that he did not think that the 8000*l.* was an insufficient security. He tells us himself, apparently unconscious of the conclusion that would be drawn from what he said, that he was willing after the order was made to come to terms which

would release 2000*l.* out of the 8000*l.*, leaving 6000*l.* only. He stipulated that he should be allowed, or rather that his client, Mrs. Venables, should be allowed to resort to the capital of the remaining 6000*l.*—terms less advantageous to his client than those which I believe were effectuated by the order. Those terms, at any rate, which fact for this purpose is more important, were offered by the other side at that time and declined. So that I think it would be absurd to suppose that Mr. Hood-Barrs imagined that Mrs. Venables' interests were in any way concerned in this appeal. But we have it now made clear, and I must say that it appeared to me not improbable, that Mr. Hood-Barrs had a direct personal interest in the matter, or, at any rate, had grounds for believing that, if he could get this order, which his client's interests in no way required him to get, reversed on this appeal his own pocket would be the better for it, because he could impose terms upon the charities which would relieve him from the personal undertaking he had entered into to pay certain costs which I need not specifically refer to. That being the position of things, and that being, as we have from Mr. Hood-Barrs' own lips, his own appreciation of the case—namely, that Mrs. Venables was sufficiently secured, and that she had no interest in the appeal — he approaches her. He suggests — and a more improper suggestion I venture to say was never made—that she should lend her name to him coming here to this court as though she were the *bonâ fide* appellant, on the terms that he should indemnify her against costs, and that he personally should take the benefit of the appeal. It startles one to find that a solicitor, an officer of this court, can come into court and openly avow a transaction of that kind, and yet apparently remain unconscious of the absolute impropriety of it. It appears to me that that unconsciousness, if it be not assumed, is a very grave feature of the case. Mr. Hood-Barrs permitted himself to make observations from a high standpoint as that of a respectable solicitor. who had a right to throw aspersions on others who were doing their duty. I wish it to be known that, in my judgment at any rate, it is not the part of a respectable solicitor to induce clients to lend their names for appeals, in which they have no interest at all, in order that the solicitor himself may gain his own private ends. I look upon such an agreement as an abuse of the practice of the court. Mr. Hood-Barrs thought it right to complain of the fact that he was not approached for information. I have formed my own judgment as to the sort of information we should have got from him if he had been allowed to be the go-between between the court and Mrs. Venables. I feel satisfied that we should not have arrived at the true state of things; and I feel certain that we should have been altogether disregarding our duty, if, in a case of this kind, we had not instructed the official solicitor to find out the facts which otherwise I feel convinced we never should have known. I will only say that I think that the official solicitor in doing what he did in no way exceeded the instructions that were given to him by us, and that he did what was perfectly right and proper. I protest against the notion that this court is to be bound by any idea of etiquette or by any theories as to what is respectable between solicitors, to shut its eyes, or rather to shut the door to information which may be obtained, and which has been obtained as in this case, and which would never have been obtained if we had not taken the course that we did. I consider that, if ever there was a case of costs being occasioned improperly, this is that case. I concur in the judgment which Lindley, L.J. has mentioned, that this is a case in which Mr. Hood-Barrs can recover nothing from his client, and that he must repay to her any costs which she is liable to pay under the order of the court already made. The fact that he indemnified her is one of the charges against him. It is no merit that he did it. It was absolutely wrong to do it. After this I hope no solicitor will ever come and say, "I intended what was right, I used the process of the court to bring about what I thought right, and I did it by deceiving the court in the first instance into a belief that it was not I acting in my own interest, but an innocent client who was bringing an appeal which the court has decided to be not only wrong, but altogether without precedent."

Appeal dismissed.

Solicitors: *Hood-Barrs* and *Co.*; *Winter* and *Co.*; *Hyde, Tandy, Mahon,* and *Sayer*; *Gadsden* and *Treherne*; *Bower, Cotton,* and *Bower.*

Nov. 27 *and Dec.* 5, 1895.

(Before SMITH and RIGBY, L.JJ.)

Re SALT. (*a*)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunacy—Person lawfully detained as a lunatic, though not so found by inquisition—Person appointed to exercise powers of committee of estate—Power of leasing—Settled Land Act 1882 (45 *& 46 Vict. c.* 38), *ss.* 6, 62—*Lunacy Act* 1890 (53 *Vict. c.* 5), *ss.* 116, 120.

The court has jurisdiction to authorise the person who has been appointed to exercise the powers of a committee of the estate of a person who is lawfully detained as a lunatic, though not so found by inquisition, to exercise on behalf of the lunatic the power of leasing vested in the lunatic as tenant for life under the Settled Land Act 1882. Re Martha Baggs (71 *L. T. Rep.* 138; (1894) 2 *Ch.* 416, *n.*) *distinguished.*

THIS was an application by the official solicitor, who had been appointed under sect. 116 of the Lunacy Act 1890 to exercise the powers of a committee of the estate of Catherine Salt, a person lawfully detained as a lunatic, though not so found by inquisition, for an order under sect. 120 of that Act, authorising him to execute the powers of leasing vested in Catherine Salt as tenant for life in the property in question, under the will of her late husband, and in particular to execute a lease of a public-house, called the Forge Inn, Cardiff, to an intending lessee.

The proposed lease had been found by the master to be a lease beneficial to the estate of Catherine Salt and the persons entitled in remainder, but the question arose whether there was jurisdiction to make the order.

Ingle Joyce for the application.—The power of

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

leasing given to a tenant for life by sect. 6 of the Settled Land Act 1882 is in general terms, and there is nothing which prevents the power vesting in a tenant for life who is a lunatic, whether so found by inquisition or not. Then by sect. 120, clause (*h*), of the Lunacy Act 1890 a judge may authorise the committee of the estate of a lunatic to "execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends." This case is clearly within that section. The only difficulty is caused by the decision in

Re Martha Baggs, 71 L. T. Rep. 138; (1894) 2 Ch. 416, n.

There it was held that, where a tenant for life was a person lawfully detained as a lunatic though not so found, the court had no jurisdiction to authorise the committee of the estate of the lunatic to exercise the power of sale given by the Settled Land Act 1882. But that case is distinguishable from the present one. Sect. 120 of the Lunacy Act 1890 contains no clause which authorises the exercise of the power of sale vested in a lunatic as a limited owner in the way that clause (*h*) refers to a power of leasing. In *Re X.* (71 L. T. Rep. 139; (1894) 2 Ch. 415) it was held that a power of sale vested in a lunatic tenant for life under a will was within sect. 120, clause (*l*), and sect. 128 of the Lunacy Act 1890. The present case, therefore, is not within *Re Martha Baggs* (*ubi sup.*).

Cur. adv. vult.

Dec. 5.—Smith, L.J., after stating the facts set out above, continued:—It is not a lease within the powers of leasing contained in the will, and the leasing powers in part 4, sect. 6, of the Settled Land Act 1882 will have to be resorted to. By sect. 120 of the Lunacy Act 1890, it is enacted. "the judge may by order authorise and direct the committee of the estate of a lunatic"—in which position the present applicant stands by virtue of sect. 116, sub-sect. 2—"to (*h*) execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends." If the lease proposed to be executed had been a lease within the power contained in the will it would clearly have been within the express terms of this section, for Catherine Salt had a limited estate only in the property in question, she being tenant for life thereof. By sect. 6 of the Settled Land Act 1882, it is enacted that "a tenant for life may lease the settled land, or any part thereof," to state it shortly, in the way proposed to be done in the present case. *Rebus hic stantibus*, where is the difficulty? It appears to me that there is no difficulty whatever, for the case falls within the express terms of the two Acts. But it is suggested that there is a decision in this court of *Re Martha Baggs* (*ubi sup.*) which stands in the way. In my judgment it does not do so. In that case an application was made under sect. 116, sub-sect. 2, of the Lunacy Act 1890, not for an order to lease, but for an order to sell property belonging to the lunatic, she having only a life estate therein; and this court held that the applicant could not bring that case within that sub-section, because the property did not "belong" to the lunatic, she having only a life interest therein, and that he could not bring the case within the provisions of sect. 62 of the Settled Land Act of 1882, because that section only applied to a tenant for life who was a lunatic so found by inquisition, which Martha Baggs was not; and this court therefore held that it was a case not provided for by either the Lunacy Act of 1890 or the Settled Land Act of 1882. But, in my judgment, the present case is expressly in terms provided for by sect. 120 of the Lunacy Act 1890. We are not therefore fettered by that case, for it does not apply to this present case; and, in my judgment, an order giving power to execute the proposed lease can be legally made, and we make such order accordingly.

Rigby, L.J.—I agree with the judgment which has just been delivered, but will add in my own words my reasons for thinking that *Re Martha Baggs* (*ubi sup.*) is distinguishable from this case. That case was an application for leave to exercise the power of sale given by the Settled Land Act 1882, in the case of a person lawfully detained as a lunatic though not so found by inquisition; and it was held that the application was not assisted by sect. 62 of the Settled Land Act 1882, as that section is expressly limited to lunatics so found by inquisition. An attempt was made to bring that case within sect. 120 of the Lunacy Act 1890. That section empowers a judge to authorise the committee of the estate of a lunatic to (clause (*a*) "sell any property belonging to the lunatic," and clause (*l*) to exercise any power vested to the lunatic "for his own benefit." But clause (*a*) did not apply, because the lunatic was not absolutely entitled to the property in question; and clause (*l*) because the power of sale under the Settled Land Act was not a power vested in the lunatic for his own benefit. It was also contended there that, by virtue of sect. 53 of the Settled Land Act 1882, the power of sale was vested in the lunatic as a trustee, and that, therefore, the power could be exercised under sect. 128 of the Lunacy Act 1890. But the lunatic was clearly not a trustee within the latter section. Therefore it was held that the power of sale could not be exercised by the committee. But sect. 120, clause (*h*) of the Lunacy Act 1890 clearly applies to the present case, for it empowers a judge to authorise the committee of the estate of a lunatic to "execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends;" and, therefore, the court has authority to authorise this committee to execute the power of leasing given to the lunatic under the provisions of the Settled Land Act 1882. I do not think that this decision departs in any way from the principle of the decision of the Lords Justices in *Re Martha Baggs* (*ubi sup.*).

Solicitor: *The Official Solicitor.*

Wednesday, Dec. 4, 1895.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

Godfrey *v.* G. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Action—Order to pay costs—Order made upon motion against solicitor—Concurrent remedies—Rules of the Supreme Court, Order XLII., r. 24.

In 1885, *upon an application to strike a solicitor off the rolls, an order was made by consent that*

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

he should pay the costs to G. Those costs were not paid, and in 1895 *G. applied for leave to issue a writ of attachment against the solicitor for disobedience of the order. That application was refused, and G. then sued the solicitor to recover those costs.*

Held (affirming the judgment of Wright, J.), that an action could be brought upon the order, and that the right to bring such action was not affected by the unsuccessful application for a writ of attachment.

THIS was an appeal by the defendant from the judgment of Wright, J., at the trial without a jury; and a cross-appeal by the plaintiff.

The plaintiff brought this action against the defendant to recover the sum of 317*l.*, being money due from the defendant to one Wood, which had been assigned to the plaintiff, and money due for costs payable to the plaintiff by the defendant under an order of the Queen's Bench Division, made on the 3rd Aug. 1885, and interest.

The defendant was a solicitor, and in 1885 an application was made by one Wood, a client of the defendant, in the Queen's Bench Division, to strike the defendant off the rolls. Ultimately the order of the 3rd Aug. 1885 was made by consent. That order was as follows:—

In the matter of ——, a solicitor.—Upon reading the order of court made in this matter on the 17th Feb. 1885, and the report of Master Brewer, it is ordered by the consent of the parties that the sum of 131*l.* paid into court to the credit of this matter be paid out to J. P. Godfrey, the applicant's solicitor, as specified in part 2 of this order, and that the sum of 102*l.* due to W. S. Wood, the applicant, be secured to the said W. S. Wood by bills drawn by the said —— on his wife, ——, at intervals of three, six, nine, and twelve months, and which bills are to be indorsed by the said —— to the said W. S. Wood, and that no proceedings be taken against the applicant, W. S. Wood, upon the judgment in respect of the said sum of 102*l.* And it is further ordered that the costs of these proceedings be taxed as between solicitor and client and paid by the said —— to the said E. P. Godfrey, and that execution do not issue therefor for three months from the date of this order, except in the event of the said —— becoming insolvent or bankrupt when execution is to issue immediately. And it is further ordered that the said —— do hand over all papers belonging to the said W. S. Wood, or to his solicitor, the said J. P. Godfrey.

The above costs were taxed at 142*l.*

In 1886 execution was issued to recover the sum due for costs, but nothing was recovered under that execution.

In March 1895 the plaintiff, Godfrey, moved, in the Queen's Bench Division, for leave to issue a writ of attachment against the defendant, for disobedience of the order to pay costs. The court refused the application.

Wood had assigned to the plaintiff the sum of 102*l.*, which was payable to him under the above order. Bills had been drawn by the defendant on his wife in respect of that debt, but his wife had refused to accept the bills.

Subsequently this action was brought.

The Rules of the Supreme Court, Order XLII., r. 24, provide:

Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect.

At the trial before Wright, J., without a jury, the learned judge gave judgment for the plaintiff in respect of the amount due under the order to pay costs; but gave judgment for the defendant in respect of the claim under the assignment from Wood to the plaintiff.

The defendant appealed; and the plaintiff gave notice of a cross-appeal.

Crump, Q.C. for the appellant.—No action could be brought upon this order. If the order were not complied with by payment of the costs, the appropriate and only remedy would be by attachment for disobedience to the order, that is, for contempt of court. In *Philpott* v. *Lehain* (35 L. T. Rep. 855) and *Norton* v. *Gregory* (73 L. T. Rep. 10), where it was held that an action could be brought upon the order, the order was not one in respect of which a writ of attachment could issue. The provisions of Order XLII., r. 24, do not apply to orders which can be enforced by attachment. In *Norton* v. *Gregory* (*ubi sup.*), Lord Esher, M.R. said: "Some orders, indeed, are enforceable by attachment, upon which perhaps no action can be brought." If such an order as this can be enforced by attachment or action, then the remedy is alternative, and the person in whose favour the order is made must elect which remedy he will pursue. If he pursues one remedy, he cannot afterwards pursue the other. Here Godfrey chose to pursue the remedy by attachment, and cannot afterwards pursue the remedy by action. Order XLII., r. 24, does not apply to orders which can be enforced by attachment:

Dent v. *Basham*, 9 Exch. 469;
Hookpayton v. *Bussell*, 10 Exch. 24.

No action can be brought against a solicitor for disobedience of an order made against him, as a solicitor, under the disciplinary jurisdiction of the court. Such an order is not an ordinary civil process, but is of a criminal nature, and cannot be sued upon:

Comyn's Digest, tit. "Debt," A. 381;
Re Dudley, 49 L. T. Rep. 737; 12 Q. B. Div 44;
Re Freston, 49 L. T. Rep. 290; 11 Q. B. Div. 545;
Gray on Costs, p. 167.

[LOPES, L.J., referred to *Re Hardwick* (49 L. T. Rep. 584; 12 Q. B. Div. 148).]

F. Marshall, Q.C. and *Pollard* for the respondent.—An action will lie upon an order to pay costs:

Re Boyd, 72 L. T. Rep. 348; (1895) 1 Q. B. 611.

Even if the remedy by attachment or action is alternative, the person having the two remedies can only be barred of the one if he has effectively pursued the other. Here the writ of attachment was refused. There is no authority for the contention that the remedies are alternative only. The rule is, that a person having several remedies may pursue them all until he has obtained satisfaction. The proceeding by attachment is not a proceeding to recover money, but to punish for contempt of court. Such a proceeding cannot affect the right to sue. This order is clearly an order within the terms of Order XLII., r. 24, and is, therefore, enforceable by action. It is not an order made in any criminal cause or matter:

Re Hardwick, 49 L. T. Rep. 584; 12 Q. B. Div. 148.

As to the cross-appeal, the learned judge decided wrongly upon the facts.

Crump, Q.C. did not reply.

Lord ESHER, M.R.—In this case there is an appeal by the defendant, and a cross-appeal by the plaintiff. The action was brought by the plaintiff against the defendant upon an order of the Queen's Bench Division that the defendant should pay certain costs to the plaintiff. It is said that, the action being brought on such an order, the court had no power to entertain the action; that such an action cannot be maintained. What, then, was the order of the Queen's Bench Division? A motion was before the court against the defendant, who is a solicitor; it was an application to strike the solicitor off the rolls for misconduct as a solicitor in misappropriating the money of his client. The court, in that proceeding, made an order that the defendant should pay to Godfrey the costs to be taxed; the costs were taxed, and the order became an order to pay the amount of 142*l.* at which the costs were taxed. That order was made in 1885. It is said, first, that this order is not an order within Order XLII., r. 24, and it is suggested that it is not, because it was an order made in a criminal matter. Now *Re Hardwick* (*ubi sup.*) is an express authority, by the whole Court of Appeal, that such an order as this is not an order in a criminal matter, for it was there decided that there was a right of appeal, which there could not be if it was an order in a criminal matter. That decision of the Court of Appeal has been acted upon over and over again; there have been many appeals by solicitors against orders of the Queen's Bench Division striking them off the rolls. Therefore that ground for this appeal cannot be supported. This was an order in a civil matter, and it was an order for the payment of money. That brings it within the words of Order XLII., r. 24, which provides that: "Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." Therefore this order to pay costs can be enforced in the same manner as if it were a judgment. Then it is said that the solicitor might be attached for disobedience of the order. So he might, under the general jurisdiction of the court, over a solicitor, who is an officer of the court, that being an ordinary mode of proceeding against a solicitor as a solicitor. The solicitor, therefore, might be attached for not obeying this order. Can it be said, however, that, because he can be attached, an action cannot be brought against him upon the order at all? The cases show that an action will lie upon such an order. Therefore a solicitor can be attached or sued upon such an order. Then it is said that, assuming he can be attached or sued, yet the person who has those two remedies must elect which he will pursue. I can see no ground for saying that he can be called upon to elect which of the two remedies he will take. There is no authority for that proposition. Two remedies are here given to a litigant in a civil proceeding. If he applied for leave to issue an order of attachment and such an order was issued, and the solicitor was taken under it and put into prison, then it might be that afterwards an action could not be maintained. The claim might be satisfied by imprisonment under the attachment. But if an order for attachment is issued and he escapes or hides, then the claim could not be satisfied. It is the constant practice, if a person has two remedies, for him to proceed on both until his claim is satisfied by means of one of them. If, therefore, the claim is not satisfied by attachment than he can proceed to satisfy his claim by action. Here the plaintiff did endeavour to obtain an order for attachment, but the court refused his application. How, then, can it be said that his claim was satisfied by attachment? That remedy failed altogether. Under such circumstances he was entitled to pursue his other remedy by action. The passage in the judgment of Bowen, L.J., in *Re Dudley* (*ubi sup.*), meant that a person can pursue all his remedies until his claim has been satisfied by means of one of them. So much for the appeal of the defendant, which must fail. Then, as to the cross-appeal, we cannot agree with the judgment of Wright, J., and must allow the cross-appeal.

LOPES, L.J.—In 1885 an order was made against the defendant, a solicitor, that he should pay costs upon an application to strike him off the rolls. It is said that, in this case, no action can be brought upon that order. One ground for that argument was that it was an order in a criminal matter, and therefore not within Order XLII, r. 24. It is perfectly clear that this was not a criminal matter. That is clear from the case of *Re Hardwick* (*ubi sup.*), which was a decision of the full Court of Appeal. Now, an action has been brought by the plaintiff against the defendant to recover the costs payable under that order. In my opinion the authorities are clear that such an action can be brought; that appears from *Philpott* v. *Lehain* (*ubi sup.*) and *Norton* v. *Gregory* (*ubi sup.*). It is clear, therefore, that an action can be brought to recover costs upon an order of the court or judge, under Order XLII., r. 24, which provides that "every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." The action, therefore, is maintainable. Then it is said that the action is not maintainable under the circumstances of this case, because attachment was the appropriate remedy, and the plaintiff moved for leave to issue an attachment, and cannot therefore take this remedy by action. It is a most important fact that the attachment was refused, and that that proceeding proved abortive. If the attachment had been granted and the party had been imprisoned under it, then I think that probably the remedy by action would have been ousted, by analogy to an arrest under a writ of *ca. sa.* which was a satisfaction of the debt. But if a writ of *ca. sa.* was issued and there was no arrest, or there was an escape, the issue of the writ of *ca. sa.* was not a discharge of the debt, and the ordinary remedy remained intact. It appears to me, therefore, that the plaintiff could bring this action upon the order. He had two remedies; one of those remedies failed, and he then tried the other. If he had succeeded upon one remedy in getting satisfaction, then he could not have proceeded upon the other. He could get satisfaction once, and only once. As to the cross-appeal, it is clear that the decision of Wright, J. was wrong, and the cross-appeal must succeed. The appeal will be dismissed.

KAY, L.J.—Order XLII., r. 24, provides that "every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." Now, the order in question, made in 1885, was an order made in the matter of a solicitor upon an application to strike him off the rolls. When the application was heard, by consent an order was made upon the solicitor to pay the taxed costs of the proceedings. A writ of *fi. fa.* was issued upon that order, and there was a return of *nulla bona*. I quite agree that this was not an order in a criminal matter. It is also quite clear that an action can be brought upon such an order as this, because that is a mode of enforcing it as if it were a judgment. That has been decided by clear authorities. Then it was argued that, after a writ of *fi. fa.* had been issued, an application was made to commit the solicitor for contempt of court. That application was not successful, and no order was made. I do not like to speak of that proceeding as a remedy for the recovery of money. It is a mode in which the court deals with its officers in order to prevent misconduct. Therefore, I do not think that it is a mere remedy to recover money. Although that is often the result, yet it is not the object of that proceeding. That jurisdiction of the court may be invoked by anyone, not only by the person to whom the money is due. Can it, then, be said that, when that jurisdiction is resorted to, and an application is made to the court, all other remedies are done away with? I do not agree with that contention. The proceeding is quite different, and is made for a different purpose. Certainly the mere making of such an application cannot deprive the party of other remedies for the recovery of the money. Here the application failed, and then this action was brought upon the order to enforce it as if it were a judgment. I think that Wright, J. was right in saying that the application to commit did not take away the remedy by action. It is not necessary to go further and to decide whether an order for attachment, and imprisonment thereunder, would have deprived the applicant of his remedy by action. I reserve my judgment upon that question. As to the cross-appeal, I cannot agree with the judgment of Wright, J., and the cross-appeal must succeed.

Appeal dismissed; cross-appeal allowed.

Solicitors for the appellant, *Foss* and *Ledsam*.

Solicitors for the respondent, *Marshall* and *Marshall*.

Friday, Nov. 29, 1895.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

Re CORNISH; *Ex parte* THE BOARD OF TRADE. (*a*)

APPEAL IN BANKRUPTCY.

Bankruptcy — Trustee — Liability to render an account — Undistributed funds — Jurisdiction of Board of Trade — Lapse of time — Trustee Act 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8, *sub-sect.* 1 — *Bankruptcy Act* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 162, *sub-sect.* 2.

The power given to the Board of Trade under clause (*b*) *of sect.* 162, *sub-sect.* 2, *of the Bankruptcy Act* 1883, *to require a trustee in a liquidation under the Bankruptcy Act* 1869 *to furnish an account of his receipts and expenditure as such trustee, is not limited to the case of trustees who have been shown to have had in their hands, since the passing of the Bankruptcy Act* 1883, *any unclaimed or undistributed funds such as are mentioned in clause* (*a*) *of the same sub-section.*

A trustee in a bankruptcy, being an officer of the court, cannot rely upon the provisions as to lapse of time contained in sect. 8, *sub-sect.* 1 (*b*) *of the Trustee Act* 1888.

THIS was an appeal by E. Fewings from the judgment of the Queen's Bench Division (Williams and Kennedy, JJ.) allowing an appeal from a decision of the judge of the Exeter County Court, who had refused an application by the Board of Trade that E. Fewings should furnish to them an account under sect. 162, sub-sect. 2, of the Bankruptcy Act 1883.

In 1875 Cornish became a liquidating debtor under the Bankruptcy Act 1869, and E. Fewings was appointed his trustee.

In 1876 Cornish died.

In Jan. 1895 the Board of Trade requested Fewings to send in to them an account of his receipts and payments as trustee.

He accordingly sent in an account in which he stated that the debtor's only asset was a life estate in certain property in respect of which he had received 850*l.*, and that he had expended more than that sum in paying off incumbrances and law costs. He had not obtained any release from the creditors. He had received some money on account of the debtor's estate since the passing of the Bankruptcy Act 1883, but had paid such moneys into the Bankruptcy Estates account at the Bank of England.

The Board of Trade, not being satisfied with this, ordered him "to submit to them an account verified by affidavit of the sums received and paid by him," as such trustee.

The trustee refused to furnish anything more.

The Board of Trade applied to the court, and the Queen's Bench Division, reversing the order of the County Court judge, directed the trustee to comply with the requirements of the Board of Trade.

The trustee appealed.

By the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) it is provided as follows:

Sect. 162, sub-sect. 2.—(*a*) Where after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. (*b*) The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The Bankruptcy Act 1869 (32 & 33 Vict. c. 71) is one of the Acts of Parliament mentioned in the fourth schedule to the Bankruptcy Act 1883.

Herbert Reed, Q.C. and *Ward Coldridge* for the trustee.—The court had no jurisdiction to order the trustee to comply with the order of the Board of Trade, because he has not been shown by the Board of Trade to be within the provisions of sub-sect. 2 of sect. 162. Clauses (*a*) and (*b*) of that sub-section should be read together. The words "such trustee" in clause (*b*) mean a trustee of the kind referred to in clause (*a*); *i.e.*, a trustee who, since the passing of the Bankruptcy Act 1883, has had any unclaimed funds or dividends in his hands or under his control:

Re Chudley; Ex parte The Board of Trade, 14 Q. B. Div. 402.

The Board of Trade has not shown here that the appellant has had any such unclaimed funds or dividends. Secondly, if the appellant is within the provisions of sect 162, sub-sect. 2, nevertheless the right of the Board of Trade to claim an account is barred by lapse of time under sect. 8, sub-sect. 1, of the Trustee Act 1888 (51 & 52 Vict. c. 59):

Re Page; Jones v. *Morgan*, (1893) 1 Ch. 304.

Muir Mackenzie, for the Board of Trade, was not called upon.

Lord Esher, M.R.—It seems to me that this case is perfectly clear. The only question is, whether under sect. 162, sub-sect. 2 (*b*), the Board of Trade is entitled to call upon this trustee to render them an account of his trusteeship. It was argued that the words in the sub-section, "such trustee or other person," are confined to a particular kind of trustee, namely, one who has had undistributed money in his hands since the passing of the Bankruptcy Act 1883. The learned judges in the court below held upon this argument that the words "such trustee or other person" refer to a trustee or any other person empowered to collect, receive, or distribute, any funds or dividends under any Act of Parliament referred to by the sub-section. If they were right in so holding, clause (*b*) of sub-sect. 2 applies to this trustee. I think that the court was perfectly right in what they held. Then it was argued that the clause only applies to this trustee if the Board of Trade has fulfilled a condition precedent. It is said that, before the Board has the right of asking for an account from this trustee, it must show that he has had in his hands since the passing of the Bankruptcy Act 1883 some undistributed money. There is no such condition required by clause (*b*). The words of the clause are perfectly plain. Then we were asked to imply that as a condition. It seems to me that to do that would upset the whole Act of Parliament, and bankruptcy trustees would be left to do as they liked without being called to account. I do not agree that the words "such trustee or other person" mean a trustee who has funds in his hands of which he must discharge himself. I think that the words mean a trustee appointed under the scheduled Acts referred to in the sub-section. Therefore that ground of the appeal fails. Then it was argued that this trustee is protected by the Trustee Act 1888. In the court below the learned judge said this: "The object of the Act of Parliament is to make him furnish such an account as would show whether he is an accounting party or not. When he has done that, it may or may not be that a claim for the balance arising on that account would be barred by the Statute of Limitations." The learned judge leaves that question open. But it has been pressed upon us here so much that I will give a decision on it. It seems to me that this Trustee Act, speaking of trustees in general, does not apply at all to such a trustee as the present, that is to say, to a trustee in bankruptcy. Therefore there are two answers upon this point: first, that the Trustee Act does not apply to such a trustee as the present; and secondly, if it did, it could only apply when a claim is made upon him to pay some money. No claim has yet been made upon him except to give an account which is merely for the purpose of showing whether any further claim can be made upon him. Therefore on both grounds I think that the learned judges in the court below were right, and that this appeal must be dismissed.

Lopes, L.J.—To my mind this is a very clear case, and I can add nothing to what has been already said by the Master of the Rolls. I only desire to say this, that I agree with his opinion that the Trustee Act 1888 does not apply to such a trustee as the appellant.

Kay, L.J.—I agree that the appeal should be dismissed. With regard to the construction of the Bankruptcy Act I will only add this: The words "such trustee or other person" in clause (*b*) of sub-sect. 2 of sect. 162 refer back to the words in clause (*a*) "any trustee or other person empowered to collect, receive, or distribute, any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceeding, under or in pursuance of any such Act." That is the description of "such trustee or other person." The words that the appellant here relies upon are no part of the description of the trustee or person. Clause (*a*) provides that, where such trustee or other person after the passing of the Act has undistributed funds in his hands, he is to pay them into the Bank of England, but the fact of his having undistributed funds in his hands is no part of the description of a trustee or other person. It would be the greatest possible nonsense if we were to introduce that as part of the description of a "trustee or other person," and it would limit the effect of clause (*b*) in a most extraordinary manner. The argument has seriously been this: that the Board of Trade cannot call upon any trustee or other person mentioned in the clause to furnish an account of his trusteeship unless it is first of all shown that since the passing of the Act he has had funds in his hands. It is argued that the appellant is not liable to give an account, because he says he has not had any funds in his hands since the passing of the Act. Williams, J. was perfectly right in holding that that is not the true construction of the Act. Clause (*b*) gives to the Board of Trade a large power for requiring a trustee to furnish accounts, and there is no reason why we should limit it. If a trustee when requested under that clause to furnish an account to the Board of Trade refuses or hesitates, the Board of Trade can apply to the Court of Bankruptcy for an order to enforce the request. The whole matter is the

accounting of an officer of the Court of Bankruptcy either to the court or to the Board of Trade which now has certain rights of interference in bankruptcy matters. The other point that was argued was that the Trustee Act 1888 applies to such a trustee as the appellant. There is more than one answer to that argument. First, I do not think that the provisions of the Trustee Act 1888 which put a limit of time to claims made upon trustees, have anything to do with the case of an officer of the court. If they did, they would apply to the case of a receiver and to other cases where officers of the court are put in possession of property, and are required by the court to account to the court. I have never heard that the Trustee Act 1888 applied to such a case as that. Then there is another point. Supposing that the Act did apply to such a trustee as this, it could not be relied on in the present case, because if it should turn out as a result of the account that the appellant has money in hand which he has not properly applied, then he would come within the exception in the Act, and the limitation of the liability of a trustee would not apply to him at all. Therefore this point also fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Collyer* and *Collyer*.
Solicitor for the respondent, *Solicitor to the Board of Trade.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, Nov. 5, 1895.

(Before KEKEWICH, J.)

Re SMITH; SMITH *v.* THOMPSON. (*a*)

Trustees—Power of investment in such securities as trustees "shall think fit"—Honest exercise of discretion—Receipt of bribe or commission—Liability of trustees.

A testator gave his residue to trustees on trust to invest in such stocks, funds, and securities as they "shall think fit." The trustees invested a portion of the estate in debentures of a limited company. One of the trustees without the knowledge of the others who had since died, received a commission or bribe of 300l. for making the investment.

Held that, as the surviving trustee could not have "honestly" thought fit to make the investment, having received a bribe, he was liable to make good any loss occasioned by the investment: but that the estate of the deceased trustee was not liable as he had made the investment honestly. In addition to making good any loss, the surviving trustee was also ordered to refund the bribe as money received when the investment was made on behalf of the trust estate.

THOMAS SMITH, who died on the 21st Jan. 1892, by his will, dated the 10th Oct. 1890 (as subsequently altered by two codicils), appointed Arthur Carpenter and Clement Smith (the testator's son) executors and trustees thereof, and, after making certain pecuniary and specific bequests providing for the payment of certain annuities and directing that the businesses in which he might be engaged at the time of his death should be carried on by his executors and trustees as therein provided, declared as follows:

And, as to the rest, residue, and remainder of my real and personal estate, I direct my said executors and trustees or trustee for the time being, in their or his absolute discretion, to sell and convert the same into money, and to invest the net proceeds of such sale and conversion, after paying thereout my funeral and testamentary expenses and debts and the legacies and annuities hereinbefore given upon such stocks, funds, and securities as they or he shall think fit, and to stand possessed of two-thirds of such residuary estate, or the stocks, funds, and securities of which the same may consist, upon trust to pay the dividends, interest, and income thereof to my said son Clement Smith during his life.

The trustees invested a portion of the trust estate in debentures for 3000*l.* in a company called The New Travellers Club Limited, which they purchased at par. The debentures were payable to bearer, and constituted a floating security on the assets of the company. Clement Smith, being desirous of increasing his income, urged his co-trustee to make this investment, but he was unaware that Arthur Carpenter had received a bonus or commission of 300*l.* from the company for procuring the application by the trustees for the debentures. It was alleged that the debentures had little or no market value.

Clement Smith died on the 18th Oct. 1894.

This was an action by beneficiaries under the will against Arthur Carpenter, the surviving trustee of the will, and the executors of Clement Smith for the administration of the estate of the testator, in which they claimed (*inter alia*) that the defendant Arthur Carpenter and the estate of Clement Smith might be held jointly and severally liable for any loss which might accrue to the trust estate by reason of the investment in the debentures of The New Travellers Club, and that the defendant Arthur Carpenter might be ordered to pay the sum of 300*l.* with interest at 4 per cent. The defendant Arthur Carpenter admitted his liability to pay the sum of 300*l.* with interest at 4 per cent.

Renshaw, Q.C. and *W. Freeman*, for the plaintiffs, referred to

Lewis v. *Nobbs*, 8 Ch. Div. 591;
Re Brown; Brown v. *Brown*, 52 L. T. Rep. 853; 29 Ch. Div. 889.

The debentures were not "proper" securities for investment, for they are payable to bearer. As a mortgage security they should have been valued. Carpenter is liable for any loss occasioned by the investment for he could not have "thought fit" to make it, as is shown by his taking a bribe of 300*l.* He is also liable to refund the bribe as money received by him on behalf of the trust estate. Smith's estate is also liable, for he concurred with Carpenter in making the investment.

Marten, Q.C. and *Dundas Gardiner* for one of the executors of Clement Smith.—The estate of Clement Smith is not liable, for he acted honestly and within the powers conferred by the will.

George Henderson for the defendant Carpenter—If Carpenter is liable for the loss occasioned by the investment he ought not to be ordered to account for the commission of 300*l.*

Renshaw, Q.C. replied.

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

KEKEWICH, J. — The question turns upon the meaning of this clause in the testator's will, "and as to the rest, residue, and remainder of my real and personal estate, I direct my said executors and trustees or trustee for the time being, in their or his absolute discretion, to sell and convert the same into money, and to invest the net proceeds of such sale and conversion . . . upon such stocks, funds, and securities as they or he shall think fit." What does that mean? Mr. Renshaw has referred to two cases, *Lewis* v. *Nobbs* (*ubi sup.*), and *Re Brown*; *Brown* v. *Brown*, (*ubi sup.*). In those cases, however, the words are different from the words used here. In *Lewis* v. *Nobbs* (*ubi sup.*) the proviso was that, "as often as the trustees should think it expedient so to do, they might sell out, transfer, or otherwise vary any of the trust moneys, funds, and securities, and invest the same in or on any other funds or securities whatsoever." The words there are peculiar, because, besides the reference to "other" funds and securities which must mean "other" than those mentioned before, there is the general word "whatsoever." Again, in *Re Brown* (*ubi sup.*), the trustees are directed to invest the moneys coming to their hands in respect of the trust estate in their names or under their control "in such mode or modes of investment as they in their uncontrolled discretion should think proper." But, in neither of those cases is there any general exposition of the duties of trustees under such a clause, although it is clear that the learned judges in those cases gave the words a wide interpretation. In my view they were right in so doing, because to give them a narrow interpretation would really be to strike them out altogether. Mr. Renshaw says that the words mean such "proper" stocks, funds, and securities, as they shall think fit to invest in, and that in the case of a mortgage, for instance, they could not invest without taking a valuation. But I should say the words clearly authorised them, if they, knowing the property, thought it advisable, so to invest on a mortgage. The question here, however, is what is the meaning of the words "shall think fit." I think they mean "shall honestly think fit." If a trustee knows a security to be rotten, he could not honestly think fit to invest in it. It is impossible for the court to allow a trustee to say, I think that a security which I know to be a bad one, is one in which I may properly invest. In such a case the court would say, you could not in fact have thought fit to invest in it. There have been many cases in which a trustee has said, "I exercised my discretion in a particular way," but in which the court has said that the real fact was that he exercised no discretion at all. Did these trustees, in fact, honestly think fit to make this investment, having a due regard to their fiduciary position? I cannot go so far as to say that these trustees were bound to look into the matter in the way that trustees without such a discretionary power as this would be obliged to do, for that would strike out altogether the discretionary words. With regard to these debentures I suppose no very prudent man would invest in debentures charged on the property of a limited company as a floating security. But there is a large class of men who are not so very prudent, and who have but a hazy idea of what a floating security really is. They do invest money on such debentures, and they think them a very good security. Why should not a trustee in the position of these trustees think fit to invest in these debentures? Mr. Renshaw says one reason why he could not think fit is that these debentures are payable to bearer. That objection does not however seem to me conclusive. It would not be difficult to find in many modern settlements power to invest in bearer debentures. Then comes the question, is the defendant Carpenter liable on other grounds, and if so, is the estate of Clement Smith liable because he concurred in the purchase? I have no doubt that the history of the case is this: Clement Smith was anxious to invest in order to increase his income, but the debentures were introduced to him by Carpenter. Smith trusted to the representations of Carpenter, and I do not see how I can say that Smith was wrong, and that he did not honestly think fit to make the investment. With respect to Carpenter it is different. He, having received a bribe of 300*l.* could not have honestly thought fit to make the investment, and I must hold that he is liable for any loss occasioned thereby, and that he must make it good, and that Smith's estate must be exonerated. The liability is not joint and several, the defendant Carpenter is alone liable. This defendant also admits on the pleadings his liability to pay the 300*l.*, and it did occur to me to suggest to counsel whether he could be made to account for the 300*l.* if he made good the loss to the trust estate arising out of the investment of the trust money, because if he pays the 3000*l.* and takes over the security, then the 3000*l.* debentures are not an investment of trust money, but of his own money. It certainly occurred to me that the court is not in the habit of fining a trustee by way of punishment. But the answer I think is this: The court says, As you received this 300*l.* when the investment was made on behalf of the trust estate, and for the benefit of your *cestui que trust*, you must account for it to those *cestui que trust*; and how can that be altered by the fact that you have been held liable to make good the loss occasioned by the investment, some time after the bribe was received. Carpenter did receive this 300*l.* as agent for the trust estate, and he must therefore account for it, although he may also have to account for breach of trust in investing in an improper security.

Solicitors: *Webster* and *Webster*; *Hunter* and *Haynes*; *O. E. Dawson.*

QUEEN'S BENCH DIVISION.

Dec. 3 and 5, 1895.

(Before MATHEW, J.)

TYSER AND OTHERS *v.* THE SHIPOWNERS' SYNDICATE (RE-ASSURED) AND OTHERS. (*a*)

Marine insurance—Syndicate of underwriters—Policy issued by—Liability of members, whether joint or several—Partnership of members.

A syndicate of underwriters, not members of Lloyd's, was formed under an agreement which authorised a manager to underwrite policies of marine insurance on account of the several persons who formed the syndicate. The manager was to have power to insure by time policies, and

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

was to obtain the highest rates, and in consideration of the "highest paid premium" was to be at liberty to return to the assured 20s. per cent. of the amount covered in the event of the vessel incurring no accident during the currency of the policy. The manager was empowered to sign these policies on behalf of the syndicate, affixing opposite the name of each member on each policy the proportion of risk taken by such member; and no liability was to attach to any member beyond his own proportion of the risk accepted in his name and the members were not to be liable for one another. The manager was to receive as remuneration a certain percentage on the premiums and the profits (if any), and was at his own expense to keep offices and the necessary staff for the business, and at the end of the stipulated time the accounts were to be closed and the profits or losses divided amongst the members in proportion to their respective interests.

Under this agreement the manager accepted, on behalf of the syndicate, a risk which was described as a re-insurance on ships to the amount of 79,300l., valued as per original policies. The subscription on the policy was in the form "The Shipowners' Syndicate (Re-assured)." Then came the signature of the manager and the names of all the members with the proportionate amount subscribed opposite the name of each. A total loss having occurred upon the policy:

Held, that the agreement did not constitute a partnership among the members of the syndicate; that the liability of the members upon the policy was not a joint, but a several liability in the proportion of the amounts subscribed by each, and that the liability to return premiums was also a several liability in the like proportion.

COMMERCIAL CAUSE tried by Mathew, J.

The plaintiffs are underwriters at Lloyd's and the defendants are a syndicate of underwriters, consisting of twenty members, of whom John M. Corderoy is the manager, and the latter underwrites for the members of the syndicate.

The action was brought to recover a total loss upon a policy of marine insurance effected by the defendants upon the s.s. *Brunswick* for 500l., and for the return of premiums.

On the 28th Feb. 1894 an agreement was entered into between John M. Corderoy, insurance broker (hereinafter called the manager), of the first part, Thomas R. Miller, manager of certain mutual insurance clubs, of the second part, and the several persons whose names were written in the schedule hereto (hereinafter called the syndicate) of the third part. After reciting that the syndicate "have arranged and agreed with the manager that he shall be authorised to underwrite policies of marine insurance as hereinafter provided for and on account of and in the names of the several parties forming the syndicate upon and subject to the terms and conditions hereinafter contained," the agreement provided:

1. The manager shall have power to insure the hulls and machinery of steamers by twelve months' policies, to be issued either on the terms of Lloyd's policies or on club terms as the manager may arrange at the time of effecting each and every insurance.

2. The dates and durations of the risks taken are to be for twelve months or shorter periods from any date in the year 1894, on or from which an insurance may be effected to the corresponding date in the following year 1895.

3. The manager shall arrange that the rates paid for the said risks shall be as far as possible the highest paid at Lloyd's or to the companies under policies of a similar or previous date in the same year, and this stipulation shall also apply to any additional premiums which may become payable in respect of any breach of warranty or other deviation from the agreed terms of any policy issued.

4. In consideration of the "highest paid premium," as far as possible the manager shall be at liberty to add the following special return clauses in policies issued on behalf of the members of the syndicate, namely, "In the event of the within insured steamer running the currency of this policy free of accident forming a claim thereupon, the owners of the said steamer shall be, and they are hereby entitled to a return of 20s. per cent. net on the amount covered on effecting this insurance, provided always that the payment of any such return premium shall operate as a cancelment of the policy on which such return is made, and no claim whatever shall be made on this policy after such return has been paid." The said policy shall also contain a provision that "should the steamer be laid up during any portion of the currency of a policy and return premium be paid but otherwise the policy be clean, a claim for return of premium for running free of accident shall only be made in proportion to the number of complete months during which the steamer has been on sea risk, and then only if this period be not less than three months, otherwise no return shall be made under this or the preceding clause."

5. The manager is hereby appointed manager of the syndicate, and is hereby empowered to sign policies on behalf of the syndicate and in the individual names of the members thereof, the said manager affixing opposite the name of each member of the syndicate on each and every policy the respective proportions of risk taken by such individual member of the syndicate on the said policy.

6. No liability shall attach to any member of the syndicate beyond his own proportion of the risk accepted in his name, the members not being liable for one another or in any way guaranteeing the solvency the one of the other.

7. The said manager's remuneration shall be 5 per cent. upon the gross premiums received by him on behalf of the members of the said syndicate, and 10 per cent. on the net profits (if any) available for distribution among the members. All interest which may accrue on any funds in hand and on deposit premium shall be held for the benefit of the syndicate and credited in account.

8. The said manager shall at his own expense keep proper and separate books for the syndicate account and the accounts of the respective members thereof: he shall provide offices and necessary staff for the conduct of the business in the city, and shall issue accounts of the working thereof to the members, such accounts being duly audited by some chartered accountant of good standing in the city of London.

9. The manager shall pay and debit against the syndicate account the necessary subscription to Lloyd's, the manager being hereby authorised to make the most favourable arrangement he can with the secretary at Lloyd's for such subscription.

10. All risks taken from other brokers are to be subject to the usual deduction of 5 per cent. brokerage and 10 per cent. discount as usual with Lloyd's and London companies; the highest rate of premium as far as possible, shall however apply to all risks taken under this clause, but such policy or policies may or may not be subject to the special return clauses in paragraph 4.

11. The manager shall be bound forthwith as risks are accepted on behalf of the members of the syndicate

to re-insure the whole of the total loss risks, and the remainder of all other risks shall be dealt with in such manner as may be determined by the manager in conjunction with the said T. R. Miller, the intention being that all the arrangements for re-insurance are to be mutually agreed between the said T. R. Miller and the said manager on behalf of the members of the syndicate.

12. The manager shall, on behalf of the syndicate, be at liberty to undertake the management of collision and salvage cases, &c., relieving the owners as far as possible from all trouble and anxiety in these matters, on the owners undertaking to produce as required all necessary witnesses, and to give the manager all reasonable and proper assistance. The manager shall also be at liberty to make advances to owners, to meet average expenses, &c., in the case of heavy claims on such terms as he and the said T. R. Miller may mutually agree.

13. The manager shall in taking each and every risk for and on behalf of the members of the syndicate throw upon each member of the syndicate a liability not exceeding the proportionate interest of such member in the syndicate as shown by the figure inserted opposite the name of each of the members of the syndicate parties hereto.

14. The authority given to the manager to underwrite on behalf of the respective members of the syndicate in manner hereinbefore provided, shall commence as from the 1st of Jan. 1894.

15. All net premiums and other moneys payable in respect of the underwriting business shall be collected by the manager, and paid into a separate insurance banking account to be kept for that purpose by the manager with the city bank, and sums shall be placed on deposit from time to time as may be mutually agreed between the manager and the said T. R. Miller, and such deposits shall be made in their joint names; and the manager shall adjust and pay in the usual course out of the moneys received by him and on deposit all claims for losses or return of premiums on the policies aforesaid, and shall pay all usual expenses and charges, and shall take all necessary steps to collect and to enforce payment of all re-insurances. The members of the syndicate in respect of their respective proportionate interests therein undertake to keep the manager out of cash advances in respect of claims and all matters aforesaid.

16. All policies of re-insurance and all moneys received thereunder shall be held in trust by the manager and the said T. R. Miller and such third party as they may appoint primarily as security for the assured under each policy the risk of which is re-insured; and by way of extra security for such assured in the event of the bankruptcy of any member of the syndicate, the following special clause is to be inserted in every policy: It is specially agreed that the assured are hereby entitled by way of further security for the performance of the obligations of the subscribing underwriters, and of each and every of them, to the benefit by way of first charge of the policies of re-insurance effected or to be effected on their behalf, and all moneys received thereunder.

17. As soon as possible after the 31st Dec. 1895 the manager shall close and wind-up the affairs of the members of the syndicate under this agreement, and shall divide the profits (if any) amongst the members of the syndicate in proportion to their interests in the underwriting account; and should the said accounts on adjustment show any loss, such loss shall be borne and paid by the members of the syndicate in like proportion.

18. In case any dispute or difference shall arise between the parties hereto, respecting this agreement or the construction thereof, or anything herein contained, the same shall be submitted to the arbitration of two arbitrators to be chosen by the parties, and the two so chosen shall choose a third, and the award of the said arbitrators or any two of them shall be binding and conclusive on the parties; and it is hereby agreed between the parties hereto that all proceedings on any arbitration shall be subject and in accordance with the provisions contained in the Arbitration Act 1889.

The syndicate was formed on the 28th Feb. 1894, and was to last for a year, but at the end of that time it was continued for another year.

On the 4th March 1895 the plaintiffs effected with Mr. Corderoy a re-insurance on the hulls and machinery of ships valued at 79,300*l.*, which the plaintiffs had as underwriters, at Lloyd's, insured. The rate was 6*l.* 12*s.* 6*d.* per cent., and the re-insurance was stated to be a re-insurance of G. W. Tyser and Co. (the plaintiffs), and subject to the same clauses and conditions as the original policy or policies, and was to remain in force for twelve calendar months, commencing at dates to be afterwards mentioned.

The policy of re-insurance contained this special clause:

The Shipowners' Syndicate (Re-assured) Special Clause. It is specially agreed that the assured are hereby entitled by way of further security for the performance of the obligations of the subscribing underwriters, and of each and every of them, to the benefit by way of first charge of the policies of re-insurance effected or to be effected, and all moneys received thereunder.—JOHN M. CORBROY, Manager.

Then followed the subscription form in the policy, which was as follows:

The Shipowners Syndicate (Re-assured).—John M. Corderoy, Manager.—John M. Corderoy, six and half thirtieths; Thomas R. Miller, one and half thirtieths; William Hedges, two thirtieths; A. L. Tweedie, two thirtieths. [Then followed the other names with the amount in thirtieths against each name, making in all thirty thirtieths, or the whole amount of the risk.]—On 79,300*l.*—March 4, 1895.—The Shipowners' Syndicate (Re-assured).—JOHN M. CORDEROY, Manager.

On the following day, Mr. Corderoy, pursuant to clause 11 of the agreement, re-insured these risks in the Uniform Line Steamship Insurance Association, against total loss, general average and salvage, and also in the New Marine Mutual Insurance Association.

While the policy of the 4th March 1895 was in force one of the ships—the *Brunswick*—became a total loss, and the plaintiffs now claimed in respect of such loss.

The defendants admitted liability, subject to the following questions to be decided by the court: (1.) Whether the liability on the policies was joint or several. (2.) In the event of loss and any individual members being unable to pay, whether the assured were entitled to recover from the trustees the proportion of re-insurance actually received from the clubs to which such individual member is entitled, or whether the whole amount received from the clubs was to be applied to cover the assured against any deficiency through default of any member or members. (3.) Whether the policies of re-insurance are to be retained by the trustees, or handed over to the assured.

The arguments are sufficiently indicated in the judgment.

Herbert Reed, Q.C. and *Scrutton* for the plaintiffs.

Joseph Walton, Q.C. and *Manisty* for the syndicate generally, except the three members who were specially represented.

Warmington, Q.C., *Lewis Thomas*, and *W. De B. Herbert*, for the defendant Hedges.

Gore Browne for the defendant Pattenden.

Scott Fox for the defendant Wheatley.

Cur. adv. vult.

Dec. 5.—MATHEW, J. delivered the following written judgment:—This action was brought to recover for a total loss of the ship *Brunswick*. The plaintiffs were underwriters at Lloyd's, who had re-insured with other underwriters, described in the writ as the "Shipowners' Syndicate (Re-assured)." The writ was issued on the 22nd Nov., and an application was made for an early trial on the ground that several actions were pending, and that it was of great importance that the rights of the parties should be speedily ascertained. It was arranged that statements of the points in dispute should be exchanged and the cause entered. The trial took place on the 3rd Dec., and I have now to deliver judgment. The defendants are a group of underwriters, not members of Lloyd's, who, under the terms of an agreement which will be more fully referred to hereafter, had authorised a manager named Corderoy to underwrite policies of marine insurance on account of the several persons forming the syndicate. The plaintiffs' policy had been effected with Corderoy as manager. It was in the ordinary form of a Lloyd's policy, and was described as a re-insurance on ships to the amount of 73,300*l.* valued as per original policies. The usual clause provided that the assurers promised and bound themselves, each one for his own part, for the true performance of the contract in the policy, confessing the consideration paid. At the end of the policy the subscription was in the following form. [His Lordship then read from the subscription form of the policy as stated above.] The first point raised with reference to this policy was whether the liability of the members of the syndicate was joint or several. For the plaintiffs it was contended that the syndicate was in point of fact a firm or partnership; that the name "syndicate" imported combination for purposes of profit, and that there was therefore a joint liability upon the policy. The question was stated to be of great importance because the operations of the syndicate had been very extensive, and had resulted in considerable losses, and if each member of the syndicate were liable for the whole of the losses the result might prove most disastrous to individuals. For the defendants it was argued that upon the face of the policy the liability was several and not joint. It was said to be in the ordinary course of business that one underwriter should act for a number of other underwriters at Lloyd's, and should subscribe policies for each member of the group, and in support of that position, which was really not disputed, attention was called to the original policy effected by Tyser and Co., at Lloyd's, from which it appeared that insurances had been effected for eight gentlemen whose names, as in this case, were stamped on the policy, and who insured in different proportions a sum of 100*l.* It was said, when the terms of the subscription to this policy were examined, that the same principle was followed, and that each member of the syndicate made himself responsible in the same way for the proportion which he underwrote of the amount insured. Then the plaintiffs' counsel called attention to the special clause in the policy under which "the assured became entitled to the benefit, by way of first charge, of the policies of re-insurance effected or to be effected by the subscribing underwriters and all moneys received thereunder." It was said that if it were left in doubt by the form of the subscription whether the liability were joint or several, this clause showed an intention to enter into a joint undertaking, for it provided that there should be a "further security for the obligations of the subscribing underwriters, and of each and every of them." This proved, it was said, that "syndicate" meant something equivalent to firm, company, or partnership. But, on the other hand, the word "syndicate" does not indicate in what way the members are acting together, and they are described on the clause as "subscribing underwriters." I see no ground for thinking that it was intended by this provision in the policy to enlarge the obligation of the underwriters, or to extend the security which this special clause was intended to afford. If each underwriter was responsible only for the obligation created by his own subscription, it was unlikely that he should extend his liability to the obligations of his fellows; and the reasonable construction seems to me to be that each underwriter undertook that the benefit of any re-insurance to which he was entitled should be available for his assured. The clause seemed to be intended to prevent the loss of the security by the insolvency of any of the underwriters, and the suggestion that the object was to provide against a possible loss of the security by bankruptcy seems to me improbable. I am therefore of opinion that the liability upon the policy is several and not joint. If this view be correct the case would seem to be concluded. But the case was further argued for the plaintiffs on the ground that the agreement under which the syndicate was formed and carried on business of itself constituted a partnership; and, as this point was discussed at considerable length, it may be desirable that I should express my opinion upon it. The syndicate was originally formed on the 28th Feb. 1894, and was to last for a year. At the end of that time the syndicate was continued for another year, the members being the persons whose names appear at the foot of the plaintiffs' policy. The agreement was between John Matthew Corderoy, the manager, Thomas Robson Miller, the manager of certain mutual re-insurance clubs, and the several persons whose names appeared in the schedule thereto, thereinafter called the syndicate. After reciting that the syndicate had arranged with the manager that he should be authorised to underwrite policies in the names of the persons forming the syndicate, power was given to the manager to insure steamers by time policies, either on the terms of Lloyd's policies or on club terms. Clause 4 provided as an inducement to insurers that the manager should be at liberty to return 20*s.* per cent. on the amount covered in the event of the vessels incurring no accident during the currency of the policy. Clause 5 provided that the manager was empowered to sign policies on behalf of the syndicate, and in the individual names of the members thereof, the manager affixing, opposite the name of each member, on each and every policy the respective proportions of risk taken by such individual member. Clause 6 provided that no liabilities should attach to any

member of the syndicate beyond his own proportion of the risk accepted in his name, the members not being liable for one another or in any way guaranteeing the solvency the one of the other. Upon these clauses there would seem to be no foundation whatever for the argument of the existence of a partnership, but great reliance was placed on the clauses that follow. By clause 7 the manager's remuneration was to be 5 per cent. upon the gross premiums and 10 per cent. upon the profits, if any, available for distribution among the members. By clause 8 the manager was at his own expense to keep proper books for the syndicate accounts and the accounts of the members thereof. He was to provide offices and necessary staff for the conduct of the business in the city, and to issue accounts of the working thereof to the members. By clause 9 the manager was to debit against the syndicate account the necessary subscription to Lloyd's. These clauses, it was said, showed that a joint business was contemplated, with a common fund for expenses and an ultimate distribution of the net profits among the members. But all these provisions are analogous to the arrangements that might be made with the manager of an underwriting account at Lloyd's for several underwriters. The provision for the creation of a fund out of moneys belonging to all the underwriters is in no way inconsistent with the obligation of each underwriter to subscribe *pro ratâ* for any expenses incidental to insuring. Very great reliance was placed by the plaintiffs' counsel on clause 11, by which the manager was bound, as risks were accepted on behalf of the members of the syndicate, to reinsure the whole of the total loss risks. It was said that what was contemplated was a re-insurance on behalf of the members jointly; and it was said that in compliance with that provision a re-insurance had been effected with two clubs, the Uniform Line Steamship Insurance Association and the New Marine Mutual Insurance Association, and when the policies came to be examined it appeared that they had been issued by name to the Shipowners' Syndicate (Re-assured) in each case. But the effect of these re-insurances is perfectly clear. The assured were the members of the syndicate. The title of the syndicate was descriptive only; and if it had been necessary to proceed against the clubs on their policies the interest must have been averred in the members individually; and for contribution to losses the individual members would have been liable: see *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie*, 60 L. T. Rep. 916; 22 Q. B. Div. 710.) It is difficult to see how a joint insurance could be effected, for each underwriter must re-insure his own risk. A policy by all to cover the risk of one would not be a valid contract of insurance, from the absence of interest in all but the one. An insurance by all to cover the risk of each is open to the same observation. The true meaning of the clause seems to me to be that where the manager accepted risks on behalf of the members he was bound to re-insure each of them. Thus construed, the clause works easily. Upon the plaintiffs' construction it would give rise to considerable difficulty. The fact that for convenience sake the name of the syndicate was used for the purposes of re-insurance with the clubs does not, and could not, alter the real nature of the contract. Clause 12 was also relied upon by the plaintiffs, for it enabled the manager, on behalf of the syndicate, to undertake the management of collision and salvage cases, &c., and also to make advances to owners to meet average expenses, &c. But this was doing no more than permitting the manager to do what the Salvage Association does for the underwriters at Lloyd's, and is no more inconsistent with the several liabilities of the members of the syndicate than is the employment of the Salvage Association with the several liabilities of the underwriters who employ it. Clauses 13 and 14 and the final clause 15 strongly favour the contention of the defendants that the agreement was not intended to create a partnership; and my judgment, therefore, upon the construction of the agreement, as well as upon the construction of the policy, is for the defendants. The further question was raised as to whether the syndicate jointly or the individual members were bound to return premiums for short interest. I am of opinion that it is in each case a liability of the individual members in the proportion of the amounts subscribed by each of them. Mr. Reed also contended, though not very strenuously, that, even though there was no partnership in fact, the members had held themselves out as partners, and he relied upon the fact that an office had been opened where the name "Shipowners' Syndicate (Re-assured)" appeared upon the door; also that the same name was stamped on the paper used by the manager. These, with the other facts in the case, were relied upon. They are clearly insufficient to justify me in coming to any such conclusion.

Judgment for defendants.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitors for the Syndicate generally, *W. A. Crump* and *Son.*

Solicitor for the defendant Hedges, *W. H. Herbert.*

Solicitor for the defendant Pattenden, *A. J. Oliver.*

Solicitors for the defendant Wheatley, *Steavenson* and *Couldwell.*

House of Lords.

Dec. 2, 3, *and* 18, 1895.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, HERSCHELL, MACNAGHTEN, MORRIS, and SHAND.)

BRAY *v.* FORD. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Practice—New trial—Misdirection—Substantial wrong or miscarriage—Order XXXIX., r. 6—Libel.

In an action for libel, if the judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, such as may have affected their minds in considering what damages they shall award, there is a substantial "miscarriage" within the meaning of Order XXXIX., r. 6, and a new trial must be had, though the court should be of opinion that

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

other parts of the alleged libel were sufficient to justify the damages actually given.
Judgment of the Court of Appeal reversed.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.) refusing a new trial in an action for libel brought by the respondent against the appellant, which resulted in a verdict for the respondent, with 600*l.* damages. The plaintiff was a solicitor and justice of the peace in Leeds, and both parties were for many years members of the Leeds Liberal Club, and they were both interested in the Yorkshire College, to the funds of which they had largely subscribed. The plaintiff was a governor and vice-chairman of the council of the college, and had acted as its solicitor, receiving profit costs for his services. The latter fact having come to the knowledge of the appellant, he wrote the following letter to the respondent, which constituted the alleged libel, and circulated it among the governors of the college:—

Leeds, Feb. 26, 1894.

Sir,—During last summer, as you are aware, it came to my knowledge that, whilst holding the fiduciary position of vice-chairman of the Yorkshire College, you were illegally and improperly, as you know, making profit as its paid solicitor. I hoped you would have retired from that position ere this without my having to draw the attention of the council and my fellow-governors to your conduct, or having to give you this notice, and I had the greater reason to expect your retirement in view of the fact that you had in February last been compelled, by direct resolution of the members, proposed by myself, to retire from the post of paid solicitor whilst holding that of director and treasurer in Leeds Liberal Club (Limited).

As a solicitor and participant in illegal profits taken whilst holding positions of trust, you know how insidiously such a practice spreads and how dire its results often are on boards of management. I could give a forceful example from near at home in which you were a participating member, but forbear.

Another phase of this system which I will remind you of is, that it often leads those who practise it into extensive fraud. I will only mention the Liberator group of swindling companies as an example of it. And the wire-pullers in these companies not only used them to serve their ends, but used religious, educational, and philanthropic schemes to which they gave considerable sums for that purpose also.

Lest you should be in doubt as to your legal position, I will refer you to the opinion of the late Sir George Jessel, late Master of the Rolls. He says, "A director cannot make a profit in the case where he is both buyer and seller. He cannot act in both capacities and do justice to the buyer if he is the seller."

Lord Justice Cairns, referring to profit-taking by men holding positions of trust, said, "The rule of this court is founded upon the highest and truest principles of morality. No man can in this court, acting as an agent or director, be allowed to put himself in the position in which his interest and his duty will be in conflict."

There is much greater reason than that affecting yourself personally, which compels me as a matter of duty to stop the continuance of this class of profit-making in the Yorkshire College, which I trust has not extended to any of the officials beyond yourself. The flow of public contributions to the college depends upon confidence that the funds contributed will be administered by gentlemen who have no sordid end to serve. Doubt on this point would fatally injure its resources and status. Hence my determination to stop it, however unpleasant the duty may be.

For your example I may quote the conduct of Mr. Moulton, Q.C., who became an alderman of the London County Council, and who last year found that he had or might have committed some technical error by remaining consulting counsel after becoming an alderman. Mr. Moulton's honour led him to return the fees that might be supposed to have the taint of impropriety about them, and he also resigned his position as alderman. I now ask you to imitate his example.

It is now my duty to inform you that if you do not retire from either your position on the council or from that of paid solicitor within seven days from this date I shall, as a governor and well-wisher of the college, and with much regret, commence an action against you for your removal from the office of paid solicitor, and, if so advised, for the recovery of the fees which you have illegally and improperly taken. I shall send a copy of this letter to the governors of the college.

I am, Sir, yours faithfully,
GEO. BRAY.

J. Rawlinson, Ford, Esq., J.P., Vice-Chairman of the Council of the Yorkshire College, Leeds.

The respondent thereupon brought the present action for libel, and at the trial, at Leeds, before Cave, J. and a special jury, it was contended on behalf of the respondent that under the articles of association of the college he was entitled to profit costs, notwithstanding the fact that he held the fiduciary position of director of the institution. The learned judge directed the jury that the plaintiff was entitled to take profit costs from the college, and left it to the jury to assess the amount of damages, which they fixed at 600*l.*

The Court of Appeal held that, although there had been a misdirection on the question of the construction of the articles of association of the college, and the plaintiff was not entitled to take profit costs, still that there were imputations in the letter sufficient to sustain the verdict, and therefore there had been no substantial wrong or miscarriage within the meaning of Order XXXIX., r. 6, and refused a new trial.

The defendant appealed.

Sir *E. Clarke*, Q.C., *Bigham*, Q.C., *Atherley Jones*, and *H. Greenwood* appeared for the appellant.

Sir *F. Lockwood*, Q.C., *Blake Odgers*, Q.C., and *Scott Fox* for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 18.—Their Lordships gave judgment as follows:—

The Lord CHANCELLOR (Halsbury).—My Lords: In this case, an action for libel, the learned judge directed the jury that the plaintiff, who was a solicitor, was entitled to charge an institution, of which he was himself both occasionally the solicitor and also a governor—that is, a person intrusted with the government and management of the institution in question—the profit costs which he would have been entitled to charge if he had not filled that character. It is not necessary to consider whether the institution could have given such a consent as would have enabled him to have taken such profit, because I am of opinion that no such consent was, in fact, given; the matter relied upon is absolutely irrelevant to such a question. It cannot now be denied that this was a misdirection. The only question, therefore, which we have to deal with is whether, in the language of the rule applicable to this matter, a substantial wrong or miscarriage has been thereby occasioned at the

trial. I think that there has been a substantial wrong and a miscarriage. I think that there has been a substantial wrong, since I think that the defendant was not permitted to present his case to the jury with the argument that his original complaint was true. This seems to me a substantial wrong, and I am not prepared to say what a jury might think if they were told that the original complaint was itself unfounded, or if they were told that, though the original complaint was well founded, there was excess in the language by which that original complaint was made; but it appears to me that it was, in this case, withdrawing from the jury a question which the defendant had a right to have submitted, a right which was so relevant and important to the discussion that I must say I cannot regard it as a trivial or immaterial matter; and I think it was a miscarriage, as this view was not presented to the jury. What influence such a wrong might have had upon the verdict or upon the amount of damages I am not disposed to consider. The case must be tried again, and I desire to say nothing which can in any way influence the arguments upon the trial which must take place. It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict for the same amount of damages. I absolutely decline to speculate what might have been the result if the judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant. I do not think it desirable to say what would be my own construction of the rule in other cases not now before me. I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed, that a new trial should be ordered, and I move your lordships accordingly.

Lord HERSCHELL.—My Lords: In this case the respondent obtained a verdict for 600*l.* in an action of libel tried before Cave, J. and a special jury at Leeds. The respondent is a solicitor, and has been for some years vice-chairman of the council of the Yorkshire College. He has manifested his interest in the work of the college by large pecuniary contributions. Either alone or in conjunction with his partner, he has acted as solicitor to the college since its incorporation nearly twenty years ago. Prior to 1878, in which year he entered into partnership with another solicitor, he made a present of his time and labour to the college. After entering into partnership he considered that he was not at liberty to do so. He informed the college of this, and bills of costs were afterwards delivered to and charged against the college in the usual way. The total amount of the profit received by the respondent on these bills of costs, which covered the period from 1879 to 1893, was 103*l.* 10*s.* His annual subscriptions to the college during the same period considerably exceeded that amount. The libel complained of was a copy of a letter addressed to the respondent, which was sent to more than 300 of the governors of the college and to some other persons. The letter commenced by stating that the respondent, whilst holding the fiduciary position of vice-chairman of the college, had been illegally and improperly, as he knew, making profit as its paid solicitor. On this were founded some comments which a jury would be, to say the least, justified in regarding as gravely libellous. At the trial it was contended that the respondent was, by virtue of the fourth clause of the college's memorandum of association, entitled to receive remuneration for his services, notwithstanding the position he held as vice-chairman of the council. The learned judge adopted this view, and so directed the jury. The Court of Appeal have held that this was erroneous, and I agree with them. I do not think the words relied on have the effect contended for. It is not now in controversy that if this be so the respondent was not warranted in making a charge for his professional services. It is an inflexible rule of the Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services. It is clear, however, that the learned judge misdirected the jury, and that, as the misdirection cannot be said to have been on a point wholly immaterial, the appellant would have been entitled, prior to the Judicature Act, to a new trial as of right. That Act provides that a new trial shall not be granted on the ground of misdirection, unless, in the opinion of the court, some substantial wrong or miscarriage has been thereby occasioned in the trial. The Court of Appeal came to the conclusion that there had been no such wrong or miscarriage in the present case. They thought, as I understand, that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction of the learned judge had been the other way. If I had thought that the enactment relied on sanctioned dealing with the case in this way, I am far from saying that I should have differed from the conclusion at which they arrived. But I have come, with some reluctance I own, to the conclusion that it does not. The provision is, in my opinion, a very beneficial one, and I should be sorry to say anything to narrow its scope further than the language employed seems to me to render necessary. In cases in which the question is what are the facts, or the proper inferences to be drawn from the facts, if the court think that the verdict of the jury is in accordance with the true view of the facts, and of the inferences to be drawn from them, it may be that they would have done right in refusing to grant a new trial on the ground of misdirection, even where the parties had a right

to claim that the action should be tried by a jury. But in the case of an action for libel not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal. The damages cannot be measured by any standard known to the law, they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at 500*l.* or 1000*l.* Where, then, the judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their mind in considering what damages they should award, I think that there has been a substantial miscarriage within the meaning of the rule. The court may think, as I might think in the case before your Lordships, that the jury would have given the same damages if the law had been correctly expounded, but this is a mere matter of speculation; it cannot be asserted with the least certainty that they would have done so. The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them. I find it impossible to say that the case upon which the jury ought to have adjudicated ever was wholly before them, and that they were allowed to give to all the circumstances which might legitimately have influenced the verdict their due weight. This seems to me to establish that there has been a substantial miscarriage, and that the appellant is entitled to a new trial.

Lord WATSON.—My Lords: I shall endeavour, without recapitulating the facts of this case, to indicate the considerations which have led me to differ from the conclusion arrived at by the learned judges of the Appeal Court. The error committed by the presiding judge consisted in his directing the jury that the respondent, as a governor of the Yorkshire College, was legally justified in charging and accepting payment of full professional remuneration in respect of services rendered by him to the college in his capacity of solicitor. Your Lordships can entertain no doubt that the respondent was neither entitled to charge profit costs in respect of these services nor to retain them when received by him. Such a breach of the law may be attended with perfect good faith, and it is, in my opinion, insufficient to justify a charge of moral obliquity, unless it is shown to have been committed knowingly or with an improper motive. Order XXXIX., r. 6. of the Supreme Court Rules makes it imperative that a new trial shall not be granted on the ground of misdirection, unless, in the opinion of the court, some "substantial wrong or miscarriage has been thereby occasioned in the trial." I think it is clear that the misdirection given by Cave, J. at the trial was such as to occasion a miscarriage, in the sense in which that word was understood by the legal profession at the time when the Rules of 1883 were framed. The only question, therefore, which your Lordships have to consider is whether the miscarriage has been substantial within the meaning of the order. Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal. In the present instance the case made in evidence by the appellant was not submitted to the jury. The whole imputations in his letter of the 26th Feb. 1894, which are said to be libellous, arise out of and are strung upon the allegation that the respondent's acceptance and retention of full remuneration for the professional services rendered by him to the college were in violation of the law. The text or basis of these imputations was, in point of fact, true; but the case went to the jury on the footing that it was false. It is plain that the learned judge did not regard its falsity as an immaterial feature of the case which the jury had to consider. He told the jury: "In my judgment he" (*i.e.*, the respondent) "was not making a profit illegally or improperly, and, if it was not illegal or improper, of course Mr. Ford could not know that it was either, and that does impute to him conduct which, if it were true, would no doubt tend to lower him in public estimation, and properly so tend." I have already indicated my opinion that the illegality of the respondent's conduct would not necessarily justify a charge of acting improperly, if the impropriety imputed meant anything more than illegality; and I agree with the learned judges of the Appeal Court in thinking that, assuming illegality, there are other imputations in his letter which might sustain a verdict against the appellant. I do not profess to know all the considerations by which juries are influenced in arriving at their verdict; but it does appear to me that, in assessing damages, a jury might reasonably take into their consideration whether the charge upon which libellous imputations were made by way of comment was or was not in itself a libel. In the one aspect, the appellant's letter conveyed a wholly baseless and libellous charge; in the other, a well-founded accusation, followed up by language which conveyed other and libellous imputations. I do not feel myself in a position to affirm that, in each of these cases, the same jury would have awarded the same sum of damages. I could not possibly arrive at that conclusion without first assessing the damages in each case for myself; and that is a duty which, in my opinion, I ought not to undertake in a case like the present. In such a case the assessment of damages does not depend upon any definite legal rule, and is the peculiar function of the jury, by whom the party liable is entitled to have the measure of his pecuniary liability determined. For these reasons I have come to the conclusion that there has been a substantial miscarriage within the meaning of Order XXXIX., r. 6, and that the case must be remitted for new trial. I have purposely abstained from suggesting any general rule applicable to the construction of Order XXXIX., r. 6. I doubt the possibility of formulating any rule which would be useful, and I do not doubt the inexpediency of making the attempt. Each case must depend upon its own circumstances. My noble and learned friend Lord Macnaghten, who is unable to be present, has requested me to state that he concurs in the views which I have expressed.

Lords MORRIS and SHAND concurred.

Judgment appealed from reversed, and a new trial ordered; appellant to have the costs of the appeal, the remaining costs to abide the event of the new trial.

Solicitor for the appellant, *E. C. Rawlings.*
Solicitors for the respondent, *B. Smith* and *Sons*, for *W. Warren*, Leeds.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Dec. 18, 1895.

(Before Lindley, Smith, and Rigby, L.JJ.)

Re Harvey; Harvey *v.* Hobday. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Incumbrance—Payment off, by tenant for life of property—Presumption as to payment off, for his own benefit—Relationship of parent and child between tenant for life and remaindermen.

The ordinary presumption that a tenant for life, who has paid off an incumbrance on the property of which he is tenant for life, has done so for his own benefit, and not for the benefit of the remaindermen, is not rebutted by the mere fact that the relationship of parent and child subsists between the tenant for life and the remaindermen.

Burrell *v.* The Earl of Egremont (7 *Beav.* 205) *applied.*

Decision of Kekewich, J. reversed.

Charles Bloomfield Harvey, by his will, dated the 3rd Oct. 1868, after directing payment of his debts and funeral and testamentary expenses, and making a bequest to his wife, Charlotte Emily Harvey, gave, devised, and bequeathed to his executors all other property of which he might die possessed, real and personal, upon trust to be disposed of by them in the best and most profitable manner, and at a time most suitable (except the pair of houses in Western-road, Romford, which should not be sold during the widowhood of his wife or until her second marriage), the proceeds of such sale to be applied in paying off his existing mortgage, with interest thereon, and the residue (if any) to be invested in the names of his executors upon trust that the interest arising therefrom, together with the rents or profits arising from the aforesaid houses should as they became due be paid unto his wife during her life or widowhood, and after her decease or second marriage, whichever should first happen, he requested that his executors would divide his property as equally as possible among his children by his said wife, or such of them as might be then surviving.

The testator died on the 7th Oct. 1868 leaving his wife and five children surviving him.

The two houses mentioned in his will were at the time of his death subject to a mortgage to a building society, the sum secured by which was under the rules of the society to be repaid by monthly instalments consisting of principal and interest. The trustees applied the rents of one of the houses in making the monthly payments to the building society, and by means of those rents and of a further sum provided out of the testator's estate the mortgage debt was finally paid off by June 1882.

The widow did not marry again, and she died on the 18th March 1891.

In May 1893 the two houses were sold for 1225*l.*, and out of this amount the plaintiff, as executor of the testator's widow, claimed to be paid so much of the amount of the rents which had been paid to the building society as represented capital.

On the 15th Nov. 1894 a summons was taken out by the plaintiff, to determine the question whether he was entitled to be so paid.

The defendants to the summons were the trustees of the testator's will and one of the residuary legatees.

The summons was adjourned into court, and came on to be heard before Kekewich, J., who directed an inquiry what (if anything) was due to the plaintiff as executor of the widow in respect of money expended out of the widow's income as tenant for life under the will in paying off incumbrances on the houses.

The chief clerk by his certificate found that nothing was due to the plaintiff, and Kekewich, J., on the matter coming on to be heard before him upon further consideration on the 2nd Nov. 1895, refused the plaintiff's application to vary the certificate.

From that decision the plaintiff now appealed.

Warrington, Q.C. and *Curtis Price* for the appellant.—Where a tenant for life pays off a charge on the inheritance he is *primâ facie* entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence the presumption is that he pays off the charge for his own benefit and not for the benefit of the persons entitled in remainder, although evidence may show the contrary conclusion to be true:

Burrell v. *The Earl of Egremont*, 7 Beav. 205.

We submit that that presumption is not rebutted by the mere fact that the relationship of parent and child subsisted, as in the present case, between the tenant for life and the remaindermen. The relationship of parent and child subsisted between the parties in

Morley v. *Morley*, 5 De G. M. & G. 610.

The defendants say that the plaintiff's claim is barred by the Statute of Limitations; but we contend that this is not a case to which the statute applies:

Topham v. *Booth*, 57 L. T. Rep. 170; 35 Ch. Div. 607.

[Smith, L.J.—I do not see how the statute can run at any rate before the 18th March 1891, the date of the death of the tenant for life.]

Renshaw, Q.C. (with him *Marcy*) for the respondents.—The law on this subject was discussed by the Court of Appeal in

Adams v. *Angell*, 36 L. T. Rep. 334; 5 Ch. Div. 634.

The question is, whether it is applicable to the state of facts now before the court. As a general rule, where a tenant for life pays off an incumbrance on the property of which he is tenant for life, he is to be considered as a creditor for the money paid:

Jones v. *Morgan*, 1 Bro. Ch. Cas. 206.

But the presumption that he intended to keep the incumbrance alive for his own benefit may be rebutted.

No reply was called for.

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

Lindley, L.J.—I think that this case is made out, after the accounts are understood. I think that it is established by the evidence beyond any reasonable doubt that, as a matter of fact (whatever the explanation of it may be), the rents of one of the two mortgaged houses were applied by the trustees of the will in paying off the instalments which became due under the mortgage to the building society. The rents kept them down. Then, having got that fact, we come to the law. I think Mr. Warrington is right in saying that the onus is upon the defendants to prove that the ordinary legal presumption does not apply in the present case—that is to say, that a tenant for life who pays off an incumbrance upon the inheritance does so for his own benefit. The fact that the tenant for life and the remaindermen stood in the relation of parent and child is no doubt a material circumstance, and if there were anything else to rebut the presumption, that fact would be of importance. But I do not think any of the authorities goes the length of saying that the existence of that relationship standing alone is sufficient to rebut the presumption. We must therefore look at the circumstances to see what there is to rebut the presumption. [His Lordship reviewed the facts of the case and continued:] The tenant for life had no option about paying off the mortgage debt; indeed, it was rather to her interest that it should be paid off. And it is one important fact that no other property but these two houses was subject to the mortgage. I do not think that the fact that some arrangement was made that the rent of one of the houses should be applied in paying off the mortgage debt does throw any light upon the question whether the tenant for life intended that it should be paid off for the benefit of her children. Then putting all the facts together it comes to this: On the one side is the legal presumption which I have mentioned, and on the other side there is nothing to rebut it except the relationship between the parties; and that, as I have already said, is not in my opinion sufficient to rebut the presumption. I think that the appeal must be allowed. The costs of all parties will come out of the fund.

Smith, L.J.—I am of the same opinion. I am satisfied by the evidence that the rents of the one house were applied in paying off the building society's mortgage. What then is the presumption of law when such a payment is made by a tenant for life? I cannot do better than read what was said by Lord Langdale in *Burrell* v. *The Earl of Egremont* (7 Beav. 205, at p. 232): "A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is upon those who allege that, in paying off the charge, he intended to exonerate the estate." The burden of proof, therefore, is upon the respondents. Have they discharged it? It is said on their behalf that the tenant for life is a mother, and the remaindermen are her children. It seems to me that, according to the authorities which have been cited, that of itself is not sufficient to rebut the presumption, and there is nothing else to rebut it. In my opinion, therefore, the presumption has not been rebutted, and the decision of my brother Kekewich was erroneous.

Rigby, L.J.—I have arrived at the same conclusion. The case is in some respects one of importance. Probably it was never explained to the tenant for life that if she paid off the mortgage debt she would be entitled to a charge upon the inheritance to the extent of the principal. Her voluntarily giving up that which the law allowed her to receive is not so strong an indication as the payment of a lump sum would have been. And if in the ordinary case of payment of a mortgage debt by a tenant for life the legal presumption arises, I think that it also arises where the debt was payable by instalments, consisting of principal and interest. Probably all that the tenant for life knew was that, if the instalments were not punctually paid, the building society would come down on the property. I think it would require more than a mere suggestion of some arrangement that she should pay off the mortgage debt for the benefit of her children to rebut the presumption that she did not intend to relinquish her right to a charge upon the property. The appeal must be allowed.

Solicitors for the appellant, *A. H. Hunt* and *Co.*

Solicitors for the respondents, *Walker* and *Battiscombe.*

Friday, Nov. 29, 1895.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

Smith v. The South-Eastern Railway Company. (a)

APPLICATION FOR A NEW TRIAL.

Negligence—Railway company—Level crossing—Breach of duty to company by its servant—Question for jury—Contributory negligence.

The plaintiff's husband was killed by a railway train of the defendant company while crossing their line at night at a level crossing. There was evidence that the night was dark but clear, that the engine carried a head light, that the engine driver began to whistle about ten seconds before the train passed over the crossing, and that the line was perfectly straight from the crossing for a distance of 750 yards. There was evidence also that it was the duty of the gatekeeper at the level crossing, who was in the service of the railway company, to stand by the line whenever a train passed by, whether by day or by night, and by means of signals to show to the engine driver whether the road was clear. There was also evidence that the deceased knew that that was the duty of the gatekeeper, and that he also knew that the habit of the gatekeeper was to perform that duty. On the night in question the deceased went into the gatekeeper's lodge, which stood by the level crossing, and spoke to the gatekeeper, who was sitting inside. The gatekeeper knew that a train was coming, but he did not warn the deceased, nor did he go outside, as it was his duty to do. The deceased was killed a few seconds after leaving the lodge. At the trial the jury found a verdict for the plaintiff.

Held, that an application for a new trial must be refused. There was evidence upon which a jury might reasonably conclude that the deceased was

(a) Reported by E. Manley Smith, Esq., Barrister-at-Law.

misled by the gatekeeper's neglect of his duties into thinking as he left the lodge that no train was coming, and that he was justified therefore in paying no attention whether a train was coming, and was not guilty of want of reasonable care.

This was an application by the defendants for judgment or a new trial after the trial of the action before Day, J. with a jury.

The action was brought on behalf of herself and her children under Lord Campbell's Act (9 & 10 Vict. c. 93), by the widow and administratrix of Thomas Clark Smith, deceased, who had been accidentally killed at a level crossing by a train of the defendant company.

The deceased was a gardener living in a cottage on the south, or up side, of the defendants' railway line, not far from the level crossing where the accident happened.

The level crossing was a highway for carriages as well as for foot passengers. It was paved, and on each side of it there were two gates, one large one for carriages and the other a small one for foot passengers.

The carriage gates could only open in one direction, that is to say across the line, and they were furnished with a lamp or lamps so fixed upon them that at night a red light was automatically shown up and down the line when the gates stood open across the line to allow vehicles to pass over the level crossing. On the north, or down side, of the line at the crossing there was a lodge belonging to the defendants and inhabited by Judges, a servant in their employ. Evidence was given at the trial that it was part of the duty of Judges to stand outside his lodge by the side of the line whenever a train passed over the level crossing, whether by day or by night, and to signal to the engine driver that the line was clear by means of a white flag by day and of a white light by night. There was evidence that Judges habitually performed this duty, though he sometimes neglected it. At about eight o'clock in the evening of the 16th Dec. 1894, the night being dark but clear, the deceased left his cottage, crossed the line, and went into Judges' lodge. There was evidence that he was then sober. In the lodge Judges was sitting by the fire reading. There was also there a man named Skinner. The deceased asked if his wife was there. He was told that she was not. He then left the lodge with the apparent intention of re-crossing the line and going back to his own cottage. Before he left the lodge a bell rang which was a signal to Judges that a train was coming. Judges did not tell the deceased that a train was coming, nor did he go outside his lodge as it was his duty to do, but he remained by the fire. There was evidence that the driver of the approaching train began to sound his whistle about ten seconds before the train reached the crossing, and that the engine carried a proper head light. The railway line in the direction from the crossing to the coming train was perfectly straight for a distance of over seven hundred yards. The engine-driver stated that he observed that Judges was not on duty showing a white light as he ought to have been, but that he did not slacken speed and the train passed over the level crossing at the rate of thirty-five or forty miles an hour. Skinner stated that, as soon as the deceased had left the lodge, he got up and went to the window to see if the deceased had got clear of the train. As he could see nothing he took a light and went outside, and presently discovered the body of the deceased at some distance from the level crossing, but not further than it might well have been carried by an engine striking him while on the crossing.

At the trial of the action before Day, J., with a jury, the jury found a verdict for the plaintiff for 600*l.* damages and the learned judge gave judgment accordingly.

The defendants now moved for judgment or a new trial upon these grounds: (1) misdirection; (2) that there was no evidence of any negligence of the defendants causing the death; and (3) that the verdict was against the weight of evidence.

William Willis, Q.C. (*W. R. Peel* and *W. O. Willis* with him) for the defendants.—There was no evidence of any negligence on the part of the defendants. There is no general duty on railway companies to place gatekeepers at level crossings, where the railway is of ordinary construction:

Stubley v. *The London and North-Western Railway Company*, 13 L.T. Rep. 376; L. Rep. 1 Ex. 13.

That is so at least with regard to foot-passengers. It cannot be said that, in respect of a level crossing, a railway company has any particular obligation towards foot-passengers other than their duty to use reasonable care in running trains over it. The omission to keep a gatekeeper has been held not to be evidence of negligence:

Cliff v. *The Midland Railway Company*, 22 L. T. Rep. 382; L. Rep. 5 Q. B. 258.

The placing of a gatekeeper at the level crossing in question was therefore merely a self-imposed duty on the railway company. A failure to perform a self-imposed duty is not actionable negligence:

Skelton v. *The London and North-Western Railway Company*, 16 L.T. Rep. 563; L. Rep. 2 C. P. 631.

The engine driver whistled ten seconds before going over the level crossing. Therefore there is no evidence of any negligence on the part of the defendants. But even if there was, there is no evidence of that negligence being the cause of the accident. The facts are as consistent with the death of the deceased being caused by his own want of care as with the negligence of the defendants being the cause of the death. Under such circumstances as that, the judge should have nonsuited the plaintiff or directed the jury to find for the defendants:

Cotton v. *Wood*, 8 C. B. N. S. 568:
Wakelin v. *The London and South-Western Railway Company*. (*a*)

(*a*) *May* 16, 1884.

(Before Lord Esher, M.R., Bowen and Fry, LJJ.)

Wakelin *v.* The London and South-Western Railway Company.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Negligence—Railway company — Level crossing—Contributory negligence—Burden of proof.

The plaintiff's husband was killed by a railway train of the defendant company while crossing their line at night at a level crossing. The engine carried a head light, but did not whistle when approaching the level crossing. There was evidence that the deceased, if he

The judgment of the Court of Appeal in this latter case was afterwards affirmed by the House of Lords (55 L. T. Rep. 709; 12 A. C. 44). The burden of proving the absence of contributory negligence lies on the plaintiff. Here there was evidence of contributory negligence on the part of the deceased. If he had looked he must have seen the light of the approaching train as it was visible more than a quarter of a mile away. He should have looked up and down the line before he ventured to cross it, and his not having done so is evidence of negligence:

Davey v. *The London and North-Western Railway Company*, 12 Q. B. Div. 70.

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had looked when he was crossing the line, might have seen the approaching train about half a mile away.

Held that, assuming that there was negligence on the part of the defendants' servants, nevertheless the plaintiff must be nonsuited because she had not given evidence of the circumstances of the accident upon which the jury could come to any conclusion as to whether the defendants' negligence was the cause of the accident.

Observations as to burden of proof with respect to contributory negligence.

THIS was an appeal from the judgment of the Queen's Bench Division (Grove, J., Huddleston, B., and Hawkins, J.) setting aside the verdict and ordering judgment to be entered for the defendants.

The action was brought by the administratrix of Henry Wakelin on behalf of herself and her children under Lord Campbell's Act (9 & 10 Vict. c. 93).

Henry Wakelin was killed on the night of the 1st May 1882 by a railway train of the defendants whilst lawfully crossing the railway line between Chiswick Station and Chiswick Junction, upon a level crossing which was a public footpath. The body of the deceased was found on the down side of the line, and the defendants admitted that he was killed by a down train, but no one saw the accident, and therefore no evidence was given of the circumstances of the death. There was evidence that the engine carried a head light. There was also evidence that a person standing by the gates of the crossing near the down line could see an approaching down train about half a mile away, and that a person standing in the centre of the down line could see a down train approaching about a mile away. The engine did not whistle or slacken its pace when approaching the crossing.

At the trial of the action before Manisty, J. with a jury the defendants called no witnesses, and submitted that there was no case. The learned judge left the case to the jury, who returned a verdict for the plaintiff for 800*l*.

The Queen's Bench Division (Grove, J., Huddleston, B., and Hawkins, J.) set aside the verdict, and entered judgment for the defendants.

The plaintiff appealed.

Jelf, Q.C. and *Jarvis* for the plaintiff.

Murphy, Q.C. and *R. G. Arbuthnot* for the defendants.

Lord ESHER, M.R.—This is an action brought against a railway company in respect of the death of a relative of the plaintiff which is alleged to have been caused by the negligence of the company. The company now assert that there was no evidence to go to the jury in support of the plaintiff's cause of action. Upon this question it seems to me impossible to come to a sound decision unless one's mind is firmly made up as to what is the cause of action alleged by the plaintiff. The plaintiff's cause of action is not that her husband was killed by a railway train of the defendants. Neither is it a cause of action, according to the common law, that the death of the plaintiff's husband was caused by the negligence of the defendants. I say that deliberately, because even though the negligence of the defendants may have been *a* cause of the death—and in that sense may be called *the* cause—yet by the common law of England it is not sufficient to say that the death was caused by the negligence of the defendants in the sense that without such negligence the accident could not have happened, if the deceased was also guilty of negligence or of want of reasonable care contributing to the accident. In such a case the plaintiff has no cause of action. The cause of action is that, as between deceased and the defendants, the accident was caused solely by the negligence of the defendants. It is not enough to show that the defendants' negligence was *a* cause of the accident, it must be shown that as between the deceased and the defendants it was the sole cause of the accident. How can the defendants' negligence be the sole cause, if there was negligence of the deceased which was also a cause? The cause of action must be that, as between the deceased and the defendants, the accident was caused by the negligence of the defendants without any negligence of the deceased contributing to it. Formerly the mode of stating that proposition at a trial used to be this: "Was the defendant guilty of any negligence which was a cause of the accident, or the cause; if so, could the plaintiff by reasonable care have avoided the consequences of the defendant's negligence?" Now that, after many years, was decided to be too large a proposition. If it were true, the defendant's negligence would not be at all a cause of the accident; the accident, it was said, was caused solely by the want of reasonable care on the part of the plaintiff, and, although the defendant had been negligent, his negligence was not the cause of the accident at all. For that reason the proposition of law was altered and stated more strictly in this way that, although the negligence of the defendant may have been a cause of the accident—that is, without his negligence the accident would not have happened—yet, if the plaintiff's negligence also partly caused the accident, so that without negligence on the part of both plaintiff and defendant the accident would not have happened, then there was no cause of action. If the plaintiff's cause of action be that the accident to him was caused solely, as between himself and the defendant, by the negligence of the defendant, he must give *primâ facie* evidence of that cause of action or he will be non-suited. If therefore the negation of any contributory negligence on his part be a part of his cause of action, and a necessary part, then it would seem to follow that he must give evidence of that negation. In my opinion it is because that negation was part of the plaintiff's cause of action, that upon a plea of not guilty in an action for negligence—a plea which traversed, and merely traversed, every necessary averment on the part of the plaintiff of his cause of action—it was necessary for the plaintiff that it should be proved that he had not by his negligence contributed to the accident. Now under such a traversing plea as that, if the plaintiff gives *primâ facie* evidence of a want of contributory negligence on his part, the defendant may give affirmative evidence that the plaintiff was negligent. Then there would be a conflict of evidence upon the traverse. Then, although the plaintiff had given *primâ facie* evidence of an absence of negligence on his part, if the defendant has brought forward evidence contradictory of that, the burden of proof is again put on the plaintiff. The reason of that is this. If upon the conflict of evidence, which I have supposed, the jury is left in doubt whether or not the plaintiff was guilty of negligence contributing to the accident, the verdict and judgment must be for the defendant, because the burden of proof lies wholly upon the plaintiff. It does not require much to make *primâ facie* evidence for the plaintiff. If the plaintiff gives evidence of the circumstances of the accident and of

[Lord ESHER, M.R.—The decision of the court in that case was, as I have said before, absolutely wrong. Baggallay, L.J. gave the right judgment.]

negligence on the part of the defendant, and also shows that upon the circumstances it is not clear and conclusive that he himself was guilty of contributory negligence, then he has made out a *primâ facie* case which must go to the jury, because, when a case such as this is being tried by a judge and a jury, the jury is the only part of that tribunal which can say whether there has been negligence on either side. The judge's duty is to explain to the jury what is the legal meaning of the word "negligence." To my mind the meaning of the word is this. Negligence consists in the doing of something which a person of ordinary care and skill under the circumstances would not do, or in the omitting to do something which a person of ordinary care and skill under the circumstances would do. In a trial with a jury, the judge cannot decide whether the plaintiff or the defendant was guilty of negligence. In most cases he would not be nearly as well able as the jury to decide what people of ordinary care and skill would or would not do under the circumstances. But unless the plaintiff gives some evidence of the circumstances under which he acted, it seems to me that the jury have no opportunity of giving any opinion as to whether the plaintiff had done that which he ought not to have done, or had omitted to do that which he ought to have done. There is nothing for them to pass judgment on. Therefore, I am of opinion that if the plaintiff merely gives evidence of negligence on the part of the defendant which contributed to the accident and gives no evidence at all with regard to his own conduct, he has only given evidence of half of his cause of action, and he ought, therefore, to be nonsuited. If that is all the evidence he gives, he has not made out a *primâ facie* cause of action which calls for an answer from the defendant. I do not retract anything of what I stated in *Davey* v. *The London and South-Western Railway Company* (12 Q. B. Div. 70) as to the principle of the law in cases like the present. For many years, and upon all the circuits in England, I have so directed juries, and I am not aware that my direction has ever been found fault with. Nevertheless it may be wrong; but until the House of Lords has distinctly decided that I have been wrong I shall follow what I have held to be the law. As to the case of *Davey* v. *The London and South-Western Railway Company* (*ubi sup.*) I do not believe that any one of the learned lords who decided that case meant to state the rule of law otherwise than I have just stated it. But if any one of them did state it differently, I cannot think that he could at that time have been acquainted with the mode in which now for some time past these cases have been left to juries. But there has been no clear decision on the point by the House of Lords, and therefore I do not feel myself at liberty to depart from what I have stated to be the law. It seems to me that in the present case the plaintiff was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give *primâ facie* evidence that the deceased was not guilty of any negligence contributing to the accident. At one time I thought that the plaintiff had given such evidence. If there were any presumption in favour of a man that out of selfishness, out of regard to his own personal safety, he would act carefully in dangerous circumstances, then that presumption would in itself be *primâ facie* evidence that the deceased was not guilty of any negligence contributing to the accident. But the question is, whether there is any such presumption. The statement of the principles on which presumptions in fact—that is, presumptions in evidence—may be made is stated in two passages in Best on Evidence, a book which in my opinion is very thoughtfully written, and is very useful in many questions of evidence. It is there pointed out that not every presumption which a person in ordinary every-day life might make is a presumption in evidence in a court of law. In a court of law accuracy is required. In daily life almost everyone acts without accuracy. In order to presume a fact you must first have some facts which in the ordinary course of human events would lead to the existence of the fact which you desire to presume, and from certain facts a certain state of things may be presumed if everybody who hears the facts stated would be of opinion that all persons would, unless in some exceptional case, have the same feelings or do the same things as those which are asked to be presumed. Can one then say that there is a presumption that a man in dangerous circumstances will act carefully out of regard to his own safety? We all know that men do not act in that way. We all know that people are careless in as many cases as they are careful, even when they are going near a dangerous thing. There is nothing which can authorise us to say that there is any presumption that a man in dangerous circumstances will act carefully. Now as I have said, the plaintiff was bound, in my opinion, to give evidence of a negative, viz., that the deceased did not by his own negligence contribute to the accident. The plaintiff unfortunately was unable to give any evidence of the circumstances at all. There is, therefore, nothing from which anyone can say whether the deceased was or was not guilty of negligence, and upon this ground, and this alone, I think that the nonsuit must be upheld. Now I am not prepared to say that there was no evidence of negligence on the part of the defendants; on the contrary, I think that there was evidence upon which a jury, and a jury alone, was entitled to say whether there was negligence. It is said that the question is whether that negligence caused the death of the deceased man. I cannot agree to that, unless "caused" is used as meaning "solely caused," as I have already explained. It was suggested that the circumstances show that the deceased must have been negligent, since he could have seen the lights of the approaching train a quarter or half a mile away. It is said that a judge can conclude that the deceased must have been guilty of negligence in this case, because there were fourteen feet between the place where he could see a light and the place where he had to cross the rails. Now can that be said to be so in every case? Supposing that, at the moment when a man comes to this position rain or hail or snow is falling heavily, then, although the train has a light in front, he would be prevented by those circumstances from seeing the light. It was also argued that the deceased must have heard the noise of the approaching train. I am not satisfied that a railway engine would make such a noise that people must hear it coming. Supposing there was something else on the other side of a man who is crossing a railway line, such as a cart which might run over him or another train coming up the other way, can a judge, without knowing all this, say that such a man was guilty of contributory negligence in not looking up the line to see whether a train was coming? Whether such a man did something which a person of reasonable care would not do, or omitted to do something which a person of reasonable care would do, depends absolutely and entirely on the circumstances of the particular case, and, at a trial with a jury, the judge is not a judge of those circumstances. The moment that there is evidence, it must go to the jury. It is true that under very peculiar circumstances the question arises whether the verdict of the jury is against the weight of evidence. In the present case the question is whether the judge

Crispe (*Bassett Hopkins* and *G. K. T. Purcell* with him), for the plaintiff, was not called upon.

Lord ESHER, M.R.—In spite of the very able

argument of Mr. Willis, I have no doubt at all as to the decision we ought to give in this case. The learned judge at the trial was asked to hold as a matter of law, first, that there was no evidence of negligence on the part of the defendants; and, secondly, that, if there was evidence of such negligence, there was no evidence of the exercise of reasonable care on the part of the deceased.

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could nonsuit, not whether the verdict is against the weight of the evidence. In the present case judgment would be entered for the defendants by way of nonsuit, whereas in the other case the court would only order a new trial. Then we come to the case of *Davey* v. *The London and South-Western Railway Company* (*ubi sup.*). I was a party to the judgment in that case, and at the time I feared what I was doing. I foresaw that that judgment would be used to bring back again the old conflict, and to support the old contention that judges might, either before or after the verdict of the jury, express opinions on these matters. The case of *Davey* v. *The London and South-Western Railway Company* was an extreme case, a most exceptional case, but the court was bound in that particular instance to hold that the verdict was against the weight of the evidence. The verdict was so much against the weight of the evidence, and the case had been so completely sifted that the court did not act, in my view, by way of nonsuiting the plaintiff, but acted under the power given by the Judicature Act, under which a court, when it has all the facts of a case before it, may enter judgment instead of sending the case to a new trial. That case, as I feared at the time, will be used over and over again to bring up the old conflict. It may be that I am wrong in having for many years considered that the principle of law was settled. It may be, and very likely will be, that the question is to be re-opened, and that we shall have some new mode of summing up these cases to juries, different from the mode which in my opinion has prevailed for many years past. If so I shall submit, but only in obedience to the highest authority. In the present case I give my judgment upon the ground that the plaintiff was bound to give *primâ facie* evidence that the deceased did not by his negligence contribute to the accident; and that as the plaintiff has not given, and has been unable to give, any evidence of the circumstances of the accident, she has failed to give any evidence in support of a necessary part of her *primâ facie* case. In my opinion, though I am sorry to have to come to this conclusion, the plaintiff has no remedy for the loss she has suffered, because, by reason of the nature of the accident, she is unable to give the evidence which I think the law requires of her in order to support her case.

BOWEN, L.J.—In this case the plaintiff's husband got in the way of a passing train, and was run over and killed. That is about all we know, with the exception of two facts which I will refer to presently. It seems to me that the story so told upon the plaintiff's own case leaves it absolutely uncertain whether the death of the deceased was due to the fault of the defendants' servants or to his own fault. It would not be in justice or in reason to inflict upon the railway company the burden of paying compensation for a death when it is uncertain upon the facts whether they have anything really to do with the death. What is the gist of this kind of action? The gist of it is negligence on the part, in the first place, of the servants of the defendants. They must have committed some breach of duty, either by omitting to do something that they ought to have done, or by doing something which they ought not to have done. But the negligent act of a servant does not become the act of his master except so far as there is a principle that the master is responsible for the negligent act of his servant if by that negligent act damage is done to something else. So it is in the very essence and element of the case that the plaintiff in a railway accident case should prove that the railway company's servants have been negligent, and that it is by their negligence that damage has been caused. If the action is brought under Lord Campbell's Act for compensation for the indirect damage caused to a man's family by reason of his having been killed, the plaintiff must prove, first of all, negligence by the defendants' servants for which their master is responsible; and, secondly, that the negligence caused the death. It follows, and it is a principle imbedded in English law, that the negligence which caused the death must, in order to render the master of the negligent servant responsible, be negligence which directly caused the death without any contributory negligence on the part of the deceased. If the death was partly caused by the deceased man, or if the injury was partly caused by the injured man, then it was not caused, within the principle of English law, by the negligence of the servant in such a way as to render the master responsible. That is no new law at all. It is a law which has been stated over and over again, and which has found its way into English pleading because, as has been pointed out frequently, both in the present case and before in other actions of negligence, evidence of contributory negligence on the part of the plaintiff could be given under the general issue. The difficulty of discussing the matter further begins when we come to analyse the question how far the negligence of the defendants' servants caused the death in the sense that I have referred to. Duties are relative, and the term "negligence" itself is correlative. It may mean the omission to do something which ought to have been done. It may be the doing of something which ought not to have been done. And again, as the circumstances of a case are partly told, and then still more fully told, and at last completely extended, at each stage a difficulty arises of knowing how far the story so told involves the plaintiff himself in fault, or how far it disengages him from fault. It is by no means easy therefore to my mind to discuss scientifically the principle, as an abstract proposition, how far it is possible to separate the two issues—contributory negligence on the part of the plaintiff, and the *causa causans* of the death consisting in the negligence of the defendants. They seem to me in most cases to be inextricably bound up, but I entertain no doubt at all that the plaintiff must show or prove facts from which the proper inference is that the death has been caused by the negligence of the defendants' servants exclusive of negligence on the part of the plaintiff himself. This subordinate question of the onus of proof of contributory negligence is further complicated by the fact that, running across through the law of evidence, there is the line of thought that generally, though not always, the burden of proving an affirmative is thrown upon the person who maintains it. As I said before, it is not very easy to my mind to lay down an abstract proposition which would assume that the two issues are always to be separate, because they are mixed up and conflicting in most cases, or at least in very many cases. I have had the great pleasure and honour for many years of practising before the Master of the Rolls, and being now his colleague I am not afraid of saying, what I believe to be the universal feeling of the Profession, that any expression of the law comes from him with very great weight and authority. I am not going to weaken by any sort of suggestion anything that has fallen from him in this case. I only wish to observe that it seems to me that, assuming that the law has not been completely expressed in the line of thought along which the Master of the Rolls has travelled, the plaintiff in this case must nevertheless fail. If it be true that in addition to *primâ facie* evidence of the death having been caused by the negligence of the defendants' servants, there must also be evidence of the absence

The learned judge was then asked upon those grounds to direct the jury to find a verdict for the defendants. It is obvious that the question is one of law. Was the judge bound in law to do that which he was asked to do? Now I shall not enter upon any discussion of the various points of law that have been argued before us. I do not say that I agree with those arguments, but,

of contributory negligence on the part of the deceased, then the plaintiff in this case is out of court, because no such evidence has been given. There may be another way of looking at the matter, which perhaps after all is not a different view from that which the Master of the Rolls has taken but is rather the same thing expressed in different words. If the true view be that, in considering the issue whether the death has been solely caused by the negligence of the defendants, regard must be had to the question whether the deceased involved himself in the injury, even then also it seems to me that in this particular instance the plaintiff must fail. What is the meaning of the expression "burden of proof?" It is not a means of arriving at a decision in a conflict of testimony. To my mind it is only useful in this sense. If a case stops at any particular point, it enables you to say on whom rests the burden of going further if he wishes to succeed in the action. The onus of proof is continually changing through the whole of a trial at Nisi Prius. I will not repeat what I once said in *Abrath* v. *The North-Eastern Railway Company* (49 L. T. Rep. 618; 11 Q. B. Div. 440), as I believe it not to be new though I believe it to be true. Supposing for a moment in this particular instance that we are to examine the case according to the strict application of onus of proof, and that we are to assume that the plaintiff has given some evidence of negligence by the defendants which caused the death, and that we are to look for absence of contributory negligence, then it seems to me that the case has travelled beyond that point, and that the story of the accident has been more perfectly told than it would have been if one only knew what the train had done. For myself I doubt very much whether there is any evidence of negligence at all in this case to go to the jury. I say so with the greatest hesitation because I know that is not the opinion of the Master of the Rolls. It is a simple matter, but it is not a matter upon which, I suppose, every mind can be always got to agree. To my mind absence of whistling is not, of itself, evidence of negligence. It is evidence of negligence only when accompanied with other facts which raise the presumption that some such precaution as whistling ought to have been taken. Take the case of a train travelling across a prairie where it can be seen twenty or thirty miles off. It may be the case that across every foot of that twenty miles foot-passengers are in the habit of passing with their cattle. Is it then to be said that the train is to go along whistling the whole way? No; because the facts show that in that particular case whistling is not a necessary precaution. Everybody who has got eyes can see. It is no more reasonable to suppose that a train ought always to whistle than that a ship ought always to whistle. In a fog a ship ought to whistle or use a fog-horn because whistling or using a fog horn then becomes a reasonable precaution. Now I think that in nine cases out of ten, it is for the jury to say whether, having regard to the special circumstances of the case, the absence of whistling was a fact from which they could presume that a reasonable precaution was neglected. But, on the other hand, if there is nothing but evidence of absence of whistling and nothing to show that whistling was a reasonable precaution or that no precaution was taken, then I doubt whether in such a case there would be evidence to go to the jury. I am not the only judge who has doubted this. I find the same opinion expressed by Lord Coleridge, C.J. in *Davey* v. *London and South-Western Railway Company* (*ubi sup.*) and also by Denman, J. But assuming that in the present case there was evidence of negligence to go to the jury, was there evidence that this negligence killed the deceased? How could anybody reasonably conclude, simply from the facts that the train was passing along a place where it could be seen half a mile off in each direction and was carrying a light and that the night was clear, that the absence of whistling killed the deceased? But I will assume again that, if there was nothing else, there was evidence to go to the jury that the death was caused by the negligence of the defendants. The moment that there is something else the foundation of the evidence that has been already given is shaken. If there were nothing else an inference might be drawn, from the fact that the defendants were negligent, that their negligence, there being no other negligence in view, was the negligence that caused the death. It might perhaps be a rash presumption. But in the present case there are other facts which make that inference impossible. The train did not whistle. The deceased did not look. If he had looked, he must surely have seen the train. What was there to prevent his seeing it? Of course I do not profess to be pronouncing an infallible verdict as to what happened, when there was no one there to see. But so far as the facts presented to us enable us to form a judgment, it seems to me that the fact that the man was killed in the middle of the line along the side of which a passing train could be seen for a distance of about half a mile, is as strong evidence that he did not look as the absence of whistling is strong evidence that the engine driver was negligent in running him down. Now, if the question be one merely of the balance of testimony, I agree it is one for the jury to decide; but the remarkable effect of the telling of the whole story in the present case is this, that there is introduced into the part of the case which deals with the cause of the accident, an independent action on the part of the deceased which makes it impossible for any reasonable person to have a view at all. I think that the case must really be decided in this way: having regard to the position in which the deceased was found and to what he must have omitted to see, it is impossible for any reasonable person to be in anything but complete doubt, on a story so imperfectly told, as to whether it was the fault of the defendants' servants or of the deceased, that he was killed. It is not a question of the balance of the testimony. The evidence is such that there is an impossibility of arriving at any conclusion. Now, under those circumstances it is said that we ought to call in aid a presumption. What presumption? That the deceased was a sober and reasonable person? Just consider what courts of justice would become if they acted upon such a basis as that. No proof of how the accident happened, but proof that the deceased was a quiet and intelligent man and nothing more. Then you are asked to draw the inference, as of law, that the deceased was not in fault. There is no such presumption known to the law. It is not a presumption which can be drawn from the ordinary course of nature. It is not in the ordinary course of nature that people act carefully, in any such uniform sense as this, that their carefulness can be taken as the groundwork from which further conclusions can be drawn. Presumptions are not excuses for guessing in the dark. They are inferences drawn by sound reason from something which has been proved, or is taken for granted as proved. Here there is nothing proved, or to be taken for granted as proved, which leads to any further conclusion about the conduct of the deceased. It is always saddening to think that the facts of a case are so imperfectly known, that justice is baffled in coming to a conclusion. Perhaps in this instance, for

assuming that the points of law were as stated, my opinion is that there was not sufficient ground upon which the learned judge could, as a matter of law, have directed the jury to find a verdict for the defendants. As to whether there was evidence of negligence on the part of the defendants it was not really argued on their behalf that there was not. The whole stress of the arguments addressed to us on their behalf was as to whether there was any contributory negligence on the part of the deceased. Now no one doubts that, in these actions of negligence, the plaintiff cannot recover if there has been on his part any contributory negligence which conduces to the accident. It must be admitted to be the common law of England, that, if the plaintiff by his negligence contributed to the accident, he cannot recover even though the defendant by his negligence also contributed to the accident. That is so, apart from any question as to the party on whom the burden of proof lies. The plaintiff in such a case as that has not made out his cause of action. It may be said that he has not made out that the negligence of the defendant was the sole cause of the accident. Or it may be said that he has not made out that the negligence of the defendant was the cause of the accident. Therefore the question in the present case is reduced to this—Could the learned judge have properly directed the jury as a matter of law that negligence on the part of the deceased had been proved or ought to have been taken as proved? I must go further. It is an admitted proposition of law also that if there be no evidence of any material fact the judge is bound to tell the jury so, and it is his duty to consider whether upon the facts there is any evidence to go to the jury. Now we must look at what happened in the present case for the purpose of determining the state of the facts as to the alleged want of reasonable care on the part of the deceased. There was a marked and paved level crossing from one side of the railway to the other, which was a highway for the public both as a carriage way and a footway. There was but one causeway upon which carriages and foot passengers crossed together, but upon each side of the railway were two gates leading on to the crossing. There was a wide gate for the use of persons with carriages and a small gate for the use of foot passengers. The deceased was a foot passenger and, as one of the public, he had a perfect right to go over the level crossing. There was evidence upon which the jury might find that he was a respectable man, and that on the night of the accident he was absolutely sober. There was evidence that he had crossed the railway and had gone into the gatekeeper's cottage to ask if his wife was there. He found the gatekeeper, Judges, sitting by the fire, and he was told that his wife was not there. Then, after some conversation, he left the cottage. Now the jury would undoubtedly be of opinion from what

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anything human eyes or human brains can tell, the deceased may have been absolutely blameless and the train absolutely in fault. But that sort of defeat and discomfiture which justice encounters is due to the fact that we are fallible creatures and that justice at best is the justice of a fallible tribunal. We cannot help it if we are obliged unfortunately to say that in this case there are not materials for coming to any conclusion in the matter.

FRY, L.J.—It appears to me that the first inquiry in the present case is, what propositions rest on the plaintiff to prove. Now, it seems to me plain beyond doubt that the plaintiff proved that the defendants were negligent. That is the first proposition. The second proposition which the plaintiff must maintain is that the negligence of the defendants was the cause of the accident. So far, there is no doubt. The Master of the Rolls is of opinion that a third proposition rests on the shoulders of the plaintiff, namely, that there was no contributory negligence on the part of the deceased, and that the negligence of the defendants was the cause of the accident. I should distrust my judgment much if I were to express any dissent from the view of the Master of the Rolls. It appears to me, I confess, that the speeches of Lord Penzance and of Lord Cairns in *The Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (39 L. T. Rep. 365; 3 App. Cas. 1155) put the burthen upon the plaintiff without the third proposition, and that they consider that a plaintiff has made out his case if he has shown that the defendants were negligent, and that the negligence of the defendants was the cause of the accident. I do not propose to express any opinion upon the question of whether the third proposition does or does not rest on the shoulders of the plaintiff, and for this reason, that I will take it in the manner most favourable to the plaintiff, and will assume that only the two first propositions rest on him. Taking it in that manner, the first inquiry is this: Has the plaintiff shown that the defendants were negligent? Now, upon that point my opinion is that there was evidence of the negligence of the defendants. It must be borne in mind that the jury had the opportunity of seeing this spot, and that the protection afforded by the head light carried by the engine might depend more or less upon the surrounding lights from the cottages, and possibly from the signal boxes. It must also be borne in mind that the watchman placed at the V. gates during the day was withdrawn at eight o'clock in the evening. In addition to that, it has been proved that the train did not whistle and that it did not slacken its pace. Now whilst agreeing that not whistling is not in itself conclusive evidence—perhaps, under some circumstances, is not evidence at all—of negligence, nevertheless I think that, coupling all the circumstances that I have referred to together, there was evidence to go to the jury of negligence on the part of the defendants. Then arises the second inquiry: Was there evidence to show that the negligence of the defendants was the cause of the accident? I am of opinion that there was no evidence of that. I think it possible that twelve men might guess upon the matter, but it appears to me that there was nothing from which any one could arrive at a conclusion from the evidence whether the negligence was the cause of the accident. Bowen, L.J. has so fully dealt with that part of the case, and has so fully expressed the views which I entertain, that I will not attempt to repeat the observations that he has made. It appears to me that there was nothing in the nature of evidence to connect the negligence of the defendants with the death of the deceased, and nothing whatever to leave the jury otherwise than in a condition of perfect equipoise as to what was the cause of the death. It is extremely difficult, if not impossible, to suppose that the deceased can have been killed by the train under the circumstances which have been indicated by the evidence without contributory negligence on his part. Whether that be so or not, the conclusion at which I have arrived is simply this, that although there was evidence of negligence on the part of the defendants to go to the jury, there was no evidence to connect that negligence with the death of the deceased. I therefore concur with the judgment of my learned brothers. *Appeal dismissed.*

Solicitor for the plaintiff, *E. A. Chandler.*

Solicitors for the defendants, *Bircham* and *Co.*

happened immediately afterwards that the deceased left the cottage with the intention of then and there crossing the railway again, and that he did, in fact, immediately go on to the causeway with the intention of crossing. Now, with regard to Judges. There was evidence upon which a jury might come to the conclusion that the duty of Judges was to be outside his cottage whenever a train, either by day or by night, was about to pass over the level crossing, and that his duty on such occasions was by means of signals to help the engine driver to do that which might be necessary. There was evidence that Judges habitually did that duty. Of course there was evidence that he sometimes neglected to do it, but it does not need much evidence to show that people with duties sometimes neglect them. Now, for the purpose for which I make use of this duty of Judges, it is immaterial whether it was in any way a duty to any member of the public. It was at all events a duty to the railway company whose servant he was, and it was imposed upon him for the purpose of helping the driver of the passing train. The deceased lived in the neighbourhood and knew the crossing, and there was evidence upon which a jury might well find that he knew that Judges was in the habit of doing for the railway company the duty that I have mentioned, whenever a train was approaching the level crossing. Since the deceased found that Judges did not go outside, as he ought to do and as he was in the habit of doing when a train was coming, the jury might well come to the conclusion that the deceased would be justified in considering that no train was coming, and that he might go across the causeway in the ordinary way without paying any great attention, and without looking up and down before crossing, and that if he acted in that way there was no reasonable want of care on his part. It was a question for the jury whether they would take that view or not. They might act upon the view mentioned by Cairns, L.C. in *The Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (39 L. T. Rep. 365; 3 App. Cas. 1165) with regard to whistling, viz., that a person may have the right to suppose, from the practice of a railway company that a train approaching a certain spot shall whistle, that if there is no whistle there is no approaching train. In such a case a jury might reasonably come to the conclusion that such a person would be thrown off his guard, so to speak, and would be left in a state of mind in which it would not be unreasonable for him not to look for a train if there was no whistle. So here, the jury, as it seems to me, might well think that the fact of Judges staying in his cottage, when, as the deceased knew, he would according to his practice go outside if a train was coming, would produce in the mind of the deceased a state of partial security which would prevent his not looking up and down the line for an approaching train from being a want of reasonable care. He might be justified in coming to the conclusion, although it was in fact an erroneous one, that there was not a train coming; and the jury might be satisfied, as they have been, that the deceased was not guilty of a want of reasonable care. There is no need, therefore, in my opinion, to enter into a discussion upon the points that have been so ably argued before us. That which I have stated seems to me sufficient to determine the case. I think that the learned judge was right in declining to direct the verdict to be entered for the defendants. As to the question of misdirection, I do not think there is a trace of any. I will only add one more thing, as to the judgment of the Court of Appeal in *Wakelin* v. *The London and South-Western Railway Company*. I think that the judgment I delivered in that case is correct in every part, and it was agreed to by Bowen and Fry, L.JJ. The decision of the Court of Appeal has not been reported, and I think it would be very useful if it were reported now.

LOPES, L.J.—I see no trace of misdirection in the summing up of the learned judge at the trial that can be relied on at all except possibly this, that the learned judge permitted the case to go to the jury. It is said that he ought, as a matter of law, to have withdrawn the case from the jury. It is said that there was no evidence of negligence on the part of the defendants, and that if there was, there was no evidence that it was negligence causing the death of the deceased, and that his death was attributable as much to his own negligence as to any negligence of the defendants. Difficult questions have been discussed as to the burden of proof of contributory negligence on the part of the plaintiff in an action of negligence, but I do not propose to express any opinion upon them. I think it enough now to say that the plaintiff in such an action must give evidence of negligence of the defendant causing the injury complained of. A question was also raised as to the duty of a man stationed at a level crossing, where there is a free passage for foot-passengers, and where there are also gates which have to be opened and shut when carriages pass through, whether the duty discharged by such a man is a duty only to his employers, or is also a duty to foot passengers and to persons driving over the level crossing. There is no need to give any opinion as to that question. I will only deal with the facts of the present case and shall not give any abstract or general opinion upon the matters that have been discussed. Now the first question is whether there was any evidence of negligence on the part of the defendants. What was their duty? Their duty was to use reasonable care and apply proper precautions in the management of their railway at that particular spot. It seems to me that they have determined for themselves what that reasonable care and proper precaution may be, because they have placed at this lodge, by that level crossing, a man whose duty it is to signal to each train as it passes. If that is the reasonable and proper precaution to be taken at this spot, I think it may be rightly said that it would be a warning, not only to the engine drivers but also to the general public who might make use of the level crossing, and in 'general public' I mean to include foot passengers as well as those persons who might come with vehicles. Now, it seems to me that that is the kind of reasonable care and proper precaution which the company themselves think that they ought to have adopted at this particular spot. On the night in question there was a man on duty there, called Judges. He seems not to have been very competent; he was a man of considerable age, and, moreover, he was very decrepit and, having formerly been a gardener, he does not appear to have had much experience

in the duties he had to perform. What did he do? It being his duty to go outside the cottage and signal to the passing train he remained in his lodge reading the newspaper by the fire, and he did not stir and did not signal. Now if it was the duty of the railway company to use reasonable and proper care and precautions, and if they thought that this was a reasonable and proper precaution it is clear to my mind that their servant failed in doing that which he ought to have done for the proper observance of that reasonable care and precaution. He was the servant of the company, and the company therefore are responsible. It seems to me, therefore, with regard to this part of the case, that there clearly was evidence to be left to the jury as to whether the defendants had not used reasonable and proper care and precaution in the management of their railway at this level crossing. But then it is argued that the circumstances of the accident are obscure and that nothing is really known as to how the deceased was killed, and the case of *Wakelin* v. *The London and South Western Railway Company* is relied upon in respect to this point. I quite agree with my Lord in thinking that the judgments of the Court of Appeal in that case ought to be reported, because the decision seems to me to lay down very important propositions of law. It is said here that what happened to the deceased was fully as consistent with the want of reasonable and proper care on his part as it was consistent with reasonable and proper care on the part of the defendants. It is said that this train had lights, that it whistled, and that it could be seen for 760 yards before it reached the crossing, and that the deceased must have contributed to his own misfortune by the heedless and reckless way in which he crossed the line with the danger before his eyes. Now, if that can be established, of course the argument which has been addressed to the court on behalf of the defendants, founded on the case of *Wakelin* v. *The London and South-Western Railway Company* would be fully sustained. Let me deal with that question. The question is whether this part of the case ought to have been withdrawn from the jury, and whether the judge ought to have held that there was such evidence of want of reasonable and proper care on the part of the deceased that the jury could not find a verdict for the plaintiff. Now can it be said that what happened to the deceased causiing his death was equally consistent with negligence on his part as with negligence on the part of the defendants? This is a matter on which I do not hesitate to say, that in the course of this case I felt a difficulty, and I have given it the best thought and attention which I can, and it strikes me in this way. The deceased man was well acquainted with this level crossing, and he knew that the duty and habitual practice of the gatekeeper was to stand outside his cottage and signal to passing trains. Then may not the jury have thought, and may they not be justified in thinking, that the deceased man, seeing that Judges remained in his lodge, and made no attempt to signal to any approaching train, thought—and reasonably thought—that he might safely cross the line without taking the precaution of looking up and down the line and listening for a whistle, as he would have done if he had not been misled by the conduct of Judges. Now, it seems to me, after careful consideration, that that is a view which a jury might reasonably take, and had I tried this case, and had the matter occurred to my mind as it does now, I feel I could not have withdrawn the case from the jury. It was a matter in respect of which they were entitled to give an opinion, and in respect of which their opinion ought to be asked. It was asked, and they have found for the plaintiff, therefore I think that their verdict cannot be disturbed.

KAY, L.J.—In this case the jury have found a verdict for the plaintiff with 600*l.* damages against the railway company, who are now moving for a new trial. The motion is put upon three grounds: first, that there was a misdirection by the learned judge; secondly, that there was no evidence whatever of any negligence on the part of the defendants conducing to or causing the death of the deceased; and, thirdly, that the verdict is against the weight of the evidence. That last ground is a very hopeless one in a case of this kind. The case is one of very great interest, and a great many arguments have been put forward from which I dissent most absolutely. I shall, therefore, venture to express my own opinion, and to give my reasons for it, notwithstanding that I concur entirely with what has fallen from the other members of this court in respect of this particular verdict and judgment. The facts proved in evidence, and about which there is no dispute, are these: The deceased was a gardener, who lived on the southern side of this line of railway. There was a level crossing on the line for foot passengers and for carriages and carts. On the northern side was a gatekeeper's lodge belonging to the defendants, and built by them in that spot for the purpose of having a person living there whose duty was, among other things, to attend to the gates and open them when vehicles were to be allowed to cross the line, and to shut them when a train was coming or when vehicles did not want to cross. He had also this further duty imposed on him, that whenever a train passed he should go to the side of the line and there show by day a white flag and by night a white light. I observe that the learned judge in his summing up says that this man was also provided with a red flag and a red light to show if there was any danger. It was said that this was not proved, but one's ordinary experience of railway matters would lead one to believe that this was the case. However, assuming that that was not proved, his duty at night was at any rate to go and stand by the line and show a white light. The defendants say that the object of that was to assist the engine driver by showing to him that the line was clear, and they deny positively that it was done for the sake of foot passengers at all. They say that the only object was to show the engine driver that the crossing was clear of vehicles. Now, the carriage gates to the level crossing when opened for the passage of vehicles went right across the railway line, and they had on them a lamp which was placed in such a way that when the gates were open across the line a red light would shine at night up and down the line. A red light I understand to be a danger signal. Therefore, at night when the gates were open for the passage of vehicles a red danger signal would be shown on the gates them-

selves. Therefore it seems to me that it could not be—or at least the jury might well say that it could not be—only for the sake of vehicles crossing the line that the gatekeeper's duty, when a train passed at night, was to be by the side of the line and to show a white light. The jury were surely justified in inferring that it was to show that the line was clear of any kind of obstruction, whether by vehicles, or by people walking over, or by any other kind of danger which might well occur upon a level crossing. For instance, supposing a school of children was passing over the line on a dark night and the gatekeeper saw them passing and that they were in danger, would it or would it not have been his duty to signal to the train that there was danger, and to try and prevent the train from running into the children? I should suppose that the jury might well infer that that was part of his duty. Now on the night in question, which was described as a dark night but clear, the deceased went to the lodge to inquire whether his wife was there. It is a fair inference that he had come from his own house on the other side of the line, and had crossed the line at the lodge to make that inquiry. He asked if his wife was there, and being told that she was not, he seems to have left the lodge. Now it is also proved that before he left the lodge, the gatekeeper, Judges, of whom he had made the inquiry, had received a signal by a bell that a train was coming along the line. Judges said nothing about it to the deceased, but allowed him to leave the lodge without any warning. Neither did Judges go out and stand by the line and show a light, as it was his duty to do. Another man, who was in the lodge at the same time, Skinner by name, was so impressed with the danger which the deceased might be running that he went immediately to a window which looked out upon the line to see whether the deceased had got clear of the train. As he could not see him, he went out with a light to look for him, and then he found his dead body at some distance from the level crossing, but not further than it might well have been carried by an engine striking him while on the crossing. Now, those being the facts of the case, I will first deal with the alleged misdirections. They are four in number. The first is that the learned judge said that the railway company puts persons on level crossings "to take care of them." That may be rather indefinite, but I see no misdirection in it. The second is this: that if a railway company does not keep a man, as is usually done, at a level crossing to take care of it and to protect the public, trains must necessarily go slowly. Is there any misdirection there? Railway companies are bound to take reasonable care and caution, and if they do not keep a servant at a level crossing who could interfere with people crossing improperly, surely they would be bound to see that their trains take all the more care and caution. I see no misdirection in that. The third was this: that the railway company being obliged to protect the gates so far as vehicles are concerned are necessarily obliged, if they keep a servant at the gates, to protect foot passengers also. The man who has to protect the carriages will also protect the foot passengers. That seems to me to be absolutely accurate, and there is no misdirection in it. The fourth and last alleged misdirection was this. The learned judge, after describing the duties of the gatekeeper Judges, went on to say, "Any neglect of duty on the part of Judges is a neglect of duty on the part of the railway company for which the railway company is responsible." It seems to me that it is not possible to say that when an official like Judges is placed at a level crossing like this and neglects his duty, that neglect of duty is not attributable to the railway company. Those were the only points upon which the defendants suggest that there has been any misdirection, and I cannot find a trace of misdirection in any one of them. The next point is whether there was any evidence to go to the jury of neglect of duty on the part of the defendants. Their duty was acknowledged to be to have a man standing by the line with a light whenever a train passed at night. They assumed that to be their duty, and had a man whose duty was always to be present with a signal when a train passed. The learned judge in his summing up does not accuse the engine driver of any neglect of duty whatever. But I am not sure that the jury would agree with him on that point. The engine driver says in his evidence that he observed that Judges was not doing his duty by the level crossing as the train passed, and that he missed the light which Judges ought to have shown him. If Judges had been there, showing his light, the engine driver might have seen it some considerable time before he came to the level crossing, because the line runs perfectly straight for some distance in the direction from which the train was approaching. Now what was the duty, or what might a jury fairly think was the duty, of the engine driver when he saw that no light was being shown by the gatekeeper? If the gatekeeper had not a red light to show, his danger signal would be the absence of a white light. Yet, though no white light was shown, the engine driver drove his train at the rate of about thirty or forty miles an hour across the level crossing. I think that it might well be said that that was evidence of a want of proper care and caution on the part of the engine driver, and that the matter is one which should be left to the jury. But the default on the part of Judges is a thing which cannot possibly be denied. It was sought to meet that difficulty by arguing that Judges had no duty whatever towards foot passengers, that his only duty was with regard to persons crossing the line with horses and vehicles. I cannot agree with that contention. The jury had a right to infer that the duty of Judges who had to signal when any train passed, whether by day or by night, in order to show the engine driver that the line was clear, was a duty as much for the safety of foot passengers as for the safety of carriages and horses or for the safety of the train. Therefore it seems to me that there was evidence upon which the jury might well infer a neglect of duty on the part of the defendants. Then it was argued that what is known of the accident is equally consistent with a want of due precaution on the part of the deceased as with negligence of the defendants. It was said that the judge at the trial ought to have held that the facts proved are equally consistent with either hypothesis, and that therefore there was no question for the jury to decide. A case in which a judge would be justified in holding that, may perhaps occur, but such cases must be very rare indeed. However the present case is not such a one as that.

I entirely agree with what the Master of the Rolls and Lopes, L.J. have said. Since the deceased was familiar with this level crossing and the gatekeeper's lodge, and with Judges himself, it is a fair inference that he knew what Judges' duties were; and since Judges did not go out of his lodge, and did not give the deceased any warning of the approaching train, it would be a very fair inference to conclude that the deceased was misled by the neglect of duty on the part of Judges, and consequently failed to take those precautions which he would have taken if Judges had gone out upon the line and done his duty in warning the deceased of the coming train. Then it was said that the engine driver began to whistle ten seconds before the train reached the crossing. Whether the deceased heard the whistle or not was a question for the jury to consider. It seems to me that there is not even a balance of evidence which would justify a judge in withdrawing the case from the jury upon the ground that the circumstances were as consistent with the accident having been caused by the negligence of the deceased as with the cause having been the negligence of the defendants. As to the other ground of this application, viz., that the verdict was against the weight of the evidence, I need only say that this case is not one in which it is possible to rely upon that ground. Therefore I agree that the application for a new trial fails entirely. With regard to the question about contributory negligence, I wish to guard myself against any supposition that I agree in the view that in a case of this kind it lies upon the plaintiff to make out a *primâ facie* case that he has not been guilty of contributory negligence. There has been a considerable conflict of judicial opinion upon this point, and I reserve my opinion upon it entirely, until the question comes before me for a decision.

Application dismissed.

Solicitor for the plaintiff, *Edward Clarke.*
Solicitor for the defendants, *Alfred Willis.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Nov. 22, 1895.

(Before CHITTY, J.)

WAYNES MERTHYR COMPANY LIMITED *v.* D. RADFORD AND CO. (*a*)

Practice—Action for fraudulent misrepresentation—Discovery before particulars.

In an action for fraudulent misrepresentation the plaintiffs in their statement of claim stated two specific cases of fraudulent misrepresentation (which the defendants admitted) and alleged generally that the defendants had on divers other occasions committed similar acts. An order having been made in chambers for the plaintiffs to give particulars before they obtained discovery from the defendants and inspection of their books, a motion was made to vary this order by making the discovery precede the particulars, the plaintiffs alleging that, although they had information in their possession tending to support the other charges, they could not substantially comply with the order for particulars until they had inspected the defendants' books.

Held, that this order ought to be varied by directing discovery to precede particulars.

There is no hard and fast rule as to the class of cases in which particulars should precede discovery or discovery precede particulars, but in each case the court will have regard to the special circumstances.

Judgment of Kay, L.J. in Zierenberg *v.* Labouchere (69 *L. T. Rep.* 172; (1893) 2 *Q. B.* 183) *discussed.*

THIS was a motion to discharge an order made in chambers directing particulars to be given by the plaintiffs before they obtained discovery from the defendants.

The action was brought by the plaintiffs, who were proprietors of a colliery, against the defendants, who were coal merchants in London, for an injunction restraining the defendants from selling or describing as coal supplied to them by the plaintiffs, or as coal from the plaintiffs' collieries, coal which had not in fact been so supplied or got, and for damages. The plaintiffs, by their statement of claim, alleged that all coal sent from their colliery was despatched in railway trucks from the colliery, the trucks and coal being weighed at the weigh-bridge there; that it was the duty of the man in charge to write on the appropriate printed form used for such purpose by the plaintiffs the respective numbers of the trucks despatched, with the date and the weight of the trucks and coal and the name of the station to which they were despatched, and the name of the consignee; and that this form when so filled in and signed was called a permit. The plaintiffs gave two instances of coal being supplied by the defendants to the City of London Brewery Company which was fraudulently represented to be coal purchased by them from the plaintiffs, and they alleged that the defendants had for this purpose used two out of six permits which an agent of the defendants had obtained from the servant of the plaintiffs who kept the blank forms of permit.

The statement of claim contained the following paragraphs:

5. The defendants have on divers other occasions taken orders from the said City of London Brewery Company and divers other persons for coal gotten from the plaintiffs' mines, and in response to such orders they have fraudulently supplied and sold to such company and persons coal which was not purchased from the plaintiffs or gotten from the said mines, and which was of a quality inferior to that of coal from the said mines, and have represented to such company and persons that the coal so supplied and sold was coal purchased from the plaintiffs and gotten from the said mines.

6. By reason of the sale by the defendants of coal as aforesaid the plaintiffs have lost the profits which they would have made if the coal sold as aforesaid had been purchased from the plaintiffs; and other coal merchants finding (as the fact is) that the defendants were selling what purported to be, and was supposed by such other coal merchants to be, coal from the plaintiffs' mines at a price lower than such other coal merchants could sell coal from the plaintiffs' mines, and even lower than they could purchase such coal from the plaintiffs, have accused the plaintiffs of unduly favouring the defendants, and have ceased to deal with the plaintiffs or to try to procure orders for their coal. [The names of two London coal merchants who had for the reasons

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

aforesaid ceased to deal with the plaintiffs were then given.]

7. By reason of the sale of coal by the defendants as aforesaid the coal from the plaintiffs' mines has suffered in reputation and value, and the demand therefor has decreased, and the plaintiffs have lost customers and otherwise suffered damage.

An interim injunction had been granted restraining the defendants from selling or describing as coal supplied to them by the plaintiffs, coal which had not in fact been so supplied, and on the motion for the injunction the defendants had filed an affidavit admitting they were technically guilty of the charge made against them as to some of the coal supplied to the City of London Brewery Company and expressing their regret for the same, stating that one of their clerks had without their knowledge wrongfully made use of two of the plaintiffs' permits, and that he had been severely reprimanded, and would have been summarily dismissed if he had not been an old servant.

The defendants before putting in their defence took out a summons for particulars as to paragraphs 5, 6, and 7 of the statement of claim, and the plaintiffs also took out a summons for discovery and inspection of documents. The two summonses came on for hearing together, and the judge in chambers made an order directing particulars to be given before discovery, and that unless such particulars were given within four days, all further proceedings in the action were to be stayed until the delivery thereof.

The plaintiffs now moved to discharge or vary this order.

Byrne, Q.C. and *W. C. Dare* for the plaintiffs.—The plaintiffs have reason to believe that the defendants or their clerks have committed other fraudulent acts, but until they have had inspection of the defendants' books they are not able to give full particulars thereof. Unless plaintiffs have discovery first they will not be able substantially to comply with the order for particulars, and the consequence will be that proceedings will be stayed and there will be a miscarriage of justice.

Farwell, Q.C. and *R. Younger* for the defendants.—Kay, L.J. in his judgment in *Zierenberg* v. *Labouchere* (69 L. T. Rep. 172; (1893) 2 Q. B. 183) lays down the rule that discovery should precede particulars only in cases where a fiduciary relationship exists between the parties. The rule, as stated in the Annual Practice for 1896 at p. 613 is, "In some cases a party may be allowed discovery for the purpose of giving particulars; but it has never been allowed in the absence of some relationship between the parties except under exceptional circumstances such as one party keeping back something which the other was entitled to know." There is no fiduciary relationship between the parties in this case, and the order made in chambers was right and ought not to be disturbed.

Byrne, Q.C. in reply.—No such rule as is contended for by the defendants was laid down in *Zierenberg* v. *Labouchere*. In the cases of *Millar* v. *Harper* (58 L. T. Rep. 698; 38 Ch. Div. 110), *Sachs* v. *Spielmann* (58 L. T. Rep. 102; 37 Ch. Div. 295), and *Maxim Nordenfelt Guns and Ammunition Company* v. *Nordenfelt* (69 L. T. Rep. 471; (1893) 3 Ch. 122), discovery was directed before particulars.

CHITTY, J.—The question is whether the plaintiffs should deliver particulars before discovery is given, or whether discovery should be given before particulars are delivered. The plaintiffs' case is founded on fraudulent misrepresentation by the defendants in passing off coal not gotten from the plaintiffs' colliery as coal from that colliery. On the statement of claim the plaintiffs give two instances of fraud, perpetrated as it appears by a clerk of the defendants, on supplying coal to the City of London Brewery Company. The statement of claim then goes on to allege that the defendants have on divers other occasions taken orders from the same brewery company and divers other persons for coal from the plaintiffs' colliery and fraudulently supplied coal not purchased from the plaintiffs. The order made in chambers was that the plaintiffs should deliver particulars, and that particulars should precede discovery. The plaintiffs now state at the bar that they cannot substantially comply with this order for particulars; they say they have information in their possession tending to support their charges in other instances than those mentioned in the statement of claim, but they are not in a position to frame particulars of them, and they say they are afraid of the defendants coming to the court and saying there has been no substantial compliance with the order for particulars, and asking to be relieved from the order for discovery, and to have proceedings stayed. Under these circumstances it becomes very material to decide whether particulars should precede discovery or discovery should precede particulars. The argument for the defendants is founded chiefly on the judgment of Kay, L.J. in *Zierenberg* v. *Labouchere* (*ubi sup.*), and was to the effect that unless a fiduciary relation existed between the parties particulars should always precede discovery. I am unable to deduce any such proposition from the judgment of the Lord Justice. He did not lay down the general proposition contended for by the defendants at the bar, and in my opinion no such rule exists. There is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery precede particulars; but in each case the court must have regard to the special circumstances. It cannot be said that the plaintiffs are making a fishing case; there has already been a motion for an interim injunction on which the defendants filed an affidavit in which they admitted the two particular cases of fraud charged against them, excusing themselves by saying the fraud was committed without their knowledge by an old clerk, and they had reprimanded him. The nature of the fraud was this: Certain documents called permits were handed by the plaintiffs to the defendants for legitimate and proper use; there were six of these forms, and two of them were made use of for the purpose of answering the question whether the coal supplied by the defendants was coal from the plaintiffs' collieries. The clerk who filled them up is not before me to justify or explain his conduct; but on the affidavits, there was a designed and deliberate fraud. The defendants have retained this clerk in their employ, in mercy, because he was an old servant—against that I will not say anything, but four forms remained in the possession of the defendants, and the defendants' counsel is instructed to say that they cannot be found. The plaintiffs

allege that they have lost business by reason of the defendants' fraudulent acts, and in paragraph 6 of the statement of claim they give two instances of firms who have ceased to deal with them. The defendants in their affidavit say that they have had friendly business relations for the last thirty years with the plaintiffs, and that during that time they have purchased from the plaintiffs quantities of coal varying from 70,000 to 15,000 tons annually, but that the annual quantities so purchased have decreased of late years. I am unable to see that this helps the defendants; it seems to me that it is rather in favour of the plaintiffs. As I have said, this is not a fishing case, but one having a substantial foundation, and it is necessary to go into these details in order to arrive at a just conclusion. The defendants by a careful examination of their books have the means of discovering whether they have committed through their clerk any act of a similar nature; the discovery claimed by the plaintiffs is limited to four years preceding the date of the writ; and it seems to me that this is a case in which, having regard to the relation between the parties and the admitted facts, and having regard to the circumstance that any of these alleged frauds are within the defendants' means of knowledge and are not within the knowledge of the plaintiffs, I think discovery ought to precede particulars, and I think the order made in chambers ought to be varied for the purpose of effecting justice between the parties, because I see the use which the defendants will be able to make of the order as it stands. The usual argument has been addressed to me that the plaintiffs ought not to be allowed to rove through the defendants' books in order to make out a case, but for the reasons already given, I do not think it is applicable here. The order, therefore, will be varied by directing discovery to precede particulars.

Leave to the defendants to appeal was refused.

Solicitors: *Heath, Parker*, and *Brett*; *Radford* and *Frankland*.

QUEEN'S BENCH DIVISION.

Dec. 4 and 9, 1895.

(Before Mathew, J.)

Woodside and Co. *v.* The Globe Marine Insurance Company Limited. (*a*)

Marine insurance—Valued time policy—Depreciation in value of thing insured by partial loss—Subsequent total loss by perils insured against—Right of assured to recover total loss.

By a valued time policy the plaintiffs insured their ship, valued at 20,000*l.*, *with the defendants, "against the risk of loss or damage by fire and (or) explosion." While the policy was in force the ship was, by perils of the seas, driven ashore and stranded, and while stranded was totally destroyed by fire. By the stranding the vessel was seriously damaged, but was still a ship, capable of being floated and repaired, though at a cost exceeding her repaired value.*

Held, that the valuation in the policy was, in the absence of fraud, binding and conclusive between the parties, and that the assured were entitled to recover a total loss under the policy upon the basis of the valuation, notwithstanding the partial loss and depreciation in the value of the ship by the stranding.

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

Commercial action, tried before Mathew, J.

The action was brought to recover a total loss upon a policy of marine insurance effected by the plaintiffs with the defendants upon the plaintiffs' steamship, the *Bawnmore*, which was valued in the policy at 20,000*l.*

The policy was a time policy, remaining in force for the twelve months from the 6th May 1895 to the 5th May 1896 inclusive, and it was "against the risk of loss or damage by fire and (or) explosion," and in the policy the insurers bound themselves to pay to the assured all such damage and loss by fire and (or) explosion, not exceeding the sum of 1000*l.* within seven days after such loss is proved, and that in proportion to the sums subscribed against their respective names.

While the policy was in force the vessel was by the peril of the seas driven ashore on the coast of Oregon and was stranded, and while stranded was totally destroyed by fire.

The plaintiffs claimed as for a total loss under the policy, the ship having been, as they contended, totally lost by the perils insured against, namely, by fire and explosions, which began about the 29th Aug., and continued for several days until the ship was, as the plaintiffs alleged, completely gutted. The defendants said that at the time when the fire occurred the ship was already a constructive total loss by the stranding, and they denied their liability on that ground.

It was ordered in chambers that the question should be tried as a matter of law on the assumption that the ship when stranded was still a ship capable of being floated and repaired, though at a cost exceeding her repaired value, and upon the argument it was agreed that the case should be dealt with as if the owners were their own underwriters against the perils of the seas which caused the stranding.

Bigham, Q.C. (*Leck* with him) for the plaintiffs.—The plaintiffs are entitled to recover upon this policy. The ship was no doubt seriously damaged by the stranding, but it was still a ship, and was capable of being repaired as a ship. The thing insured was still in existence when the fire occurred, as the loss by the stranding was a partial loss only. That being the state of affairs, the valuation in the policy was still binding upon the parties. The ship was then totally destroyed by fire, and that being so, the plaintiffs are entitled to recover a total loss:

Barker v. *Janson*, 17 L. T. Rep. 473; L. Rep. 3 C. P. 303;

Lidgett v. *Secretan*, 24 L. T. Rep. 942; L. Rep. 6 C. P. 616.

Joseph Walton, Q.C., and *J. A. Hamilton* for the defendants.—If the plaintiffs' contention were well founded, they would be entitled to recover twice over as for a total loss, because at the time of the fire the ship was already a constructive total loss by the stranding. The case of *Barker* v. *Janson* (*ubi sup.*), and *Lidgett* v. *Secretan* (*ubi sup.*), relied on for the plaintiffs, are entirely different from this case; and in fact *Lidgett* v. *Secretan* (*ubi sup.*), is rather in favour of the defendants' contention. In *Barker* v. *Janson* (*ubi sup.*), the constructive total loss was before the policy attached at all; which distinguishes that

case from the present, where the constructive total loss occurred during the continuance of the policy. In *Lidgett* v. *Secretan* (*ubi sup.*), there was a constructive total or partial loss under one policy, and a total loss by fire under another policy; that is, there was a partial loss on one voyage, and a total loss on a different voyage; whereas, here the fact is different, as the constructive total loss occurred while the one policy was in existence. During the voyage there was first a constructive total loss by perils of the seas, and, secondly, a total loss by fire. Now, if the fire had occurred first and had caused the partial loss, and that damage had not been repaired, and that had been followed by a total loss by sea perils, there would be no liability on the fire policy: (*Livie* v. *Janson*, 12 East. 648.) There would be a merger, and we contend that there is a merger here. In *Lidgett* v. *Secretan* (*ubi sup.*) Willes, J. deals with the very point when commenting on the case of *Livie* v. *Janson* (*ubi sup.*). The principle is that the assured is to be treated as if he had been fully covered and had been paid, when once paid for a total loss under the policy. Apply that doctrine conversely and the same principle covers the present case. The difference is between a partial loss and a total loss; and here the plaintiffs, being their own insurers against the perils of the seas, must be assumed to have been paid for a total loss in respect of the stranding. That puts an end to the risk altogether and causes a merger, so that the plaintiffs cannot recover for loss subsequently caused by the fire. The next point is that there is no total loss by fire. This involves a question of fact, and, therefore, we assume that the fire left the vessel still a vessel, though much damaged. Upon this view of the case we are not liable for a total loss, but only for the actual loss to the vessel. Is the vessel a constructive total loss by the fire? We submit that she is not, and she must be a constructive total loss to be a total loss under the policy.

Bigham, Q.C. in reply. *Cur. adv. vult.*

Dec. 9.—Mathew, J. read the following judgment:—This was an action to recover a total loss upon a time policy of marine insurance on the ship *Bawnmore*, valued at 20,000*l.*, against loss or damage by fire or explosion only. The vessel by perils of the seas was driven ashore on the coast of Oregon, and, while stranded, was totally destroyed by fire. The defendants denied their liability on the ground that at the time of the fire the ship was already a constructive total loss. The plaintiffs, on the other hand, contended that, even if there had been a constructive total loss of the vessel by reason of the stranding (which was not admitted), the assured as matter of law were entitled to recover. An order was made in chambers that the question should be argued as a preliminary point of law, on the assumption that the vessel, when stranded, was still a ship capable of being floated and repaired, though at an expense exceeding her repaired value. Upon the argument it was agreed that the case must be dealt with as if the owners were their own underwriters against the perils of the seas which caused the stranding. For the plaintiffs, reliance was placed upon the decisions in *Barker* v. *Janson* (17 L. T. Rep. 473; L. Rep. 3 C. P. 303) and *Lidgett* v. *Secretan* (24 L. T. Rep. 942; L. Rep. 6 C. P. 616). The ship, it was said, though seriously damaged by the stranding, was still capable of being repaired as a ship; and the valuation in the policy was therefore binding, notwithstanding the depreciation in her value due to her having been driven ashore. For the defendants it was argued that if the fire had occurred first and the damage had not been repaired, the underwriters would not have been liable; and that no doubt would be so because the assured would not have sustained any loss by the fire. The result, it was said, ought to have been the same in this case. The constructive total loss made a subsequent loss legally impossible; there was, it was said, a merger; and the assured must be treated as if they had been already indemnified, and had received the value of their ship; and therefore that it was not right that they should be permitted to recover twice over for what was one loss. But if the owners are to be regarded as insurers in respect of the stranding, the doctrine of satisfaction would prevent any such result. I am of opinion that the plaintiffs are entitled to my judgment. The loss by stranding would only become total if the assured gave timely notice of abandonment. If none were given, the loss would be a particular average only, and it would seem clear that a partial loss, however serious, would not impair the right of the assured to recover for a subsequent total loss upon the basis of the valuation. Whether the subject-matter of the insurance be ship or goods, the valuation is the amount fixed by agreement by which, in case of loss, the indemnity is to be calculated. When goods are insured, the valuation may be low when the policy attaches, but the value to the owner may be enhanced when the goods have nearly reached their destination by the expenses of transit, &c., nevertheless, the valuation is binding. And again, if the valuation be high, though the goods at the time of loss may be depreciated in value from fall of prices, or the unusual length of the voyage, or other causes for which the underwriter is not liable, the valuation cannot be opened. Neither appreciation nor depreciation, where there is no fraud, will affect the underwriter's liability. In the case of a ship, in the same way, the vessel may, for many causes, be worth much less at the time of loss than the agreed value, but the valuation determines the amount of the indemnity. This has clearly been the law since the case of *Shawe* v. *Felton* (2 East, 109). I am unable to distinguish such a loss as the present from any other in which, while the subject-matter of the insurance still exists, and there is no ground for suggesting fraud or wagering, the diminution in value is relied upon to exonerate the underwriter from the whole or from part of his liability. It is impossible, as Lord Kenyon said in *Shawe* v. *Felton* (*ubi sup.*), to draw the line between a greater or less diminution of value. I give judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *Waltons*, *Johnson Bubb*, and *Whatton*.

Dec. 9 and 12, 1895.

(Before Mathew, J.)

Roth and Co. *v.* Taysen, Townsend, and Co. and Grant and Co. (*a*)

Contract—Measure of damages—Sale of goods to be delivered at future time—Repudiation by buyer—Acceptance of repudiation by bringing action—Subsequent re-sale by seller.

By a contract, made on the 24th May 1895, *the defendants purchased from the plaintiffs a cargo of maize, to be shipped from a port in the Argentine Republic about the 15th July. The market was then falling, and on the 28th May the buyers repudiated the contract, and on the 24th July the plaintiffs brought this action for damages for non-acceptance of the goods. The prices at that time were falling continuously, and there was no prospect of their recovery. If the plaintiffs had re-sold about the 24th July, when they brought this action, the loss on the contract price of the cargo would have been* 1557*l.*, *but they did not re-sell until the vessel and cargo arrived at her port of call on the 5th Sept., when the loss was* 3807*l.*

Held, that the measure of damages was the sum of 1557*l.*, *being the difference between the contract price and the market price on the 24th July, when the plaintiffs accepted the defendants' repudiation by bringing this action, as, having regard to the falling prices, the plaintiffs ought to have re-sold at that time, and ought not to have waited until the arrival of the cargo on the 5th Sept.*

Commercial cause tried by Mathew, J.

The action was brought by Messrs. Louis Roth and Co. Limited, of London, against the defendants, Grant and Grahame, of Aberdeen, for damages for breach of contract for non-acceptance of a cargo of maize, and against the defendants, Taysen, Townsend, and Co., of London, for breach of contract, or breach of warranty to make a contract.

On the 24th May 1893 the defendants Taysen and Co., purporting to act for and on account of the defendants Grant and Co., signed a contract note for the sale to Grant and Co., of a cargo of maize, consisting of about 2800 tons, at the price of 21*s.* 10½*d.* per quarter of 480lb., to be shipped for the plaintiffs per the steamer *Haverstoe*, expected to load about the 15th July, from a port or ports in the Argentine Republic and (or) Uruguay, to any safe port in the United Kingdom, or on the Continent between Bordeaux and Hamburg, both included.

The ship was chartered by the plaintiffs, the cargo of maize was loaded, and the ship and cargo were expected to arrive on or about the 5th Sept. at her port of call (St. Vincent).

The contract note having been signed on the 24th May, the buyers, the defendants, Grant and Co., on the 28th May, sent to the plaintiffs a telegram repudiating the contract, on the ground that Taysen and Co. had no authority to make it on their behalf. The market price was then falling, and the buyers adhered to their position and refused to accept delivery of the maize, and after some correspondence and an unsuccessful attempt to induce the buyers to go to arbitration, the plaintiffs, on the 24th July, brought this action.

Upon the trial of the action the learned judge found that Taysen and Co. had authority to sign the contract on behalf of Grant and Co., and that Grant and Co. were therefore liable upon the contract. The question as to the amount of the damages was postponed, and that was the sole question now argued.

By the contract note payment was to be by cash in London in exchange for shipping documents on or before arrival of the vessel at port of discharge, which was Plymouth, but in no case later than fourteen days after receipt of invoice, less a certain discount; and clause 6 of the conditions and rules indorsed on the note provided that

> In default of fulfilment of contract, either party, at his discretion, shall, after giving notice in writing, have the right of re-sale or re-purchase, as the case may be, and the defaulter shall make good the loss, if any, by such re-purchase, or re-sale on demand.

If the cargo had been re-sold by the plaintiffs about the 29th or 30th May, the date of the repudiation by the buyers, the loss would have been 1*s.* a quarter, or upon the whole cargo about 680*l.*, including brokerage. If the cargo had been re-sold about the 24th July, the date when the plaintiffs brought this action, the loss upon the contract price would have been about 1557*l.*

The prices were then still falling and were likely to fall, but the plaintiffs did not sell until the 5th Sept., when the cargo arrived at port of call. They then re-sold the cargo at 16*s.* per quarter, the best price obtainable, and the loss on the contract price was 3807*l.* 5*s.* 8*d.*, and the plaintiffs said they were entitled to recover this sum as damages.

Bigham, Q.C. and *H. F. Boyd* for the plaintiffs. —The 5th Sept. was the time when the ship was expected to arrive at her port of call, and when in fact she did arrive; and we submit that the damages are to be estimated in reference to this date, and that the true measure of damages is the difference between the contract price and the market price on the 5th Sept. when the goods were actually resold. This difference is 3807*l.*, and it is the measure of damages applicable to this case:

Frost v. *Knight*, 26 L. T. Rep. 77; L. Rep. 7 Ex. 111;

Brown v. *Muller*, 27 L. T. Rep. 272; L. Rep. 7 Ex. 319;

Roper v. *Johnson*, 28 L. T. Rep. 296; L. Rep. 8 C. P. 167.

In *Roper* v. *Johnson* (*ubi sup.*), Keating, J. says, (28 L. T. Rep. at p. 300), that "the period of time at which the difference in prices is to be taken would be the period at which the contract would have been performed if it had been performed;" and Brett, J. says (at p. 301) that the true measure of damages is "the difference between the contract and the market price on the day the defendant ought to have performed the contract by delivery;" and he goes on to say: "Although you may treat the refusal before the day of performing the contract as the day of the breach, yet it is not the day of the non-performance of the contract." The judgment of Cockburn, C.J. in *Frost* v. *Knight* (*ubi sup.*) is to the same effect These authorities

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

clearly show that the breach or repudiation of a contract is one thing, but that the time at which the damages are to be estimated may be wholly different. A repudiation of a contract may be accepted, and thereby a cause of action may be created; but it does not follow that the damages are to be estimated from that time. The measure of damages remains the same, although the cause of action is expedited, and that measure is estimated on the basis of the market price at the time when the contract ought to have been performed.

Tindal Atkinson for the defendants Grant and Co.—On the 30th May there was an election on the part of the buyers to rescind the contract, and they had then repudiated the contract. The date of repudiation is to be taken as the date at which the damages are to be fixed; and the damages are the difference between the contract price and the market price at the date of repudiation. There is a distinct authority for this proposition in the case of *Warin* v. *Forrester* (4 Rettie, 4th series, p. 190, a decision of the Court of Session in Scotland in the year 1876, which was affirmed by the House of Lords in June 1877 (Ib., p. 75). [Mathew, J.—Was there any evidence there of acceptance of repudiation?] The report seems to omit that item of fact. The measure of damages, therefore, is the loss on the 30th May, the date of the repudiation, and that loss was the sum of about 680*l.*, and that is what we say the plaintiffs are entitled to, and no more. But, secondly, even if that is not the date at which the damages are to be estimated, at all events as soon as one party accepts repudiation there is a breach. One party cannot by his repudiation compel the other party to put an end to the contract, but when one party accepts the repudiation by the other there is a breach, and the damages are to be assessed with reference to the date of that breach; that is, with reference to the date of the acceptance of repudiation. So that, even if the date of the repudiation in May is not to be taken, at any rate, on the date of the writ, that is, on the 24th July, there was a distinct acceptance by the plaintiffs of our repudiation. The loss at that date, that is, the difference between the contract price and the estimated market price, was 1557*l.*, and we submit that, at the very outside, the plaintiffs are not entitled to recover more than this sum. The markets were then falling and were likely to fall, and the plaintiffs, to avoid further loss, ought to have sold at that time. As they did not do so the defendants ought not to have to bear the increased loss caused by not re-selling until the 5th Sept. He referred to

Phillpotts v. *Evans*, 5 M. & W. 475;
Hochster v. *De La Tour*, 2 E. & B. 678.

H. F. Boyd in reply.—Sect. 50 of the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), deals with the question of damages for non-acceptance of goods, and it says (sub-sect. 3), that the damages are the difference between the contract and market price at the time "when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept." In either case that date here would be the 5th Sept. That provision was evidently inserted to meet the case of

Phillpotts v. *Evans* (*ubi sup.*).

The plaintiffs are entitled to the full amount of damage sustained by the breach of the contract, and that is the sum of 3807*l.*: per James, L.J. in the

Dunkirk Hall Colliery Company v. *Lever*, 39 L. T. Rep. at p. 241; 9 Ch. Div. at p. 25.

Apart from the authorities we are also entitled to the damages claimed under clause 6 of the conditions on the contract note. He also referred to

Maclean v. *Dunn*, 4 Bing. 722;
Ex parte Stapleton, 40 L. T. Rep. 14; 10 Ch. Div. 586;
Mayne on Damages, 5th edit., p. 173.

Cur. adv. vult.

Dec. 12.—Mathew, J. read the following judgment:—In this case it was agreed at the trial that the amount of the damages should be postponed in the expectation that the parties would be able to agree. No arrangement was made, and the case comes before me again to fix the amount. It had been directed that the defendants Grant and Grahame, were bound by the contract note, dated the 24th May 1895, signed on their behalf by the defendants Taysen and Co. The contract had been repudiated by the buyers on the ground that Taysen and Co. had no authority to make the contract, and the action was brought in the alternative against the buyers upon the contract, and against Taysen and Co. for breach of the warranty of authority. It appeared that from the time when the contract was made the market began to fall, and the buyers on the 28th May sent by telegram an ultimatum that unless the contract was altered as they desired, they would not accept delivery. To this position they adhered, notwithstanding an offer from the sellers to modify the contract as the buyers suggested. After an unsuccessful attempt to induce the buyers to go to arbitration, the plaintiffs, on the 24th July 1895, brought this action. Prices had about that time fallen, and if the cargo had then been sold the loss would have been, according to the figures furnished to me, 1557*l.* There would seem to be no doubt that as the market was still giving way, and no reason to expect that prices would recover, it would have been prudent from a business point of view to have taken immediate steps to realise, and so avoid the risk of further loss. But the plaintiffs claimed to do nothing until the 5th Sept., the time about which the ship and cargo were expected to arrive, and by that time the difference between the contract and market prices amounted to 3807*l.* 3*s.* 8*d.*, a sum for which the plaintiffs claimed to be entitled to judgment. In support of the plaintiff's contention reliance was placed on the judgment in *Brown* v. *Muller* (*ubi sup.*), and upon passages in the judgment of Kelly, C.B., in which it was stated that under similar circumstances a seller was entitled to recover damages calculated with reference to the market price at the time when the contract ought to have been performed. But the authorities seem to me to establish clearly that where, in a case like the present, a seller treats a repudiation as a wrongful ending of the contract and brings an action, he will be entitled to such damages, subject to abatement in respect of circumstances which may have afforded him the means of mitigating the loss. He is not at liberty to permit the loss to be aggravated to the last farthing by the neglect of means which ought to be adopted by a prudent man, whereby the loss

may be diminished: (*Frost* v. *Knight*, 26 L. T. Rep. at p. 79; *Roper* v. *Johnson* (*ubi sup.*) It is a question of fact in each case whether such reasonable steps have been taken when the buyer or seller, as the case may be, has clear notice that the contract will be repudiated, and acts upon that notice by commencing an action: (*Wilson* v. *Hicks*, 26 L. J. 242, Ex.) In this case several excuses were offered for what seemed to be unbusiness like conduct on the part of the plaintiffs. In the first place it was said that if a sale had taken place sooner, the buyers might object that the sellers ought to have waited. But that excuse is answered by the terms of clause 6 of the conditions and rules indorsed on the contract note. Then it was said that instructions had been given to the plaintiffs' market clerk to sell early in August, but that what he considered a sufficient price could not be obtained. I cannot accept that explanation. The cargo would have been sold then at a loss much less than that ultimately sustained. Then the further excuse was offered that it had been decided by mercantile arbitrators in the city that the proper time to sell under clause 6 was when the vessel had reached her port of call, and that out of this decision there had grown a practice not to realise at any earlier date. It is possible that there may have been such a decision, but neither the view of the arbitrators nor the practice, if any, which is said to have sprung from it, would in my judgment be reasonable. This excuse was somewhat inconsistent with the evidence that instructions had been given to sell on the 15th Aug. With reference to the case of *Brown* v. *Muller* (*ubi sup.*), there was no evidence that the plaintiff could have made a similar contract elsewhere, and it was not suggested that the loss had been increased by the acts of the plaintiff. Even in that case the principle relied upon by the defendants was recognised, for the plaintiff was not permitted to add to the damages by reference to the market prices on the last day at which a delivery under the contract might have been made. I take into account in this case, in the words of the Lord Chief Justice, in *Frost* v. *Knight* (*ubi sup.*), what the plaintiffs ought in reason to have done whereby the loss would have been diminished, and I hold that the sale should have taken place about the time when the writ was issued. I give judgment for the plaintiffs for 1557*l.*

Judgment for the plaintiffs for 1557*l.*

Solicitors for the plaintiffs, *Stibbard*, *Gibson*, and *Co.*

Solicitors for the defendants, *Murray*, *Hutchins*, *Stirling*, and *Murray*.

Dec. 18 *and* 21, 1895.

(Before MATHEW, J.)

BARRACLOUGH AND OTHERS *v.* BROWN AND OTHERS. (*a*)

Shipping—Wreck—Obstruction in tidal river—Removal of wreck—Liability for expenses of removal—Owner—Harbours, Docks, and Piers Clauses Act 1847 (10 *&* 11 *Vict. c.* 27), *s.* 56—*Aire and Calder Navigation Act* 1889 (52 *&* 53 *Vict. c. xxxii.*), *s.* 47.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

By sect. 47 *of the Aire and Calder Navigation Act* 1889, *if any vessel shall be sunk in any part of the navigation of the undertakers, and the owner shall not forthwith remove the same, the undertakers may remove, and may detain and sell the same in payment of their expenses, and they shall pay the overplus, if any, to the owner; and by sect.* 56 *of the Harbours, Docks, and Piers Clauses Act* 1847 "*the harbour-master may remove any wreck or other obstruction in the harbour, and the expenses of removing any such wreck shall be repaid by the owner of the same.*"

Held, that, under both sections, the word "owner" means the person who was the owner of the vessel at the time when the expenses of removal were incurred, and not the person who was the owner when the vessel sank, and consequently that, where the owner of a vessel, which had sunk in a tidal river, had completely abandoned all ownership in the vessel before the expenses of removal were incurred, he was not liable for such expenses.

COMMERCIAL CAUSE, tried by Mathew, J.

The facts, as stated in the written judgment of the learned judge, were these:

The action was brought by the undertakers of the navigation of the rivers Aire and Calder to recover a sum of 3278*l.* 8*s.* 11*d.*, the costs of removing by explosions the steamship *J. M. Lennard*, which had sunk in the river Ouse, within the navigation and jurisdiction of the plaintiffs.

The plaintiffs' powers were conferred by a local Act of 1884, which incorporated the Harbours, Docks, and Piers Clauses Act 1847 and a local Act of 1889, by which the plaintiffs' jurisdiction and authority were enlarged.

On the night of the 20th Aug. 1894 the *J. M. Lennard*, of which the defendants were the registered owners, whilst on a voyage from Goole to Jersey with a cargo of coal, capsized and sank in the river Ouse.

The vessel was fully insured, and notice was given to the underwriters, who endeavoured unsuccessfully to raise the vessel. On the 30th Aug. the defendants gave notice of abandonment to the underwriters, and on the 1st Sept. the underwriters gave notice to the plaintiffs that they considered the salvage impracticable, and on the 5th Sept. the plaintiffs telegraphed to the defendants that the underwriters had abandoned the vessel. On the same day the underwriters settled with the plaintiffs for a total loss.

On the 8th Sept. the plaintiffs forwarded to the defendants a copy of a contract which they had made on the 6th Sept. with Mr. Thomas N. Armit for raising the vessel. He failed to float the ship, and the amount expended in the attempt was 2778*l.* 8*s.* 8*d.*

The plaintiffs then resolved to destroy the wreck by explosives, and spent for that purpose 500*l.* 0*s.* 3*d.* under an agreement dated the 27th Oct. 1894.

These are the sums which the plaintiffs in this action seek to recover from the defendants.

Sect. 47 of the Aire and Calder Navigation Act 1889 (52 & 53 Vict. c. xxxii.) provides:

If any boat, barge, or vessel shall be sunk in any part of the navigation, cuts, canals, docks, basins, or locks of the undertakers, or in the river Ouse, within the limits

of improvement defined by the Act of 1884, and the owner or person in charge of such boat, barge, or vessel shall not forthwith weigh, draw up, or remove the same, it shall be lawful for the undertakers, by their agents or servants, to weigh, draw up, or remove such boat, barge, or vessel, and to detain and keep the same, with her tackle and loading until payment be made of all the expenses relating thereto, or to sell such boat, barge, or vessel, and the tackle and loading thereof, or a sufficient part thereof, and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the overplus, if any, on demand, or the undertakers may, if they think fit, recover such expenses from the owner of such boat barge, or vessel, in a court of summary jurisdiction.

Sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) provides:

The harbour-master may remove any wreck or other obstruction in the harbour, dock, or pier, or the approaches to the same . . . and the expense of removing any such wreck, obstruction, or floating timber, shall be repaid by the owner of the same, &c.

Sir *Walter Phillimore* and *Montague Lush* for the plaintiffs.

Joseph Walton, Q.C. and *A. Lennard* for the defendants.

Cur. adv. vult.

Dec. 21.—Mathew, J. read the following judgment:—[After stating the facts his Lordship proceeded:] The plaintiffs in support of their claim mainly relied on sect. 47 of the Act of 1889. They further contended that apart from this enactment they were entitled to be indemnified for the costs reasonably incurred for removing the wreck from a tidal river, the navigation of which had been artificially improved under their statutory powers. It was also contended that the defendants were owners in point of fact, and were asserting their rights as owners down to the time when the wreck was finally removed. With respect to the first contention it was not disputed that, if the plaintiffs' right to recover depended upon sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847, the case of *The Crystal* (71 L. T. Rep. 346; (1894) A. C. 508) was conclusive in the defendants' favour. But the plaintiffs insisted that sect. 47 of the local Act of 1889 conferred upon them the right to remove the wreck at the expense of the defendants. It was said that the word "owner" in that section was specially interpreted to be the owner of the vessel when she sank, whose duty it was "forthwith" to raise and remove it, and that the owner from whom the expenses could be recovered was that same person. For the defendants it was argued that there was no indication of an intention that the word "owner" should receive a different interpretation in sect. 47 of the local Act from that which it had been decided to bear in sect. 56 of the incorporated Act. It was said that the two sections should be read together, and were consistent with each other, though sect. 47 gave further powers of charging not merely the vessel, but her loading with the expenses of removal. But the word "owner" under such section meant the person who was owner at the time when the expenses were incurred. I am of opinion that the construction contended for by the defendants is the correct one, and that upon this section, as well as upon sect. 56 of the incorporated Act, the time when the expenses were incurred, and not the time when the vessel sank, is the period at which the ownership is to be ascertained. The plaintiffs contended that the defendants had not sufficiently disclaimed all ownership in the vessel before the expenses were incurred. But upon the correspondence I am of opinion that the defendants had fully and completely disclaimed all further ownership in the vessel, and had abandoned her *sine animo recuperandi*, and were understood to have done so by the plaintiffs. Upon the question whether the defendants were owners in fact there was no good ground, it seems to me, for suggesting that the defendants had reserved any right to the proceeds of the wreck, or had done anything to lead the plaintiffs to believe that they made any such claim. The fact that the registry had not been closed before the end of October might afford some evidence under different circumstances that the defendants were still owners; but this *primâ facie* case was displaced altogether by proving, as was done in this case, what the facts really were: (see *Baumvoll Manufactur* v. *Furness*, 68 L. T. Rep. at p. 5; (1893) A. C. at p. 20.) No authority was referred to in support of a proposition advanced on the part of the plaintiffs that there was no right to abandon a wreck when the vessel had sunk in tidal waters, the navigation of which had been improved by artificial means. The means adopted by the plaintiffs in the river Ouse consisted of the construction and maintenance of embankments on each side of the river, in lieu of the old mud banks. The argument is answered by reference to the Harbours, Docks, and Piers Clauses Act 1847, and by the Removal of Wrecks Act 1877, sect. 4, which deals with vessels sunk or abandoned in any harbour or tidal water under the jurisdiction of a harbour or conservancy authority, or in or near any approach thereto. I therefore give judgment for the defendants.

Judgment for defendants.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, for *A. M. Jackson*, Hull.

Solicitors for the defendants, *W. A. Crump* and *Son*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Monday, Nov. 11, 1895.

(Before Barnes, J.)

In the Goods of Teece (deceased). (a)

Administration—Intestacy—Application by guardians of the poor—Informal notices to next of kin—Citation dispensed with.

Verbal notices to next of kin allowed to be proved, and accepted by the court, in place of citations, to save expense in a very small estate.

Henry Teece, late of 4, Portland-street, Altofts, in the county of York, miner deceased, died on the 2nd April 1893, intestate, leaving his lawful widow Hannah Teece, his father, since deceased, and brothers and sisters, but no mother or children him surviving.

Prior to the death of the said Henry Teece, namely, on the 6th Feb. 1893, the said Hannah Teece became chargeable to the guardians of the Wakefield Union, on her removal to the Pauper Lunatic Asylum at Stanley, near Wakefield.

The said Henry Teece was liable to the said

(a) Reported by H. Durley-Grazebrook, Esq., Barrister-at-Law

guardians for his said wife's maintenance in the lunatic asylum during the period of two months and sixteen days, being the period between the removal of the said Hannah Teece to the asylum and the date of the death of the said Henry Teece, the amount of his said indebtedness being 5*l.* 10*s.* 6*d.*

The estate of the said Henry Teece consisted of a policy of assurance in the Prudential Company for 16*l.*; an amount of 6*l.*, due from the Miners Union Fund; household goods and personal effects of the estimated value of 20*l.*; and other goods at Altofts aforesaid, valued at 8*l.* The whole of his estate, being under 500*l.*, passed to his widow Hannah Teece, who continued an inmate of the asylum until her death, which occurred on the 11th April 1894, and the amount of her indebtedness to the guardians, between the death of her husband and the time of her own death, was 25*l.* 6*s.*

She died a widow and without children, leaving her surviving a brother and sisters. She died intestate, and possessed of no property save 36*l.*, the nett amount of her husband's estate, after payment of his debts, and a sum of 10*l.* insurance money and 6*l.* in the Miners' Union Fund. No letters of administration had been taken out by any of her relatives.

Bargrave Deane, on behalf of the guardians, moved that letters of administration be granted to their clerk and nominee, in respect of each estate, under sect. 73 of the Probate Act 1857. There will be only a sum of 5*l.* 3*s.* 6*d.* left for distribution amongst the persons entitled in distribution to the estate of Hannah Teece, after the costs of administering both the estates and the debts due have been paid. The brother and two sisters, who are the next of kin of the widow, have had notice, though not formal notice. In these cases the court should not insist upon citation. The husband's estate was only about 50*l.*, and the wife's estate about 46*l.*, consisting of the same property. She had nothing except what came from her husband.

Barnes, J.—Take a grant to the husband as creditor of the husband; and take a grant to the widow as representing her. If you file an affidavit which satisfies the registrar that the next of kin have had notice of this application, that will, I think, do, under the circumstances.

Solicitors: *Clarke* and *Blundell*.

DIVORCE BUSINESS.

Oct. 25 *and* 26, 1895.

(Before Barnes, J.)

Clark (falsely called Stier) *v.* Stier. (*a*)

Nullity of marriage—Pressure exercised by mother of petitioner—Duress.

The petitioner, a girl of seventeen, went through a ceremony of marriage in church, by licence, in 1889. *The respondent, some twelve or fifteen years her senior, had only met her a few times as a friend of her brother, and had never shown any affection for her, nor proposed marriage to her. On the day of the ceremony her mother took her for a drive. They alighted at the church, where they found the respondent, who told her she was to do as her mother bade her. Acting under her mother's influence, she went through the ceremony, which her mother told her was only a betrothal. She signed the register in a firm hand. She had never read the marriage service, nor seen a wedding. She threw away the wedding-ring outside the church, and never again saw the respondent, who left England the same day, in company with the petitioner's brother, upon whom, also, secrecy was enjoined by the mother, on his return, later in the same year, and to whom the respondent had, while in South Africa, communicated the fact of the marriage. In* 1893 *the petitioner married another man, and not long afterwards her father received a letter from the respondent, claiming her as his wife.*

The Court came to the conclusion that the petitioner was not a free agent, but that she went through the ceremony with the respondent under duress, exercised by her mother acting in concert with the respondent. The petitioner was therefore entitled to have the marriage annulled.

This was a petition by Ella Louise Clark for nullity of marriage on the ground of duress.

The respondent was William Douglas Somerset Keppel Stier, and the marriage ceremony was performed on the 5th June 1889, by licence, at St. Mary Abbott's Church, Kensington, the mother of the petitioner, who died in the following February, being present at the ceremony.

According to the evidence of the petitioner, the mother told her at the time that she was only going through a form of betrothal with Stier, and, before her death, she enjoined the petitioner never to mention what had taken place.

The petitioner, on the 18th Nov. 1893, married a Mr. Ford.

The father, in the course of his evidence, stated that he was not a consenting party to the marriage ceremony with Stier, as the latter had falsely alleged when applying for the licence. He knew nothing of the ceremony until Stier wrote to him in 1894, claiming the petitioner as his wife. He knew Stier only as a friend of his son, and, as such, Stier visited a few times at his house. Mrs. Clark was a very strong-minded woman, and the petitioner was completely under her control. In 1889 he was reputed to be a rich man and his daughter was supposed to be an heiress.

The other facts appear in the judgment.

Bargrave Deane, for the petitioner, referred to *Scott* (*falsely called Sebright*) v. *Sebright* (57 L. T. Rep. 421; 12 P. Div. 21); *Crane* (*otherwise Cooper*) v. *Crane*, (1891) P. 369); and *Bartlett* (*falsely called Rice*) v. *Rice* (72 L. T. Rep. 122), and submitted that the petitioner was not a strong-minded girl, and had acted entirely under the orders of her mother and the respondent; that the petitioner never consented to the marriage; and that she was entitled to a decree.

Barnes, J.—This is a very remarkable case The petitioner seeks to obtain a declaration by the court that a ceremony of marriage, solemnised between the petitioner and respondent on the 5th June 1889, is a nullity, on the ground that she was not a consenting party to the marriage, and was induced to enter into it by pressure put upon her by her mother and the respondent, whose conduct, acting together, amounted to such

(*a*) Reported by H. Durley-Grazebrook, Esq., Barrister-at-Law

duress that she was not a free agent when she went through the ceremony of marriage. The case is very peculiar, but it is unnecessary that I should recapitulate the whole of the facts. Suffice it to say, that no word of marriage or suggestion of affection seems to have passed between the parties, and the petitioner's acquaintance with the respondent was only of very short duration prior to the alleged marriage, and, on that occasion, they only met at the church and parted after the ceremony. The petitioner was at that time about seventeen years of age—young and inexperienced—and, judging from her appearance and demeanour in the witness-box, I should say she is a person of nervous temperament, and one over whom a person of strong character would have a powerful and effective influence. A few days before this ceremony the respondent seems to have started with a brother of the petitioner for South Africa, but, owing to some failure in the arrangement the respondent returned shortly afterwards—a day or two before the marriage, and appears, on the 14th June 1889, to have applied for a marriage licence, in the affidavit for which he stated that the consent of Arthur William Clarke, the natural and lawful father of the said minor, had been obtained to the intended marriage. That name is wrong, and the father appears never to have heard of the matter at all. The petitioner stated before me that on the 5th June 1889 she was taken out by her mother for a drive, and that on approaching Kensington Church she was induced to go into the church, and the ceremony, which forms the subject of this suit, was gone through. The petitioner (without going through the whole of her evidence) states in regard to it that she thought she was being pressed to go through a form of betrothal with the respondent; that her inexperience was such that she knew nothing about the form of the marriage; and that, although she objected to the utmost of her power to go through even this ceremony, yet she was in such a state and so much under the influence of her mother, that she did as she was told, and that she did state, in the presence of the respondent, that she did not want to become betrothed to him as she did not know him sufficiently; and that he said to her, "Do as your mother tells you; it is all right;" and that, having been so pressed, she did in fact go through the ceremony, and apparently went through it without attracting the attention of those witnesses who have appeared before me. I have not seen the curate. I am told that he has no recollection of the matter. But the clerk and one of the witnesses, who seems to have been called in, in an informal way, from the neighbourhood, have been called, and have given evidence as to their recollection of the matter. After the ceremony, the young lady and her mother went home together. The petitioner was never seen by her husband from the time he left her at the church door, and she appears to have flung away the ring in the street. There the matter seems to have ended. No member of the family but the mother knew anything about it at the time, except that, at a later date in the year, the brother seems to have been told of the marriage by the respondent when they went to South Africa on board a vessel, which left London on the same day, the 5th June 1889. The brother seems to have been much offended on his sister's account, and to have quarrelled with him over the matter, and separated from the respondent on her account. Then he appears to have mentioned the affair to his mother on his return home, and was asked by her to keep it quiet from the father, and he never, in fact, mentioned it to the father until his attention was drawn to the matter by a letter received at the end of the year 1893, and he states that he is not prepared to say that he mentioned the subject to his sister. The petitioner says that she never heard any mention of it by him. Mr. Clarke, the father of the petitioner, has been called; he states that he never had the slightest idea that any marriage ceremony had been gone through by his daughter until on the 15th Nov. 1893, he received a letter from the respondent, and at once sent for his daughter, who had just then been married to a Mr. Ford. On her father communicating to her the statement he had just received, the petitioner seems to have given to her father, and to the solicitor who was shortly afterwards consulted, substantially the same account as she has given in court Having seen her in the witness-box, I am satisfied that she has given to me a *bonâ fide* account, so far as lies in her power, of all that took place. As I have already said, she was extremely youthful at the time of the alleged marriage—she was then only seventeen—and her case, shortly put by herself and through her counsel, is this: "I really gave no consent to a marriage to this gentleman: I thought I was going through a ceremony of betrothal." It is, of course, remarkable that a person of any education should think that this was so. But then we have to judge persons by their manner, and by the fact that they may be inexperienced in forms and ceremonies. The petitioner says that, so far as she did give way to any ceremony she did so under pressure put upon her by her mother, acting with the respondent, who was cognisant of the position and must have known that, as a fact, he had never made an offer of marriage to the petitioner; and, moreover, according to the evidence, had shown her no special attention, had not communicated with her on the subject of the marriage, and had, in fact, made an affidavit which was inaccurate, and had also, I think, given particulars for the register which are also inaccurate. Taking all the circumstances into consideration, the conclusion of fact to which I have come in this case is, that this young lady was not, in fact, a consenting party to this marriage; and, that, when going through the ceremony, she thought she was going through some form of betrothal, and not a ceremony of marriage; and, that, in doing what she did, she was quite under the duress of her mother and of the respondent, which prevented her acting as a free agent in the matter. On these grounds, there must be a decree *nisi* with costs against the respondent.

Solicitors for the petitioner, *Beyfus* and *Beyfus*.

House of Lords.

Thursday, Dec. 9, 1895.

(Before the Lord Chancellor (Halsbury), Lords Watson, Herschell, Macnaghten, Morris, Shand, and Davey.)

McCord v. Charles Cammell and Co. Limited. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Negligence—Evidence—Employers' Liability Act 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-sect.* 5—*Person having the charge or control of a locomotive engine or train upon a railway.*

An engine driver and fireman in the employment of the respondents brought a train of four waggons to be unloaded. The driver detached three of the waggons and left them standing on an incline while he took the fourth to be unloaded. The fireman scotched the wheels of the trucks so left on the incline, but did so insecurely, so that they ran down the incline and killed the husband of the appellant, who was also in the employment of the respondents.

Held (reversing the judgment of the court below), that there was evidence of negligence of a person who had "the charge or control of a locomotive engine or train," within sect. 1, *sub-sect.* 5, *of the Employers' Liability Act* 1880 (43 & 44 *Vict. c.* 42), *whether such control was in the driver and fireman jointly or of one or other of them separately.*

A "train" within the meaning of sect. 1, *sub-sect.* 5, *of the Employers' Liability Act* 1880 *includes anything in course of being drawn along a railway by a locomotive engine, and need not consist of more than one vehicle: (per Lord Halsbury, L.C.)*

The words of the sub-section, "a person who has the charge or control of any train," do not necessarily point to a person in charge of the whole train: (per Lord Watson.)

A person does not cease to be in charge of a train because some of the vehicles are uncoupled from the rest for the purpose of being dealt with separately in operations all directed to one end: (per Lords Herschell, Morris, Shand, and Davey.)

This was an appeal *in formâ pauperis* from a judgment of the Court of Appeal (Lord Esher, M.R. and Lopes, L.J., Rigby, L.J. dissenting) who had affirmed a judgment of the Divisional Court (Wills and Wright, JJ.) upholding a judgment of the County Court of Cumberland in favour of the defendants in an action in which the appellant sought to recover compensation for the loss of her husband, who was killed through the alleged negligence of the respondents' servants. The action was brought under the Employers' Liability Act 1880 by the widow of the deceased man. It appeared that the deceased was in the employment of the defendants, the present respondents, who were the owners of large steel works in Cumberland, through which ran certain railway lines belonging to them. The deceased man's duty was to uncouple the waggons used on the line. Upon the day in question an engine belonging to the defendants, driven by an engine driver and fireman, was engaged in drawing four waggons, and three of the waggons were left uncoupled on an incline on the line, the fireman having scotched the waggons with slag to prevent them from running down the incline. The engine then brought the other waggon under the shear legs to have it unloaded, when the slag under the wheel of the front waggon left on the line gave way and the waggons ran down the incline and struck the deceased man as he was uncoupling the waggon at the shears and killed him. The plaintiff alleged that the engine driver and fireman or one of them were "in charge or control of a train" within the meaning of sect. 1, sub-sect. 5, of the Employers' Liability Act 1880, and that they were guilty of negligence in not properly scotching the waggon, and that, therefore, the defendants were liable. There was evidence that the defendants had provided pieces of wood for scotching the waggons, and the plaintiff's case was that slag was liable to crumble and was not a proper thing to use for that purpose. At the trial the County Court judge held that there was no evidence to go to the jury that the engine driver or fireman was "in charge or control of a train," and nonsuited the plaintiff.

T. S. Little and *J. Lumb* appeared for the appellant.

Bigham, Q.C. and *Mattinson* for the respondents.

Little was not called upon to reply.

At the conclusion of the argument for the respondents their Lordships gave judgment as follows:—

The Lord Chancellor (Halsbury).—My Lords: I propose in the first instance to say what I infer from the evidence given in this case to be the state of the facts, in order that I may confine what I have to say to the state of the law as exhibited by the 5th sub-section of sect. 1 of the Employers' Liability Act 1880. Now, if I understand the facts correctly, they amount to this: that the engine driver and his fireman were bringing up to a particular point on these works a number of trucks loaded with slag—that the place at which the whole body of these trucks were stayed was a place which was immediately adjoining to, if not a part of, an incline of 1 in 66, a sufficient incline obviously from what afterwards took place to cause the trucks by the force of gravitation to run down unless they were properly arrested—that the persons engaged in the operation were Fletcher and his fireman, and that their duty, that is to say the thing they were engaged to do, was to bring the trucks, one by one, to the particular place where the deceased man was employed, and his duty was in his turn to uncouple the truck which was brought down alone from the engine in order that it should then be sent on its journey in some way that has not been explained, and perhaps is not very material—and then that the engine should go back again and fetch another truck, and that the operation should be repeated from time to time until the whole of the loaded trucks were disposed of, and the materials in those trucks tipped over into some place for the purpose of the works. That I understand to be the state of the facts. I think a confusion has arisen partly from the fact that the learned counsel for the plaintiff had, of course, to call witnesses as it is said from the hostile camp, and

(a) Reported by C. E. Malden, Esq., Barrister-at-Law.

to get as well as he could what was the course of business from the witnesses whom he so called—there has been a confusion, partly arising from the class of witnesses, and partly from the compendious character of the notes taken by the learned judge, between what I would call the ordinary and regular course of business and the facts which were put in proof on this particular occasion. As to the course of business, it appears to me that the evidence points to what I have described, and I infer from the evidence given that that was the course of business which all the parties to the transaction were familiar with, and were in course of performing on the occasion in question when this calamity occurred. I infer then that the engine driver was the person who—I will not use the phrase, was in charge of the train, because I should seem to be following the language of the Act of Parliament and to be assuming the proposition I am endeavouring to establish—but the engine driver was the person who must necessarily from his position give the momentum to the particular truck which he is taking down and by his removal of the particular truck he is taking down and leaving the other trucks there if they are upon the incline, which I assume them to be, would necessarily allow the other trucks to follow. It appears to me therefore that a necessary part of the operation with which the engine driver was dealing was to take care that when he was taking down the trucks one by one, the other three trucks, or, however, many there might be, should not follow in the same course. To do that it was necessary, by reason of the gradient upon which the trucks were placed, to arrest the progress of the others in such a way that they should not follow. It was not an unknown or extraordinary thing that such a transaction should take place, because both the witnesses who were called stated that such a thing had occurred within their knowledge, that is to say, that the other trucks had followed; and therefore everybody was alive to the fact that there must be some precautions taken against the recurrence of that accident. Now, what takes place is this. The engine driver, as I say, giving the momentum to his train by turning the proper machinery which puts the steam on and causes the driving wheel to operate, knows that he is doing that which will, unless the trucks he leaves behind are properly arrested, bring down the other trucks, because, though he may go on with the one truck, yet if the others are left on the incline the force of gravitation will bring down the rest. The inference I draw from these facts is that it was a common employment between the engine driver and the fireman, and that it is fallacious to take each part of the transaction by itself as if it was the only thing to be done—the engine driver and the fireman are both in charge of the engine and of the trucks. I will say a word or two in a moment as to whether the engine and the trucks together constitute "a train" or whether you can have a train of one truck and an engine—I do not think for the reason I am going to give, that it becomes very material. What follows is this, that it is part of the duty of those who are conducting that operation to prevent the following of the trucks which are intended to be left behind. It appears to me, therefore, that it was a joint control of both the engine driver and the fireman, which is pointed to by this evidence. The engine driver and the fireman are operating together for the common purpose not only of taking one truck down but keeping the others back. As to what was done then—I do not profess to give any opinion upon the subject whether what was done was rightly or wrongly done—but it is clear that there was evidence for the jury that what was done was negligently done, for this reason: There appear to be sprags of wood which are provided by the company for the purpose of this very thing. The men—probably because it gives them more trouble—I think there is some evidence by the statement of one of them that that was the reason, that is to say, that it gives them more trouble to disentangle the wood afterwards from the wheel—prefer using slag which is there ready to their hands. I do not say how a jury ought to find upon that question—it seems to me to be enough to say this, that if slag is used it ought to be used in such a way as to prevent that happening which happened here. If it was a crumbling material such as would not prevent that, the use of it in itself was negligence; or if it was put in such a way as would not prevent the truck going down, that is evidence that it was insufficiently done with that crumbling material. All that was for the jury; but a thing which it is certainly within the resources of science to prevent, viz., the coming down of this truck, was, by the act or the omission to act, of the fireman, allowed to occur. The point which appears to have been relied on in the argument of Mr. Bigham is this, that no one could say that the engine which drew the train was in the charge of the man who did the act from which the injury followed. I think there are two answers to that. The one that is most satisfactory to my mind is that the thing done is not one act but two acts, the disengaging the engine from the train by taking off the couplings, and combined with that the omission properly to secure the remaining part of the train. That seems to me to be a sufficient answer to the contention that the engine driver and the fireman were not in charge of it; but I should not hesitate to say that each of them in turn was in charge of the operation which involved the use of the locomotive engine. The Legislature for very obvious reasons, I suppose among others the extremely dangerous nature of the employment which involves the use of locomotive engines and trains, has provided in this 5th sub-section that if "personal injury is caused to a workman" by "the negligence of any person in the service of the employer who has the charge" of either a "locomotive" or a "train"—the words are in the disjunctive—the employer may be made liable. That which happened in this case I think may illustrate what the intention of the Legislature was. Here is a man engaged twenty or twenty-five yards off who by no possibility can protect himself, he is obliged to deal with these dangerous implements, locomotives, and he is absolutely dependent upon the carefulness of his fellow servants in the use of these dangerous implements on behalf of his employer. I cannot help thinking that the Legislature meant in a very wide way to protect workmen who are engaged in such dangerous employments, and they said, as an exception to the ordinary rule of law, that if the person in charge of a locomotive or of a train shall be guilty of negligence, then, quite apart from any question of superiority of employment,

and quite apart from the necessity of superintendence, the employer may be liable. It appears to me that this case illustrates very well what may be supposed to have been the intention of the Legislature. Now, one word upon what construction your Lordships ought to place upon the words "a train." I doubt very much whether the Legislature intended these words to be narrowed in the way which Mr. Bigham has contended for. I should think, speaking in a general way, that the Legislature meant that a locomotive engine by itself or anything that was drawn along a railway, or was in course of being drawn along a railway by that locomotive engine, should be included in "a train." I doubt very much whether it would depend upon the number of carriages or the number of vehicles going upon wheels which the locomotive was taking along the railway. I should think the Legislature intended a very wide scope to be given to the use of these words. Under these circumstances, I cannot help thinking that the Court of Appeal have entirely misunderstood the facts as they were presented. I do not believe there was the least ground for supposing that these operations were left open and unconnected with the employment of any particular person at the works. I have no doubt myself that in turn each of these persons did, and had charge of the particular acts which are in proof here—Jackson did it one day, Hopper did it another day, and another engine man I daresay did it another day; but as regards the particular transaction on the particular day it appears to me that the engine man and Hopper were the only two persons who had charge of the operation and in the course of the operation had charge of the train, and of the locomotive which did the mischief. Under these circumstances I confess I do not wish to go further into the evidence, because if this case is to be tried anew I do not wish to express any opinion as to what the true result of the evidence may be; but I cannot entertain any doubt that upon these two questions, both of negligence and of the persons being in charge of the train; there was ample evidence for the jury, to justify their being left to the jury; but inasmuch as the learned judge decided that there was no evidence of negligence and no case for the jury, by which I suppose he meant that there was no evidence of that particular responsibility which the Legislature contemplated in the 5th sub-section, he nonsuited the plaintiff. It appears to me that that cannot be right, and I move your Lordships that the judgment of the court below be reversed.

Lord Watson.—My Lords: I am of the same opinion. It appears to me that the disengaging the tail waggons from the engine and securing them in order that they might remain steady on the line was an act done in the conduct of the train with which that engine started. If that act was negligently done (and that is a matter for the jury to determine), then under the statute of 1880 the appellant is entitled to recover if the person guilty of the negligence had at the time "charge or control of the train." Now, the words "the person having charge or control of the train" do not, I think, necessarily point to a person who is in charge of the whole train. Different duties and different parts of the train may be assigned to different persons, and each of those persons is charged with the conduct of the train; and if he is negligent in his own department that would constitute "negligence," bringing the case within the terms of sect. 1, sub-sect. 5. I shall only say further in this case that, according to the view I take of the evidence, the appellant is entitled to go to the jury upon two alternatives, viz., either that Fletcher, the engine driver, or that Hopper, his fireman, was guilty of a negligent act. It is plain that Hopper was the person who insufficiently scotched the waggon which ran down the incline and killed the deceased; but it may be that, although he was the direct cause of the accident, the engine driver was also negligent in his duty if he was charged with that duty directly. And I think, if that view were taken, he knew quite well the kind of sprag that was being used and he had reason to know that, although for some purposes sufficient, the use of it was attended with danger. But on whichever of these alternatives negligence be found, whether it be fixed upon the engine driver or upon the fireman, I think it follows that such person is also fixed in the position of the "person having control of the train" in that department of its conduct. It has been suggested by one of the learned judges in the Court of Appeal that that duty having been committed to a great many persons, anyone of whom might have performed it, therefore the person actually performing it was not "in charge." To my mind all these considerations are very immaterial. I think the statute points directly to the person having the "charge or control of the train" as being that person who at the time when the negligent act is committed, has actually the charge of the train in any particular department of the work which is necessary for its proper conduct. Upon these grounds I think that this case must go down for a new trial.

Lord Herschell.—My Lords: I am of the same opinion. I see no reasons to differ from, but very strong reasons for agreeing in, the view taken by Rigby, L.J. in the court below. It appears to me that there was in this case evidence of negligence on the part of the driver of this train. He undoubtedly was in charge of the train at the outset, he was in charge of it when it stopped at the point where it did stop. I do not think he ceased to be in charge of it, because some of the carriages were uncoupled from one another, and from the engine, with a view to their being dealt with separately in operations all directed to one end, viz., to the discharging of the train of the contents with which he brought it filled. When he removed, or before he removed, the engine from the train, unless he wanted the rest of the train to follow, or was content that it should follow, it was absolutely essential that something should be done to detach that part of the train, and to make it stationary, while the rest of the train went on. That was a dealing with the train under his charge, and it seems to me that it was his duty to take care that all that was necessary for the operation with which he was concerned, viz., conveying these carriages severally and successively to the place where their contents were to be discharged was done. It was not necessarily his duty to do it himself. If that duty had been left to some other servant of the company, and if he had every reason to believe that the duty was being properly performed, then

it might be well that there could not be said to be negligence on his part, he would have discharged the obligation resting upon him by seeing that the work was being done by the person whose duty it was to do it in that sense. But in the present case there is evidence that he knew the method which was being employed to sprag the wheels was a method which on previous occasions had proved ineffectual—there was the evidence of witnesses who were called before the jury that the use of this slag at all was an improper method—that the proper method was to use wood. Under these circumstances it seems to me impossible, when once the conclusion is arrived at that he was in charge of the train, to say there was no evidence of negligence upon his part. But I desire to add that, if it could be established that, as soon as he had detached his engine and carriage and left it to Hopper or whoever it might be to scotch the carriages, his duty was at an end, so that the scotching was left entirely to them, and that he was justified in saying "I have left it with the proper person to scotch, and now I leave with my engine and carriage," I am by no means prepared to accede to the proposition that the person so left is not in charge or control of the train. What is the section meant to guard against? The danger to *employés* of a company from the moving of a train from place to place along the line—that is, the source of danger—the only way in which an accident can happen. Now, why has not the person upon whose act it depends whether a train moves or does not move, "control of the train?" It is the only sense in which anyone has "control" of a train, as it seems to me, within the meaning of the section, viz., that he can make it move or not move as he pleases. If, therefore, you can detach that operation so as to free the engine driver from all liability as soon as he has left the proper person to scotch, and let him go on, it seems to me, I confess, to follow that then the person so left to prevent that train from moving beyond the point at which it was intended to remain cannot be said to be otherwise than "in charge or control" of the train. It seems to me that the word "control" is perfectly appropriate to what he has to do in relation to it, viz., control its motion or prevent its moving. My Lords, for these reasons I think the judgment must be reversed, and that there must be a new trial.

Lord Macnaghten.—My Lords: I am of the same opinion.

Lord Morris.—My Lords: I am of opinion that Hopper cannot in any sense be held, in the operation in which he was engaged, and in which for argument's sake I assume he acted negligently, to have been either by himself or in conjunction with Fletcher "in charge or control of the train," I think that the case would be quite the same if it was Jackson who had scotched the waggons, and who for argument's sake I will assume had done it negligently, who was in charge of the train, a portion of which had preceded to be tilted and a portion of which was left behind temporarily, to be returned for, as each of the waggons which had gone on its journey was discharged. I come to the conclusion that within the meaning of sub-sect. 5 Fletcher was, and that he remained in charge of the entire train, split up as it was, until he had finally brought each waggon to its final destination. In this view there still remains the further question, was Fletcher, who I have come to the conclusion was in charge or control of the train, guilty of negligence, or rather was there evidence to go to a jury upon that question? I think it was not a case which should have been withdrawn from the jury, who were entitled, under the entire circumstances which have been already referred to, to consider whether he was reasonably justified in thinking that the part of the train he had left behind was safely secured. I therefore concur in the judgment which has been arrived at by your Lordships.

Lord Shand.—My Lords: I am clearly of opinion, with your Lordships, that the waggons in question, standing on the top of the incline, formed part of the train. They were undoubtedly part of a train which had been brought by the engine driver and the fireman to the spot at which one of the carriages was uncoupled, and I cannot think that in any sense they ceased to form part of the train, because there was a temporary movement of one carriage to one part with the prospect of the engine returning to take up one carriage after another. I am further of opinion, with your Lordships, that there was evidence of negligence to go to the jury. I concur very much in the view which has been expressed by some of my noble and learned friends, and was taken by Rigby, L.J. in the Court of Appeal, that there was certainly evidence to go to the jury of negligence on the part of the engine driver. He had the control of the train from the first. It humbly appears to me that he did not cease to have the control of that train as it went on and as it was being disintegrated by carriage after carriage being taken from it. But I concur further with those of your Lordships who think that if there was not charge or control of the train on the part of the engine driver, there certainly would be on the part of Hopper who was left with this carriage, with the duty which, if it was not the engine driver's duty, was his duty. I therefore concur in thinking that the case must go down for a new trial.

Lord Davey.—My Lords: I also agree in thinking that the engine driver, Fletcher, was "in charge of the train" and remained "in charge of the train," till the duties with which he was entrusted were fully completed; and it seems strange to me to say, when we find that the engine driver, who is in charge of the train, leaves three-fourths of the train in an exposed and dangerous position, and it turns out that insufficient precautions have been taken to secure the safety of that portion which was so left behind, that there is no evidence to go to the jury of negligence on the part of the "person in charge of the train." I also concur with those of your Lordships who think that, independently of the case with regard to Fletcher, there was sufficient evidence before the learned judge and jury to warrant the learned judge in holding that Hopper was in charge of that portion of the train which was on the incline, and that he performed the duty which was entrusted to him, and which he undertook, in a negligent manner.

Judgment appealed from reversed. Respondents to pay to the appellant the costs in the courts below, and the costs in this House.

Solicitors for the appellant, *Helder, Roberts, Son*, and *Walters*, for *E. Atter*, Whitehaven.
Solicitor for the respondents, *H. Nelson Paisley*, for *Paisley* and *Falcon*, Workington.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 25, 26, 28, *and Dec.* 17, 1895.
(Before Lord HERSCHELL, SMITH and RIGBY, L.JJ.)

MARA *v.* BROWNE. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Trustee—Breach of trust—Improper investment—Constructive trustee—Solicitor.

By a settlement made in 1875 *on the marriage of M. with H. R. certain securities were transferred to trustees upon trusts in favour of M. and H. R. and the children of the marriage.*

In 1883 *H. R. consulted H. B., a solicitor in partnership with A. B., as to the security of the trust funds then in the hands of W. and J., the original trustees. It was arranged that W. should retire, and that A. R. should be appointed in his place, and in Jan.* 1884 *a deed appointing A. R. a trustee in place of W. was executed by M. and H. R., but not by A. R. A few days after H. B. obtained an examination of the securities alleged by J. to represent the trust funds, and H. B. came to the conclusion that some of them were forgeries, but he induced J. to pay all the trust funds by instalments into an account in a bank in the names of J. and A. R.*

In 1884 *J. and A. R. drew various cheques on this joint account and handed them to H. B. for investment upon mortgages found by him at the instigation and with the approval of H. R., M., and A. R. These cheques were paid by H. B. into his own banking account, though there was a record of the transactions in the partnership books.*

In May 1884 *M. and H. R. appointed A. R. and M. R. trustees of the settlement in place of W. and J., the deed being executed by all the parties. In* 1885 *H. R. died, his widow M. and two children surviving him.*

This action was commenced on the 7th Nov. 1890 *by M., her two infant children, and A. R., and M. R., against H. B. and A. B., to make them liable as constructive trustees for losses which had resulted from the investments. The investments were not proper ones for trustees to make. The writ was issued more than six years after the date of the last mortgage complained of.*

Held, that from the date of the opening of the joint account in the names of J. and A. R. to the execution of the deed of May 1884, *J. and A. R. were trustees of the settlement.*

Held also, that H. B. in all that he did acted in the capacity of solicitor to the trustees; that under the circumstances he could not be made liable as a constructive trustee; and that it was too late to make him liable for his negligence (if any) as solicitor.

Held also, that it was not within the scope of the implied authority of a partner in a solicitor's business to constitute himself a constructive trustee so as to bind a partner and make him also liable as a constructive trustee although he was not aware of the dealings by which the constructive trust was established.

Held, therefore, that neither of the defendants was liable; and the action must be dismissed with costs.

Decision of North, J. (72 *L. T. Rep.* 765; (1895) 2 *Ch.* 69) *reversed.*

THIS was an appeal from a decision of North, J., reported 72 L. T. Rep. 765, holding that two solicitors were liable, as constructive trustees, to make good certain trust funds which had been lost in consequence of improper investments.

The facts, as stated by Smith, L.J. in his judgment, were as follows:—

By a marriage settlement, dated the 30th Aug. 1875, made in contemplation of the marriage of Mr. Harold Reeves with his future wife Mrs. Reeves (now the plaintiff, Mrs. Mara), present and after-acquired property which together has amounted to a little over 10,000*l.* was vested in two trustees (Mr. Walker and Mr. James) in trust (so far as material for this point) for the wife for life, with remainder to the issue of the marriage.

Power was given by the settlement to the trustees to invest the trust funds amongst other things in freehold, leasehold, and chattel real securities in England, Wales, and Ireland, and power was also given to Mr. and Mrs. Harold Reeves, or the survivor of them, to appoint new trustees.

There were two children of the marriage, the two infant plaintiffs.

In Dec. 1883 Mr. Harold Reeves and his wife became dissatisfied with the way the trust was being administered by Mr. James. Mr. Walker for some years had taken hardly any part in the management of the trust, having left that to Mr. James, who was a solicitor at Liverpool.

At this time (Dec. 1883) Mr. Harold Reeves consulted his brother, Mr. Arthur Reeves, who afterwards became trustee of the trust funds, and thereupon they communicated with the defendant, Mr. Hugh Browne, who was a solicitor at Nottingham in partnership with the other defendant, Mr. A. Browne, in order that he might look into the affairs of the trust, which he accordingly did.

Grave irregularities, to say the least, were then discovered by Mr. Hugh Browne upon Mr. James' part; portions of the trust property were not forthcoming; documents supposed to be spurious were produced by him; and it became evident that the great thing to be done was, if possible, to get the trust funds which were not then forthcoming replaced and made good by James.

Mr. Walker was desirous of being relieved of the trust, which, as before stated, he had left to the management of Mr. James, and upon the 7th or 8th Jan. 1884 (the deed is not dated) Mr. and Mrs. Harold Reeves, under the powers contained in their marriage settlement, by deed appointed Mr. Arthur Reeves (the brother of Mr. Harold Reeves) a trustee in the place of Mr. Walker, who took no further part in the management of the trust.

By this deed, which recited, as the fact was, that Walker was desirous of retiring from the

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

trust, and that Harold Reeves and Ellen his wife desired to appoint Arthur Reeves to be a trustee of the marriage settlement in the place of Walker, Arthur Reeves was appointed a trustee of the marriage settlement in the place of Walker.

This deed was duly executed by Harold Reeves and Ellen his wife. It was not signed by Mr. Walker nor by Mr. Arthur Reeves, but the latter at once entered upon the management of the trust and took an active part therein.

Mr. Hugh Browne, at the instance of Mr. and Mrs. Harold Reeves, thereupon set to work to press Mr. James to make good the deficiencies in the trust funds, and North, J. said that in this matter it was doubtful whether anyone could have been found who would have shown so much tact, and have managed the matter with so much success as Mr. Hugh Browne did.

Mr. James was induced by Mr. Hugh Browne to make good the deficiencies, and between Jan. 1884 and the 9th May 1884 Mr. James with this object made payments into an account opened at the bank of Messrs. Yates and Co. in the joint names of himself (James) and Mr. Arthur Reeves.

Mr. James agreed that he should retire from the trust when he had fully recouped the trust fund, and all deficiencies were made good by him by the 9th May 1884.

It was also arranged that Miss Marian Reeves, sister to Mr. Arthur Reeves, should become trustee in the place of James when he retired, and on the 9th May 1884 a deed appointing Miss Marian Reeves trustee of the trust funds in conjunction with her brother Arthur was executed.

Between Jan. 1884 and the 9th May 1884 the moneys paid by James into the joint account at Yates' bank became available for the trust, they having been paid into the joint account by James for that purpose.

It appears that Mr. Harold Reeves and his wife were anxious that this money should be invested and not lie idle, and that, if possible, 5 per cent. interest should be obtained for it, and they and Mr. Arthur Reeves agreed that Mr. Hugh Browne should look out for investments upon mortgage for these moneys, as they were paid by James into the joint account at Messrs. Yates' bank.

Mr. James was well aware that these moneys were being invested by Mr. Hugh Browne on behalf of the trusts, and, in order that this might be done, he in conjunction with Mr. Arthur Reeves from time to time drew cheques upon the accounts at Yates' bank in favour of Mr. Hugh Browne, who passed the money so received into his private banking account, and thereout advanced it to the different mortgagors as their buildings progressed.

It appeared from the correspondence put in that all that was done by Mr. Hugh Browne in these matters had the sanction and approval of Mr. and Mrs. Harold Reeves and of Mr. Arthur Reeves, who were kept fully informed of what was going on, and the investments that were being made. Mr. James knew that investments were being made for the trust by Mr. Hugh Browne out of the moneys he had paid into the joint account, and he was content that this should be done, though it would seem that as regards the actual investments he was willing to leave this, and did leave this, to Mr. Arthur Reeves and Mr. and Mrs. Harold Reeves, and did not care to inquire thereto.

The greater part of the trust funds having been lost in consequence of the mortgages proving an insufficient security, this action was commenced on the 7th Nov. 1890 by Mrs. Mara, her two infant children, A. R. Reeves, and Marian Reeves against Hugh and A. Browne, claiming a declaration that they were jointly and severally liable to make good the losses, and North, J. held they were liable.

Swinfen Eady, Q.C. and *Boome* for A. Browne.—The only possible claim which the trustees could have against the defendants is for negligence as solicitors for not advising them that the investments were improper; but that claim is barred by the Statute of Limitations. The infant plaintiffs could not maintain an action for negligence against the defendants:

Rae v. *Meek*, 14 App. Cas. 558.

North, J. has held that they are liable to the beneficiaries as constructive trustees. But Hugh Browne always acted only as solicitor to the trustees. The money merely passed through his hands for a particular purpose in each case. The investments in every case were made in the names of the present trustees, and are within the investment clause in the settlement. The adult plaintiffs were all aware of what was being done, and the investments were made at their request and with their approval. They are all recited in the deed of the 9th May 1884, appointing A. R. Reeves and Marian Reeves trustees in the place of James and Walker. At the time the investments were made there were existing trustees, viz., James and A. R. Reeves. Although the deed of the 7th or 8th Jan. 1884, appointing A. R. Reeves a trustee in place of Walker was only executed by Mr. and Mrs. Reeves, yet the trust money was paid into the joint account of James and A. R. Reeves, and A. R. Reeves dealt with that money and was a trustee. At any rate he was a designated trustee. The fact that H. Browne kept some of the money in his possession for a time, and only paid it to the mortgagors as the buildings were finished, does not make him a constructive trustee. The money was paid to Browne by James and A. R. Reeves out of their joint account. Hugh Browne acted as the agent merely of the trustees, and is not a constructive trustee:

Barnes v. *Addy*, 30 L. T. Rep. 4; L. Rep. 9 Ch. App. 244;
Robertson v. *Armstrong*, 28 Beav. 123;
Re Spencer; *Spencer* v. *Hart*, 45 L. T. Rep. 645;
Soar v. *Ashwell*, 69 L. T. Rep. 585; (1893) 2 Q. B. 390;
Life Association of Scotland v. *Siddal*, 4 L. T. Rep. 311; 3 De G. F. & J. 58.

North, J. relied on *Blyth* v. *Fladgate* (63 L. T. Rep. 546; (1891) 1 Ch. 337). Here there were existing trustees at the time of the investments, and other persons were ready to come on as trustees. There the solicitors obtained the money as agents of the old trustees, and after the death of the old trustees, and before the appointment of the new trustees they invested it on an insufficient security, and were therefore held liable for the loss. But, if Hugh Browne is liable as a constructive trustee, his partner A. Browne is not. The money received by H. Browne

was not paid in to the firm's account. The cheques were payable to the order of H. Browne, and he paid them into his own account. The money was never in H. Browne's possession as a member of the firm. It is essential to the character of a trustee that the trust money shall be under his control:

Re Barney; Barney v. *Barney*, 67 L. T. Rep. 23; (1892) 2 Ch. 265.

Besides, it is not within the scope of a solicitor's business to become a constructive trustee. Everything was done with Mrs. Mara's knowledge and at her instigation, and if the defendants are liable as trustees they have a right to impound her interest in the trust funds under sect. 45 of the Trustee Act 1893. If the decision of North, J. that Mrs. Mara's present interest in the trust funds was a new one which arose on the death of her husband in 1885, and was a resulting trust in consequence of her life interest after the death of her husband not being comprised in the settlement, then the trustees of the settlement were not trustees of it, it is a part of her interest not settled, and no constructive trust of it can arise.

Cozens-Hardy, Q.C. and *C. E. E. Jenkins* for the plaintiffs.—Assuming Hugh Browne to be the sole defendant, he has so conducted himself that he is responsible for the breach of trust which has taken place. These investments were recommended by him, and were all breaches of trust, not only because they were insufficient securities, but because they were of such a nature that they were improper investments for any trust money. The houses were not only unlet, but were unfinished:

Learoyd v. *Whiteley*, 58 L. T. Rep. 93; 12 App. Cas. 727.

When the cheques were paid to him he paid them into his own account, knowing that the money was trust money and the terms of the trust. He repaid himself certain money which he had advanced on these securities, and doled out the money by instalments to the mortgagors at various times. Neither James nor Walker was consulted as to the investments. H. Browne has never purported to act for James, and therefore he can only have acted for A. R. Reeves, who was merely designated as a trustee, and until the execution of the deed of May 1894 A. R. Reeves was merely a trustee *de son tort*. A trustee *de son tort* cannot employ an agent, and anyone employed by him as an agent into whose hands trust money comes is a constructive trustee:

The Attorney-General v. *The Corporation of Leicester*, 7 Beav. 176.

[Lord HERSCHELL referred to *Fyler* v. *Fyler* (3 Beav. 550).] A solicitor can be a constructive trustee as to the beneficiaries, though he is solicitor to the trustees. If an agent gets possession of trust funds and misapplies them, or assists in misapplying them, he becomes a principal and liable as such:

Morgan v. *Stephens*, 4 L. T. Rep. 614; 3 Giff. 226;
Lee v. *Sankey*, 27 L. T. Rep. 809; L. Rep. 15 Eq. 204.

[RIGBY, L.J. referred to *Wilson* v. *Moore* (3 M. & K. 337).] The difference between an ordinary case and the present is laid down in *Brinsden* v. *Williams* (71 L. T. Rep. 177; (1894) 3 Ch. 185). Hugh Browne is therefore liable as a constructive trustee. A. Browne is also liable. It is within the scope of the business of the firm to invest clients' money. Money for investment was placed in the hands of one member of the firm, and the partnership books contain entries of these transactions. The firm is therefore liable:

Blyth v. *Fladgate* (*ubi sup.*);
Rhodes v. *Moules*, 71 L. T. Rep. 599; (1895) 1 Ch. 236;
Moore v. *Knight*, 63 L. T. Rep. 831; (1891) 1 Ch. 547.

The construction put on the settlement by North, J. is correct. Mrs. Mara's life interest is settled only during the joint lives of her husband and herself, and on her husband's death in 1885 a fresh interest became hers. The Statute of Limitations is therefore not a bar to her claim. [SMITH, L.J. referred to *Re Akeroyd's Settlement* (69 L. T. Rep. 474; (1893) 3 Ch. 363).]

Swinfen Eady in reply.

Cur. adv. vult.

Dec. 17.—Lord HERSCHELL.—On the 30th Aug. 1875 a settlement was executed on the marriage of Mrs. Mara, one of the plaintiffs in this action, with her first husband, Mr. Harold Reeves. The trustees of this settlement were Mr. James Walker and Mr. Bernard James. The latter was a solicitor, and his co-trustee left the management of the trust property almost entirely to him. Towards the end of the year 1883 Harold Reeves consulted the defendant Hugh Browne as to the course that should be taken, as Mr. and Mrs. Reeves entertained grave doubts as to the safety of the trust investments. The amount invested on these securities exceeded 10,000*l.* The defendant Hugh Browne was a friend of Harold Reeves, and was in practice as a solicitor in Nottingham in partnership with his brother Arthur Browne, the other defendant. It was in consequence arranged that Walker should retire from the trust, and that the plaintiff Arthur Reeves should become a trustee in his stead. To this all parties, Mr. and Mrs. Harold Reeves, Walker, and Arthur Reeves, assented. Accordingly a deed was prepared, by which Mr. and Mrs. Reeves, in whom the power of appointment was vested, appointed Arthur Reeves as trustee in the place of Walker. This deed was executed by Mr. and Mrs. Reeves about the 7th or 8th Jan. 1884. It was not executed by Arthur Reeves. On the 11th Jan. a meeting took place between Hugh Browne and James, which left upon the mind of Hugh Browne the impression that the securities were not in order, and, indeed, that some of them were forgeries. James, however, expressed his willingness to take over the securities himself and to pay the amount of the trust funds in cash, expressing himself willing to retire from the trust. A sum of 1403*l.* 15*s.* was at once forthcoming from James, and this was placed in the bank of Yates and Co. at Liverpool, to the credit of an account opened in the joint names of James and Arthur Reeves. I may state at once that various moneys were from time to time paid by James to the credit of this account until the whole of the trust funds for which he was responsible were accounted for. Sometime in Jan. 1884, apparently soon after James had expressed his willingness to retire from the trust, it was arranged that Marian Reeves should become trustee in his place. On the 9th May 1884 a deed was duly executed by

Mr. and Mrs. Reeves, as well by the retiring and new trustees, by which Arthur Reeves and Marian Reeves were appointed trustees in the place of Walker and James. The transactions for which it is sought to make the defendants responsible in the present action all took place between the previous month of January and the date of that deed. The defendant Hugh Browne was undoubtedly asked by Harold Reeves, with the full knowledge of Arthur Reeves, to look out for investments by way of mortgage, to which the moneys paid in by James to the bank in Liverpool could be applied. Mr. and Mrs. Reeves were naturally anxious that the money should begin bearing interest as soon as possible. Hugh Browne accordingly suggested a series of investments. I do not differ from the learned judge who tried the case in the conclusion that the investments were not proper ones for trustees to make. The money was to be lent upon building property of a speculative character, and the margin was not satisfactory. If the action had been one charging the defendants with negligence as solicitors, with a view to make them responsible for such loss as the trust estate had sustained owing to the investments made, it may well be that there would have been no answer to the action had it been brought in due time; but any such claim is now barred by the Statute of Limitations. The case sought to be made against the defendants is, that their liability is the same as if they had been the appointed trustees of these trust funds, and bound as such to see, not only that the investments were within the terms of the investment clause, but that they were of a proper nature. The learned judge in the court below held that the plaintiffs had established their case. "The moneys," he said, "laid out by him while there were no trustees were advanced upon his own responsibility, he being a principal in the matter, and not a mere agent for persons under whose lawful directions he was acting." I find myself quite unable to take this view of the facts. It becomes necessary now to advert more particularly to the manner in which the trust funds came into the hands of Hugh Browne. In each specific case the particulars of the investment which Hugh Browne had to propose were communicated to Arthur Reeves, and a cheque was drawn for the purpose of being applied to that particular investment, the cheque being signed by both Arthur Reeves and James, in whose names the banking account stood, and the money, when so received by Hugh Browne, was paid over to the intended mortgagors. It is true that in two instances Hugh Browne had himself advanced a portion of the sum which the mortgagor required, and of course paid over to the intending mortgagor the balance only, and that he sometimes delayed paying a portion of the sum agreed to be advanced until the mortgagor had proceeded further with the buildings he was erecting, but I do not think these circumstances make any difference. The moneys sent by Arthur Reeves and James were in every case applied to obtaining the investments for the purpose for which they were sent. James, indeed, probably was not made aware, as Arthur Reeves was, of the particulars of the proposed investments, and perhaps did not trouble himself about them, but he undoubtedly knew that the money was being lent for investment on mortgage securities which had been offered, since that very circumstance was employed as a means of putting pressure upon him to complete as speedily as possible payment into the bank of the full value of the trust estate. It was conceded by Mr. Cozens-Hardy, in his argument for the respondents, that, if the transactions now impeached had taken place after the date of the deed of appointment of May 1884, he could not have maintained that the defendant Hugh Browne was to be regarded as a constructive trustee. North, J. appears to have taken the same view, for he refused relief in respect of advances made when the trusteeship was, as he said, full. In my opinion the distinction made is not a sound one. I do not think that it is correct to say that prior to that date there were no trustees. It appears to me that from the date, at all events, when the account was opened in the names of Arthur Reeves and James, down to the appointment by deed in the May following, those two gentlemen were the trustees of the settlement. It may be quite true that, when the circumstances of suspicion in relation to James's conduct became known to Arthur Reeves after the 11th Jan., he was unwilling to be joined with James as trustee, and that, if he had not intermeddled with the trust in any way, the deed of appointment executed by Mr. and Mrs. Reeves would have been ineffectual. But, in the circumstances which actually occurred, I cannot treat that instrument as a mere nullity. Arthur Reeves actually became a joint recipient with James of the whole of the trust funds, and jointly with him disposed of them at a time when James, though he had expressed his willingness to retire, was still a trustee. It is admitted that Reeves by so doing subjected himself to the responsibilities of a trustee in respect of that trust fund. He became, it is said, a trustee *de son tort*. But does it not seem strange thus to designate him when he had, immediately before this, been appointed a trustee with his assent by those who were competent to make the appointment? It is surely more reasonable to refer his acts as trustee to this appointment than to treat them as tortious. In my opinion, therefore, the trusteeship was full during the period covered by the transaction in question as truly as it was after the subsequent month of May, and the learned counsel for the respondents made, in my opinion, no greater concession than he was compelled to make when he conceded that, if the money had come into Hugh Browne's hands from duly appointed trustees for application upon specific investments, his responsibility would have been that of a solicitor, and not of a trustee. I think it right, however, to say that I am not satisfied that, even if Arthur Reeves is to be regarded as not having been duly appointed, the result would have been different. Hugh Browne was certainly not purporting or intending to act as trustee, nor was he supposed by anyone to be so acting. He purported to act throughout as solicitor, and was understood by all parties to be so acting. Even conceding that he might in some circumstances, notwithstanding this, be held liable as a trustee, what are the circumstances here? James was undoubtedly a trustee, and Arthur Reeves, with the assent of Walker, the other trustee, and of those who had the power of appointing a new trustee, acted as such. Although James may not have troubled himself about the

investments, I can entertain no doubt that both he and Arthur Reeves regarded and dealt with Hugh Browne as solicitor to the trust, and as such handed to him the trust funds to be applied to specific investments. Under circumstances such as these I am not, as at present advised, prepared to hold that Hugh Browne would be liable as a constructive trustee. What I have already said is sufficient to dispose of the action. But I desire to add that, even if in the circumstances of this case Hugh Browne had been held liable as a trustee, I should still have come to the conclusion that the defendant Arthur Browne was not so liable. The only case against him is that, during the period covered by these transactions, he was in partnership as a solicitor with the other defendant. He took no part in them and was ignorant of their nature. In my opinion, it is not within the scope of the implied authority of a partner in such a business that he should so act as to make himself a constructive trustee, and thereby subject his partner to the same liability. I think the appeal must be allowed, and the action dismissed with costs.

Smith, L.J.—In this case North, J. has held two solicitors, Mr. Hugh and Mr. Arthur Browne, liable as constructive trustees to make good a loss which has accrued to a trust fund by reason of its having been invested in improper securities, and the question is, whether either or both of these gentlemen are so liable. The plaintiffs are Mrs. Mara, who has a life interest in the trust funds, her two infant children, and the present trustees of the fund. No case is made against the defendants that they were liable to make good the loss by reason of negligence whilst acting as solicitors, and, had it been, the defendants would have had a good answer to such a claim by either Mrs. Mara or the trustees under the Statute of Limitations, for the investment of the trust funds, which is the subject-matter of complaint, took place as long ago as the months of February and March 1884, and the writ in the action was not issued till the 7th Nov. 1890, and, as regards the infant plaintiffs, the case in the House of Lords of *Rae* v. *Meek* (*ubi sup.*) shows that they could not maintain an action for negligence against the defendants, for the breach of duty, if it existed, was to the trustees and not the beneficiaries. The facts are these: [His Lordship then stated the facts set out above and continued:] North, J. found, and I agree with him, that eight of the mortgages taken for the trust funds were speculative and risky, and not such as could be justified by a trustee; in fact, these investments constituted breaches of trust. Although this might well render the trustees liable for a breach of trust, it certainly *per se* does not render their solicitors so liable. But it is said that the facts show that there should be imputed to Mr. H. Browne the character of a trustee, or, in other words, that he was a trustee *de son tort*, and upon this ground the learned judge has held him liable. It is not contended on behalf of the plaintiffs that Mr. Hugh Browne has been guilty of any fraudulent or dishonest conduct to the injury of the *cestui que trust*; nor, to use Lord Langdale's words in *Fyler* v. *Fyler* (3 Beav. 560), did he, being a solicitor, take advantage of his position to acquire a benefit for himself at the hazard, if not to the prejudice, of the trust. But it was said that he had made himself a constructive trustee, which, as far as I know, is the same thing as a trustee *de son tort*. Now, what constitutes a trustee *de son tort*? It appears to me if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong—*i.e.*, a trustee *de son tort*, or, as it is also termed, a constructive trustee. Lord Selborne, when Lord Chancellor, dealt with this question in *Barnes* v. *Addy*. He said (30 L. T. Rep. 5; L. Rep. 9 Ch. App. 251): "That responsibility" (*i.e.*, of a trustee) "may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort* or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of trustees." James, L.J. added (30 L. T. Rep. 7; L. Rep. 9 Ch. App. 255): "I most cordially concur in the general principle with which the Lord Chancellor began his judgment. I have long thought, and more than once expressed my opinion from this seat, that this court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, to some more or less degree, injudicious. I do not think it is for the good of the *cestuis que trust*, or the good of the world, that those cases should be extended." In this, if I may say so, I entirely agree. In the present case Mr. Hugh Browne never became possessed of the trust funds excepting for the purpose of transferring them from the joint account at Messrs. Yates to the mortgagors, which he faithfully carried out, and which he did with the sanction of Mr. James and of Mr. Arthur Reeves, who had been appointed trustee under the circumstances above mentioned, and no one can suggest any knowledge in Mr. Hugh Browne of a fraudulent design on the part of the trustees, for the simple reason that no such design in fact existed. In my judgment, the true inference to be drawn from the facts of this case is, that Mr. Hugh Browne between Jan. 1884 and the 9th May 1884 acted as solicitor for Mr. James and Mr. Arthur Reeves, and that he never assumed to act otherwise, that he never intended to act otherwise, and that, in truth, he never did act otherwise. Mr. Cozens-Hardy, on behalf of the plaintiffs, admitted—and I think that his admission was well founded—that, if the deed of the 9th May 1884, appointing Mr. Arthur Reeves and his sister Marian trustees had been executed in Jan. 1884, he could not have contended that Mr. Hugh Browne was acting otherwise than as solicitor to the trustees in what he did between January and the 9th May 1884, for he would then have been acting for principals—*i.e.*, for trustees in transactions within their legal power—but he contended that, as the deed was not executed until the 9th May 1884, Mr. Arthur Reeves up till then

was at the most a mere trustee *de son tort*, and that Mr. James, although an undoubted trustee, was not permitting Mr. Hugh Browne to act for him, and consequently Mr. Hugh Browne having no principals, he must be held to have been a principal himself, and therefore a trustee *de son tort*. But why is it to be said that Mr. Arthur Reeves between January and the 9th May 1884 was merely a trustee *de son tort*? He had been appointed trustee by deed under seal in Jan. 1884, and he at once undertook the burden of the trust, and the impeached investments did not take place until afterwards—viz., between the 20th Feb. 1884 and the 14th March 1884. In my judgment it is incorrect to hold that he was acting as trustee *de son tort*. Why is this to be assumed? The learned judge came to the conclusion that Mr. Arthur Reeves never acted under the deed of Jan. 1884, and he holds that it was abandoned; but why is this to be so held? We find Mr. Arthur Reeves after its execution at once entering upon the business of the trust; and why is it to be assumed and held that he then acted as a trustee in his own wrong rather than as a properly appointed trustee? I can draw no such inference. It is true that in 1890 Mr. Hugh Browne ran his pen through the signatures of Mr. and Mrs. Harold Reeves, lest, as he said, any person should mistake the deed for a living one; but this was many years after it was executed and at a time when it was no longer needed, for the deed of the 9th May was all that was then required. The learned judge also held that Mr. Hugh Browne could not say that he was acting as solicitor for James, for he had treated him as a hostile party. But, with submission, although this was so at one time, the learned judge appears to me to have omitted to notice the part taken by James, as he made good the trust fund, in drawing the cheques in conjunction with Arthur Reeves upon their joint account at Messrs. Yates' Bank with the express object that the moneys so obtained should be invested by Hugh Browne for the trust. Upon these questions of fact I find myself differing with the learned judge. In my opinion, between Jan. 1884 and the 9th May 1884 it has been proved that Mr. Hugh Browne was acting for Mr. James and Mr. Arthur Reeves in making the investments, that they were the *de facto* trustees, and that he had them as principals, and that in what he did he was not, therefore, a trustee *de son tort*. This suffices to determine this case; but, had Mr. Hugh Browne been acting as a trustee *de son tort*, I do not see how that circumstance renders Mr. Arthur Browne, his partner, liable for the consequences attaching to such a position. It is not, however, necessary to discuss this nor the point, so much debated at the bar, as to what would have been Mr. Hugh Browne's position if he acted for Mr. James, who was an actual trustee, and Mr. Arthur Reeves, if he had been merely a trustee designated and not actually appointed. For these reasons I think that this appeal should be allowed with costs, and that the action must be dismissed with costs.

RIGBY, L.J.—By a settlement dated the 30th Aug. 1876, made in contemplation of the marriage afterwards solemnised between Harold Reeves and Ellen Jane Walker, certain property of Miss Walker, of the value of about 5000*l.*, was vested in James Walker (a brother of the lady) and Bernard Edwin James as trustees, upon trust, after the solemnisation of the marriage, to permit the existing investments to remain unaltered, or with the consent in writing of the lady during her life to convert and invest the proceeds in their names upon (amongst other securities) leasehold securities in England. The deed also provided for bringing into settlement property to which the lady might become entitled during the intended coverture, and under this covenant large sums were received by the trustees, so that at the time of the investments complained of in this action the trust funds exceeded 10,000*l.* in value. From the time of the marriage James Walker did not take any active part as trustee. The management of the trust funds was left entirely to the other trustee, Bernard Edwin James, a solicitor in Liverpool, who also acted as solicitor for James Walker in matters relating to the trust. In the month of Dec. 1883 some uneasiness having been felt as to the position of the trust funds, James Walker became desirous of being, or at least willing to be, discharged from the trusts of the settlement, and the plaintiff Arthur Reeves, brother of Harold Reeves, was requested to become a trustee in his place jointly with Bernard Edwin James. He agreed to do so, and requested the defendant Hugh Browne, a member of a firm of solicitors at Nottingham, practising under the style of Browne and Sons, to act for him in the matter. The defendant Arthur Browne was the only partner of the defendant Hugh Browne at the time, but personally he appears to have taken no part in the business of the trust. On the 19th Dec. 1883 the defendant Hugh Browne informed the plaintiff Arthur Reeves by letter that he was sending off the draft appointment of himself (Arthur Reeves) for Mr. James to peruse. Whether the draft was so sent at the time does not appear from the correspondence; but on the 3rd Jan. 1884 Mr. James and the defendant Hugh Browne had an interview in the house of the latter at Nottingham, and there settled the draft of a deed providing for the appointment of the plaintiff Arthur Reeves to act as trustee in the place of Mr. Walker jointly with Mr. James. At this interview it would seem that Mr. James gave assurances to the defendant Hugh Browne which for the time led the latter to believe that any suspicions which had been entertained as to the safety of the trust funds were without foundation. Accordingly he had the draft appointment engrossed, and shortly afterwards sent it to Mr. and Mrs. Reeves for execution by them, and they executed it on or about the 8th Jan. 1894. The defendant Hugh Browne pressed for an interview with Mr. James to examine the securities alleged to have been taken in the joint names of the trustees, and he and Mr. Harold Reeves, for whom, as well as for Mrs. Reeves and the plaintiff Arthur Reeves, he was acting, had an interview at Liverpool with Mr. James on the 11th Jan. 1884. The plaintiff Arthur Reeves had himself seen Mr. James with reference to the trust, but was not present at the interview, though he knew that it was to take place. At the interview the defendant Hugh Browne learnt enough to satisfy him that there were strong reasons for suspecting Mr. James of having dealt improperly with the greater part of the trust funds (then amounting to upwards of 10,000*l.*), and he did what appeared to be the best thing possible at the time by procuring an immediate transfer of 1403*l.* 15*s.* into

the joint names of the plaintiff Arthur Reeves and Mr. James at Yates' Bank at Liverpool. A further sum of 2000*l.* was paid to the same account on the 23rd Jan. 1894, and subsequently the sums paid to the same joint account exceeded altogether 10,000*l.*, and represented the great bulk of the settlement funds. At what time the plaintiff Arthur Reeves first became aware of these payments does not precisely appear, but he was sufficiently informed of them by a letter of the 29th Jan. A letter of his dated the 5th Feb. 1884 shows that he had himself obtained a copy of the bank account showing what payments had been made down to that time, and was acquiescing in further payments being made to the same accounts. Further, he operated upon the account by joining Mr. James in drawing cheques in favour of the defendant Hugh Browne, for the express purpose of enabling the latter to invest the sums for which cheques were drawn upon the leasehold securities complained of in the action. In these and other matters he acted as trustee of the settlement, and he was so treated by Mr. James, the other trustee. It is true that, after the interview of the 11th Jan. 1884, it became at once apparent that Mr. James could not remain a trustee, and the plaintiff Arthur Reeves objected very naturally to have him as co-trustee; but before the middle of January it was arranged that he should retire, and that the plaintiff Marian Reeves, a sister of Mr. Reeves, should be appointed in his place to act jointly with her brother Arthur Reeves. This does not show that the plaintiff Arthur Reeves was not acting as trustee along with James, at any rate from the 5th Feb., and if he was properly appointed he could not after that date disclaim, even though his consent to act might in the first instance have been conditional only. By the Conveyancing Act of 1881, sect. 31, sub-sect. 1, Mr. and Mrs. Reeves had power to appoint him by writing, and their execution of the deed of appointment on the 7th or 8th Jan. 1884, followed by his acceptance, operated as a valid appointment. By sub-sect. 5 of the same section, "every new trustee so appointed, as well before as after all the trust property becomes by law or by assurance, or otherwise, vested in him," is to have the same powers, authorities, and discretion, and may act in all respects as if he had been originally appointed a trustee by the instrument creating the trust. Whatever was at the time or afterwards thought by the parties, Arthur Reeves and James were trustees in the interval between the acceptance of the trusts by Arthur Reeves and the retirement of James, which followed on the 9th May 1884. It was during that interval that all the investments in respect of which relief has been granted were made, and the investments themselves, however improvident they may have been, were within the legal powers of the trustees. The defendant Hugh Browne, in all that he did during the interval, acted in the capacity of solicitor for one of the two trustees whose directions as to investments were accepted and acted upon by the other. The deed executed by Mr. and Mrs. Reeves on the 7th or 8th Jan. was naturally left incomplete in order that a deed suitable to the new state of things might be substituted for it, but its effect as an appointment in writing was not in the least altered. Under these circumstances it seems to me that H. Browne cannot be made liable as a constructive trustee, and it is too late to make him liable as solicitor. I do not think that the circumstances of the appointment of Arthur Reeves and the effect of the deed executed by Mr. and Mrs. Reeves as an appointment under the Conveyancing Act 1881 were so clearly called to the attention of North, J. as they were to the attention of this court; if they had been, I do not think that he would have arrived at a different conclusion from that above stated. I gather from his judgment that he would, if satisfied of the facts, have dealt with the questions of law as the court is now doing. The conclusion to which we have arrived renders it unnecessary to consider in detail the questions of law which might have arisen if Arthur Reeves had only been what was called in argument trustee designate. I wish, however, to reserve for further consideration, whenever the case may arise, how far a solicitor acting as solicitor for a *de facto* trustee, can be made liable as a constructive trustee merely by reason of a defect in title of his principal. I think also with Lord Herschell that it is not within the scope of a solicitor's business for a partner to constitute himself a constructive trustee so as to bind another partner, and make him also liable as constructive trustee, although he is not aware of the dealings from which the constructive trust is established.

Solicitors for the plaintiffs, *Stedman, Van Praagh, Sims,* and *Co.*

Solicitors for the defendants, *Swann* and *Co.*

Friday, Dec. 6, 1895.

(Before LINDLEY, SMITH, and RIGBY, L.JJ.)

DUNHILL *v.* NORTH-EASTERN RAILWAY COMPANY. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Railway company—Superfluous lands—Right of pre-emption—Compulsory sale to another company—Lands Clauses Act 1845 (8 *Vict. c.* 18), *s.* 128.

Under the powers conferred by a special Act a railway company acquired certain land for the purposes of their undertaking. Under the powers of a special Act passed some years after another railway company took compulsorily a part of this land which had not then been used for those purposes, but it would have been so used if it had not been acquired by the second company. The time allowed to the first company for the sale of its superfluous land had not expired.

Held, that the fact that power was given to the second company by their special Act to acquire the land did not show that it was not required by the first company for the purposes of their undertaking; and therefore the original owner had no right of pre-emption under sect. 128 *of the Lands Clauses Act* 1845.

Decision of Kekewich, J. reversed.

Carington *v.* Wycombe Railway Company (18 *L. T. Rep.* 96; *L. Rep.* 3 *Ch. App.* 377) *and* Hobbs *v.* Midland Railway Company (46 *L. T. Rep.* 270; 20 *Ch. Div.* 418) *distinguished.*

UNDER the powers of the North-Eastern Railway Company's (Hull and Doncaster Branch) Act 1863 the company purshased from the plain-

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

tiff's predecessors in title a little more than fifty-seven acres of land near Goole, in Yorkshire, for the purposes of their undertaking.

By the Lancashire and Yorkshire Railway Act 1883, s. 40, the company were authorised, for the purposes of their undertaking, to purchase or take by compulsion or agreement (in addition to certain other property) certain land therein described, which was a part of the land near Goole, purchased by the North-Eastern Railway Company above-mentioned, and which was still in the company's possession.

The section contained a proviso in the following terms:

Provided always, that nothing in this section contained shall alter, vary, abate, lessen, abridge, or in any manner affect or prejudice any estate, right, title, interest, or advantage of William Henry Carter Dunhill, his heirs or assigns.

Under the powers of this Act the Lancashire and Yorkshire Railway Company shortly afterwards purchased from the North-Eastern Railway Company about seven acres of the land originally purchased by them from the plaintiff's predecessors in title for the sum of 2247*l.* 10*s.*

Sect. 127 of the Lands Clauses Act 1842 provides that the promoters of every undertaking shall sell their superfluous lands, within the period prescribed by their special Act, or, if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, and provides that, in default thereof, all such superfluous lands remaining unsold at the expiration of such period shall become the property of the owners of the adjoining lands.

Sect. 128 provides that the promoters, before disposing of any superfluous lands, shall first offer the same to the person then entitled to the lands from which they were originally severed.

The period within which, under sect. 127, the North-Eastern Railway were obliged to dispose of the lands acquired by them from the plaintiff's predecessors in title as superfluous lands was extended from time to time by various special Acts, and did not expire until July 1894.

The plaintiff contended that the lands sold by the North-Eastern Railway Company to the Lancashire and Yorkshire Railway Company were superfluous lands, and ought to have been first offered to him as provided by the Lands Clauses Act 1845, and he commenced this action claiming a declaration that he was entitled to the difference between the 2247*l.* 10*s.* received by the North-Eastern Railway Company in respect of such lands and the fair value thereof at the time of such sale as between the plaintiff and the North-Eastern Railway Company, or alternatively that he was entitled to damages in respect of such sale.

The case was heard by Kekewich, J. on the 5th and 6th July 1895.

The North-Eastern Railway Company alleged that the lands were not superfluous lands, and produced evidence to show that, if the Lancashire and Yorkshire Railway Company had not bought the land and constructed sidings on it, the defendant company would have been obliged to do so.

Kekewich, J. held, following the decision of the Court of Appeal in *Carington* v. *Wycombe Railway Company* (18 L. T. Rep. 96; L. Rep. 3 Ch. App. 377) in preference to that of Manisty, J. in *Hobbs* v. *Midland Railway Company* (46 L. T. Rep. 270; 20 Ch. Div. 418), that the fact that the defendant company had entered into a contract to sell the lands to the Lancashire and Yorkshire Railway Company showed they were not required for the purposes of the defendants' undertaking, and therefore they were superfluous lands, and he gave judgment for the plaintiff.

From this decision the defendants appealed.

Renshaw, Q.C., *W. Baker*, and *Ernest Moon* for the appellants. — The defendants did not sell this land voluntarily, but it was taken compulsorily under the power given to the Lancashire and Yorkshire Railway Company by their special Act. Kekewich, J. relied on *Carington* v. *Wycombe Railway Company* (*ubi sup.*), but in that case the company had no intention to use the land for their railway, and did not want it. What they did was a fraud on their powers. There is nothing of that kind here. This land is not superfluous land. The evidence shows that, if the Lancashire and Yorkshire Railway Company had not bought it and constructed sidings on it, the defendant company would have soon been obliged to do so in consequence of the increase in traffic. This case is similar to *Hobbs* v. *Midland Railway Company* (*ubi sup.*). The land now belongs to the Lancashire and Yorkshire Railway Company, and any claim the plaintiff may have is against that company, and not against the defendant company. The object of the proviso was to give the plaintiff a right of pre-emption if the lands became superfluous in the hands of the Lancashire and Yorkshire Railway Company, and to preserve that right to him in the event of that company not buying the land under the Act.

Warrington, Q.C. and *E. Ford* for the plaintiff. —If the defendants had required this land for their undertaking the Legislature would not have taken it away from them for the purpose of another railway, as they did by the Act of 1883. The land must therefore be superfluous land. In *Beauchamp* v. *Great Western Railway Company* (19 L. T. Rep. 189; L. Rep. 3 Ch. App. 745, 751) Sir W. Page Wood, L.J. says that the most conclusive way in which a company can show that land is not required for the purposes of their undertaking is by selling it. This case is distinguishable from *Hobbs* v. *Midland Railway Company* (*ubi sup.*). If the land was superfluous land, then under the Lands Clauses Act the defendants were bound to offer it to the plaintiff, and he was entitled to buy it of them at a fair price, and then to sell it to the Lancashire and Yorkshire Railway Company at a larger price in consequence of the sale to them being compulsory. Then by virtue of the proviso in sect. 40 of the Act of 1883 the plaintiff is entitled to be paid by the defendants out of the proceeds of the sale the difference between the fair value of the land and the amount received by them.

Lindley, L.J.—We need not trouble you to reply, Mr. Renshaw. This case has been very ingeniously argued, and we have had the opportunity of considering the judgment of the learned judge who decided the matter. The point is a very short one, and it appears to me, I confess, free from any real difficulty. It appears that prior to the Act of Parliament of 1883, the plaintiff.

Mr. Dunhill, or his predecessors in title (it is not necessary to distinguish between the two), sold some land to the North-Eastern Railway Company for the purpose of their railway. The land which was so sold consisted of about fifty-seven acres, and a piece of that land consisting of seven acres is the subject-matter of the present proceedings. In the year 1883 this piece of seven acres had been conveyed to the North-Eastern Railway Company by a deed of May 1871. The North-Eastern Railway Company were the owners in every sense of the word of those seven acres. The evidence shows that in 1883 they were not superfluous lands; that is to say, they were not within sects. 127 and 128 of the Lands Clauses Act 1845. It could not be then said that those seven acres were not required for the purposes of the North-Eastern Railway. The evidence is that they were required. The ten years referred to in the statute had been extended by various special Acts and had not expired, and Mr. Dunhill was not in a position to assert any right under sects. 127 and 128 of the Lands Clauses Act 1845, and to require the defendant company to sell this land and to give him the right of pre-emption. Now, that was the position of affairs when the Lancashire and Yorkshire Railway Act 1883 was passed. At that time it is important to bear in mind that Mr. Dunhill had no right whatever and no interest whatever in these lands, except that if they became superfluous lands or lands not required for the purposes of the North-Eastern Railway Company, then he had a right of pre-emption under the Lands Clauses Act 1845. In 1883 the Lancashire and Yorkshire Railway Company obtained an Act which enabled them to obtain compulsorily the seven acres for the purpose of their undertaking. That power was given by the 40th section of that Act, which says that the Lancashire and Yorkshire Railway Company may purchase or take by compulsion or agreement certain lands in Goole, which include this seven acres. Now, what was the position of affairs then? I will not allude to the proviso to the 40th section of that Act for the moment. Kekewich, J. has held, and the plaintiff contends, that by that very circumstance these lands must be treated as no longer wanted for the purpose of the North-Eastern Railway Company. That appears to me to be an inference which it is impossible to draw from any language contained in the Act of Parliament. What does the Legislature say? It says, "Whether you want the land or not the Lancashire and Yorkshire Railway Company are entitled to have it." It does not say "You do not want the land for the purpose of your undertaking" in this case any more than it says to a private owner "You do not want your land, the railway company does, the railway company shall have it." What the Legislature says to a private owner is "You may want your land, but public reasons and convenience are such that it justifies us in making you part with it for public purposes, however much you want it." That is what Parliament has said to the North-Eastern Railway Company. Whether the North-Eastern Railway Company opposed the Bill or not I do not know, but this Act of Parliament clearly enables the Lancashire and Yorkshire Railway Company to take these lands, however much the North-Eastern Railway Company may want them. How can it be said under the circumstances, and how are we to infer either as a matter of fact, or to hold as a matter of law, that the mere circumstance that Parliament forces the North-Eastern Railway Company to give up this piece of land to the Lancashire and Yorkshire Railway Company is equivalent to saying "You, the North-Eastern Railway Company, do not want it, and because you do not want it you shall part with it." Such a construction seems to me to be impossible. But that is really the root of the decision of Kekewich, J. which is appealed against. I cannot help thinking that Kekewich, J. was rather confused by the other cases referred to. The case of *Carington* v. *Wycombe Railway Company* (*ubi sup.*) does not touch this case at all, and is nothing like it. In that case the land obviously was land not required for the purpose of the railway company, and no Act of Parliament had been passed compelling the railway company to part with the land. With regard to the case of *Hobbs* v. *Midland Railway Company* (*ubi sup.*) I think the view taken by Manisty, J. was right, viz., that, if you find the railway company is selling land before the ten years has expired, the *primâ facie* inference is that the company does not want the land. That is only a *primâ facie* inference, you must look at the facts to see whether the land is or is not wanted for the purpose of the railway. If you find, as Manisty, J. found in *Hobbs* v. *Midland Railway Company* (*ubi sup.*), that the land was wanted and was sold nevertheless by an *ultra vires* proceeding, you cannot infer from the sale itself what is contrary to the fact, that the land is superfluous land. Therefore I think that that decision was perfectly right, and the principle upon which the decision proceeded was also perfectly right. Kekewich, J. thought the case of *Carington* v. *Wycombe Railway Company* (*ubi sup.*) was opposed to the case of *Hobbs* v. *Midland Railway Company* (*ubi sup.*); but I think it is entirely distinguishable from that case, and also from this case. Now, if that view is well founded—and I have not the slightest doubt about it—what becomes of this litigation? It ends in this: that the plaintiff is entirely in the wrong, and I think he is in the wrong from beginning to end. Now, I will say a word or two about the proviso in the clause which authorises the Lancashire and Yorkshire Railway Company to take the seven acres. That proviso says: "Provided always that nothing in this section contained shall alter, vary, abate, lessen, abridge, or in any manner affect or prejudice any estate, right, title, interest, or advantage of William Henry Carter Dunhill, his heirs and assigns." I have pointed out what in my opinion his rights were exactly when this Act of Parliament was passed, and it appears to me, although the language is not so explicit as it might be, to follow from this that, if the seven acres had become superfluous land in the hands of the Lancashire and Yorkshire Railway Company, Mr. Dunhill might have had the benefit of the proviso, and might have been able to say to them, "Treat me as a person who sold those lands to you, and give me the right of pre-emption under the Lands Clauses Act 1845, which I should have had against the North-Eastern Railway Company if they had not required them." That it seems to me is the true effect of the proviso. It seems to me it has no other operation, but of course that may

be an important operation. It may not be important to Mr. Dunhill as matters are; but, if those lands should become superfluous lands in the hands of the Lancashire and Yorkshire Railway Company, that proviso might be of use to Mr. Dunhill. It appears to me that is the only effect the proviso can have. It appears to me that to ask us to hold that this proviso gives him a right to say, contrary to the fact, that these lands are to be treated as superfluous lands in the hands of the North-Eastern Railway Company, is to ask us to say that which is not warranted either by the language of the section or by the real truth. Therefore I think this appeal must be allowed, and judgment must be given for the defendants with costs both here and below.

SMITH, L.J.—In or about the year 1863 Mr. Dunhill, or his predecessors in title, sold certain land to the North-Eastern Railway Company for the purposes of their undertaking. There were seven acres of it in 1883 that had not been utilised by the North-Eastern Railway Company for the purpose of their undertaking. At that time the ten years mentioned in the Lands Clauses Act 1845 had not run out, because there had been various prolongations of the time until the year 1894. As a matter of fact, in the year 1883 these lands *de facto* were not superfluous lands within the meaning of the Lands Clauses Act 1845 in the hands of the North-Eastern Railway Company. I have looked through the evidence, and I find there are two or three passages in the evidence of Mr. Gibb, who is the general manager of the railway company, which bear upon this point. [His Lordship then considered the evidence and continued:] Therefore *de facto* this land in 1883 was not superfluous land in the hands of the North-Eastern Railway Company. Now, what has happened? Have the North-Eastern Railway Company sold this land before the expiration of what I will call the ten years within the meaning of sects. 127, 128, and 129 of the Lands Clauses Act 1845? In my judgment they have done nothing of the sort. Those sections apply to voluntary sales by a railway company, and not to a case where the Legislature has thought fit to intervene and compulsorily take lands out of the hands of a railway company. The object of the section is well-known. In the year 1845 it was contemplated that, unless railway companies were compelled to sell their superfluous lands, they might become large landowners, with large powers, and might become holders of land greatly in excess of what was requisite and necessary for their undertaking. If one reads the sections carefully, namely, sects. 127, 128, and 129, in my judgment they apply to the case only of a voluntary sale by a railway company of its own land. Now, what has happened? In 1883 the defendant company did not at the moment require these lands, but before the lands did become superfluous lands within the meaning of the Act, the Lancashire and Yorkshire Railway Company wanted them for the purpose of their undertaking. In those circumstances, in 1883, the Legislature intervened, and insisted that the Lancashire and Yorkshire Railway Company should purchase and were entitled to purchase by compulsion these seven acres from the North-Eastern Railway Company. Under these circumstances what is the result? It is said, because the North-Eastern Railway Company have been compelled by the Legislature to sell lands which were not superfluous lands, that Act of the Legislature constituted them superfluous lands, although they were *de facto* not superfluous lands in the hands of the North-Eastern Railway Company, and thattherefore the plaintiff had a right of pre-emption, and that they ought to have been offered to Mr. Dunhill before the Lancashire and Yorkshire Railway Company were entitled to purchase them from the North-Eastern Railway Company. Now I cannot see how that can be at all. In my judgment a compulsory purchase under the Act of Parliament cannot be held to be any evidence, and is no evidence at all, that lands which are not *de facto* superfluous lands at the time, become superfluous by reason of the existence of the legislative power empowering this company to purchase them. Kekewich, J. has come to a wrong decision in trying to apply either of the two cases referred to, namely, *Hobbs* v. *Midland Railway Company* (*ubi sup.*), and *Carington* v. *Wycombe Railway Company* (*ubi sup.*). With all submission to the learned judge, they have nothing to do with this case; there was no taking by compulsion by the Act of the Legislature in either of those cases. In those cases there was a voluntary sale, and, if I may be allowed to say so, I think Manisty, J. was quite right in holding that a valid sale by a railway company of lands which had been in the company's possession prior to the extension of the ten years was something from which you might infer that those lands were superfluous lands, for this reason: if they were not superfluous lands, what right had the company to sell those lands at all? In the case of *Carington* v. *Wycombe Railway Company* (*ubi sup.*) the railway company had bought lands in the first instance not for the purpose of its own undertaking, but for the purpose of selling it immediately afterwards at a profit to a purchaser, and that was set aside; and Manisty, J. set aside the conveyance in the case of *Hobbs* v. *Midland Railway Company* (*ubi sup.*), which relegated the parties to their original rights. It seems to me that neither of those cases touches the point which we have to decide here, namely, whether the compulsory power of purchase which was given by the Legislature by the Act of 1883 to the Lancashire and Yorkshire Railway Company is any evidence that it converted lands which were not *de facto* superfluous lands into superfluous lands. I confess I cannot follow the learned judge in his decision upon the point, and I think he was wrong, and I think he was wrong because he missed the point. Then with regard to the other question about the proviso, I have nothing to add to what has fallen from my brother Lindley. I should like, however, to point out this, that when the Act of Parliament of 1883 was passed, on the facts of the case there was no right as to the superfluous lands, with regard to the North-Eastern Railway Company, which could be preserved to Mr. Dunhill; for the best of all reasons, that at that time they were not, and from the fact as was proved that they never would have been, superfluous lands in the hands of the North-Eastern Railway Company to which Mr. Dunhill could have any right at all. It is true that as to these lands transferred by compulsion to the Lancashire and Yorkshire Railway Company they might possibly become superfluous lands in the hands of

that company; and that may have been the idea of the draftsman and of the Legislature when they inserted this proviso in favour of Mr. Dunhill. But, in my judgment, that proviso in no way alters this case and converts lands which were not superfluous into *de facto* superfluous lands. Therefore I am of opinion, for these reasons, that the appeal must be allowed.

RIGBY, L.J.—In this case the North-Eastern Railway Company have purchased lands from either the predecessors in title of the present plaintiff, or under such circumstances that the plaintiff now stands in the position of the vendor. The lands so purchased were a very considerable tract of land, and the Legislature would not have given these powers to purchase this land but for special circumstances. What those special circumstances were is apparent if one looks at the map. This is a piece of land to the east or south of the North-Eastern Railway, and it is very close to the town of Goole, and the North-Eastern Railway Company must have persuaded the Legislature that there was a probability of their wanting the land for the purposes of the railway, or else they never would have been allowed to buy it. Then in 1883 was passed the Act of Parliament already referred to. Sect. 40 gives power to the Lancashire and Yorkshire Railway Company to compulsorily take a portion of the land containing about seven acres, which is the only part of the land which we have to consider. The question arises first of all independently of the proviso. As pointed out by my brother Lindley, it does not prove that the Legislature thought it was land not required for the purpose of the North-Eastern Railway Company. All that it proves, in my opinion, is that the Legislature thought it might be better for public purposes to place it in the hands of the Lancashire and Yorkshire Railway Company. Now, what has happened? In 1883 it is plain that the period had not arrived when the railway company were bound to say definitely whether the lands were superfluous lands or not, and the time was ultimately extended to the year 1894. In 1883 it was not incumbent on the North-Eastern Railway Company definitely to make up their minds upon the question. In other words, the vendor, that is the plaintiff representing the vendor, had no existing right whatsoever with regard to the land. Ultimately he might become entitled to the land in default of the company dealing with it, if it really was land not required for the purposes of their railway. That was all the right apparently that he had. Now let us follow out the consequences of the sale. Before notice to treat was given the railway company was under no obligation to offer it to the plaintiff. When notice to treat was given, that formed a statutory contract, and they were bound, they were no longer in equity the owners of the land at all. A conveyance had to take place, and that was all. How could they, having no equitable interest in the land which they were selling in obedience to a statute, go through the form—because it must be a form only—of saying to the plaintiff "We will sell you the land?" They had no power to do so; they could not have done it. I think that conclusively shows that the sections which have been referred to of the Lands Clauses Act 1845, namely, sects. 127 and 128, cannot have been intended to deal with such a case; and it is idle for an Act of Parliament to say "You, who, by reason of the notice to treat which has been legally served upon you, have no longer any equitable interest in the land, shall sell it." It cannot mean that. Then as to the proviso. The proviso says: "That nothing in this section contained," that is sect. 40, "shall alter or affect," to take the words which are important for this purpose. "any interest or advantage of Wm. Henry Carter Dunhill," that is the plaintiff. As I have said, all the right he had was a contingent right, or right arising at a future time in case it turned out that the lands were lands which were not required for the purpose of the North-Eastern Railway. Now the evidence shows conclusively what would have been the position of the land, namely, that the land at the expiration of the time in 1894 would have been required for the purpose of the North-Eastern Railway. Therefore Mr. Dunhill's rights were nothing at all. I cannot understand how under these circumstances the cases referred to have any application. I can understand when a railway company sells, it being recited that the lands are superfluous lands, which means the same thing as saying they are not required for the purposes of the Act, that as between the railway company and the adjoining owners they are bound. The case of *Carington* v. *Wycombe Railway Company* (*ubi sup.*) would be sufficient authority for that. I agree with the decision of Manisty, J. in *Hobbs* v. *Midland Railway Company* (*ubi sup.*) that it is not conclusive evidence, and it does not operate by way of an estoppel so as to make a railway company say what they never intended to say, that the land was not required for the purpose at all. In my judgment there is nothing in either of these authorities to lead to the conclusion that a sale of this kind under compulsory powers given to another railway company to buy, has any effect in showing that the lands were not required, and would not have been required, before the end of the term for the purpose of the railway company.

Solicitors for the plaintiff, *Beyfus* and *Beyfus*.
Solicitors for the defendants, *Williamson, Hill*, and *Co.*, agents for *A. Kaye Butterworth*, York.

Friday, Nov. 8, 1895.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

ASFAR AND CO. *v.* BLUNDELL AND OTHERS. (*a*)

ON APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance — Insurance of "profit on charter"—Total loss of goods—Destruction of merchantable character—Concealment of material fact.

The plaintiffs chartered a vessel for a lump sum, and then goods were shipped under bills of lading at freights which amounted to more than the charter freight. They insured their "profit on charter" with a warranty against all average. The underwriters were not told, and did not inquire as to the terms of the charter, and did not know that the charter was at a lump freight. During the voyage the ship was sunk by collision, and was afterwards raised. Part of the cargo

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

consisted of dates, which were so damaged by water as to be unmerchantable as dates, though they retained the appearance of dates, and were of considerable value. The freights payable under the bills of lading in respect of the rest of the goods amounted to less than the charter freight.

Held (*affirming the judgment of Mathew, J.*), *that there had been a total loss of the dates, and freight was not payable in respect of them; that there had been a total loss of the "profit on charter" within the meaning of the policy; and that there had not been any concealment of the fact that the charter freight was a lump sum.*

APPEAL by the defendants from the judgment of Mathew, J. without a jury.

The plaintiffs hired the ship *Govino* by a charter-party, made on the 4th Aug. 1888, for a voyage from the Persian Gulf to London for a lump sum of 3900*l.* All freight earned was to be for account of charterers.

The plaintiffs sent the ship to various places in the Persian Gulf, and cargo was shipped by various parties at certain rates of freight under bills of lading which made the freight payable on right delivery. The total bills of lading freights amounted to 4690*l.*

While the ship was loading the plaintiffs insured their profit on the charter for 2000*l.* with the defendants on the 17th Oct.

The defendants were not informed of, and did not inquire as to, any of the terms or conditions of the charter-party, or of the bills of lading, or that the charter-party was for a lump freight.

The formal policy was made out and underwritten by the defendants on the 23rd Oct. The plaintiffs were expressed to be insured for 2000*l.* on the *Govino*, and the interest insured was described as "2000*l.* on profit on charter. . . . Warranted free from all average."

During the voyage mentioned in the policy, the *Govino* was sunk by a collision in the Thames, and, after being submerged for several tides, was raised and taken into dock.

A large part of the cargo consisted of dates, which were damaged by water. They were saturated with sewage, and in a fermenting condition; and they were condemned as unfit for human food, and were not allowed to be landed in London. Although unmerchantable as dates, a large part of them retained the appearance of dates, and they were of considerable value. They were sold for distillation for 2400*l.*, and were transshipped and exported.

The rest of the cargo was landed and delivered. The total of the bills of lading freights payable on this part of the cargo was less than 3900*l.*

The plaintiffs brought this action as for a total loss of profit on charter, claiming 2000*l.* as on a valued policy, or alternately 790*l.*, being the difference between the lump freight payable under the charter-party and the total amount of the bills of lading freights.

At the trial before Mathew, J., without a jury, the learned judge gave judgment for the plaintiffs for 790*l.*

The defendants appealed.

Carver for the appellants.—First, there was not a total loss of the dates, and therefore not a total loss of the freight payable in respect of the dates. Though damaged, the dates still remained dates, and their nature was not changed:

Roux v. *Salvador*, 3 B. N. C. 266;
Dakin v. *Oxley*, 10 L. T. Rep. 268; 15 C. B. N. S. 646;
Duthie v. *Hilton*, 19 L. T. Rep. 285; L. Rep. 4 C. P. 138;
Cocking v. *Fraser*, Park, Insurance, vol. 1, p. 247.

Secondly, even if the freight on the dates was lost, yet the underwriters are protected by the warranty against average, for the freights were payable under the other bills of lading:

Hodgson v. *Glover*, 6 East, 316;
Phillips on Insurance, sect. 1503.

Thirdly, there was a concealment of a material fact; the assured did not inform the underwriters that the freight payable under the charter-party was a lump freight and not a tonnage freight, That was a material fact which ought to have been disclosed by the underwriters:

The Bedouin, 69 L. T. Rep. 782; (1894) P. 1;
Haywood v. *Rodgers*, 4 East, 590;
Tate v. *Hyslop*, 53 L. T. Rep. 581; 15 Q. B. Div. 368;
Mercantile Steamship Company v. *Tyser*, 7 Q. B. Div. 73.

Joseph Walton, Q.C. for the respondents.—[He was called upon to argue only the question as to concealment of a material fact.] Assuming that this was a material fact, there was no duty upon the assured to disclose more than they did disclose. The underwriters knew that there was a charter and a charter freight. If they wished to know what that freight was they ought to have asked. In *The Bedouin* (69 L. T. Rep. 782; (1894) P. 1) it was held that, as the underwriters knew that the charter was a time charter, they had notice of the common clause in such a charter. In *Mercantile Steamship Company* v. *Tyser* (7 Q. B. Div. 73) the clause was very special and unusual, and therefore there was a duty to inform the underwriter of it. There is no such duty in the case of an ordinary charter and of a provision which is usual in such a charter:

Inman Steamship Company v. *Bischoff*, 47 L. T. Rep. 581; 7 App. Cas. 670.

Carver in reply.—The test is not whether a clause is unusual or not. In *Mercantile Steamship Company* v. *Tyser* (*ubi sup.*) the clause was not unusual. In *The Bedouin* (*ubi sup.*) the clause was one which is found in every time charter.

Lord ESHER, M.R.—In this case the action was brought by the assured against the underwriters. The first point taken by the defendants was, that there was not a total loss of the dates. The subject-matter is a quantity of dates, in a commercial sense, and these dates were under water for two days, and were then examined by a business man who said that they were then a filthy mess and not dates at all. It is said that there was no change in their nature, and that they were still dates. The well-known test under such circumstances is whether, as a matter of business and of mercantile dealing, the subject-matter has been altered in its nature. If, as a matter of business, it has become something else, and the question is whether there has been a total loss, then, if by the perils of the sea its nature has been so altered, in a commercial and business view, that it has become unmerchantable, there has

been a total loss. That is the test; and that test has been fulfilled in this case. Mathew, J. came to the conclusion that, as a matter of business, the dates had become so deteriorated as not to be dates at all, and to be unmerchantable as dates. That is a total loss. If there was a total loss, then no freight was due from the consignees of the dates to the charterers. The freight was not earned and was not payable. Therefore, the bill of lading freight was totally lost. Then, what was the subject-matter of the insurance in this case? The assured had chartered a ship in such a form that she could go from place to place for cargo; they were to have the whole of the ship and to pay the owners for that. That was the charter freight. They then intended to collect cargo and give bills of lading. They would make a profit out of the ship if they got more from the bills of lading freights than they had to pay for the charter freight. If through perils of the sea they were prevented from earning bills of lading freights to a larger amount than the charter freight, then they would not make that profit. That was their speculation. It was as nearly certain as anything could be in business that the charter freight for the whole use of the ship would be a lump freight. Otherwise, if the freight were a tonnage freight, the charterer could fix the amount of the charter freight by the quantity of goods which he might choose to put on board the ship. As a matter of business, then, it would be almost certain that the charter freight would be lump freight. Therefore, where it would ordinarily be a lump freight, and it was a lump freight, the subject-matter of the insurance would be the difference between the charter freight and the bills of lading freights. That being so, part of the bills of lading freights was totally lost, and no profit was made. The difference between the lump freight and the total bills of lading freights was totally lost. Then it was said that there had been a concealment of a material fact. The rules applicable to such a question are well known. The assured is bound to disclose every material fact within his knowledge, and not within the knowledge of the underwriters. If he does not do so then he is guilty of concealment. If he has failed to disclose any such material fact, that is a concealment. It is equally well known that, in insurance law it is not necessary to disclose minutely and in detail every material fact. If the disclosure which is made is sufficient to direct the attention of the underwriters so far that, if they should ask for more information, then everything would be disclosed, that is sufficient. Here it was disclosed that there was a charter-party, and that the subject-matter of the insurance was the difference between the charter freight and the bills of lading freights. Therefore, the whole of the circumstances were really disclosed to the underwriters, and they were asked to insure that difference against a total loss. Having told them that much, the charterers did not tell them whether the charter freight was a lump freight or a tonnage freight. But, as I have said, that it would be a lump freight was almost certain, and if the underwriters had wanted to know they could have asked at once. There was, therefore, in this case enough disclosed to the underwriters to satisfy the rule that the assured must give information with reference to the insurance as to all material facts. I think that Mathew, J. was right in saying that there was a sufficient disclosure to the underwriters. This is no new law; the rules are well known. The question here is as to the application of well known rules to the facts of this case. The appeal, therefore, fails, and must be dismissed.

Lopes, LJ.—I am of the same opinion. The first contention of the defendants is, that there was no total loss. The facts as to the dates were that they were so damaged by water as to be unmerchantable as dates. It is idle to suggest that there was not a total loss of the dates, and that the plaintiffs are not entitled to rely upon a total loss of the freight. Then it is argued that, though there might be a total loss of the dates, yet there was a profit remaining. It is all important to consider what was the subject-matter of the policy. I agree with Mathew, J. that the subject-matter was the difference between the charter freight and the bills of lading freights. If that be the subject-matter of the insurance, can it be denied that, that being lost, the plaintiffs are entitled to recover? No profit at all was made; and, therefore, there has been a total loss of the profit which would have been made. Then it is said that there was a concealment; that the assured had not disclosed the fact that a lump freight was payable under the charter-party, and that they were bound to disclose that fact. The defendants say that that was a concealment of a material fact. I am of opinion that the assured disclosed all that it was necessary for them to disclose. The assured must disclose every material fact within their knowledge. In this case they did disclose everything which there was an obligation upon them to disclose. There was a great probability that the charter freight was a lump freight. It is admitted that that would be the usual thing. When the insurance was effected the underwriters were informed as to the subject-matter of the insurance, and that there was a charter freight. If they wanted any further information they might have asked for it. They did not ask. I think that Mathew, J. was right in holding that there was a sufficient disclosure. The appeal must be dismissed.

Kay, L.J.—This is an action upon a policy of marine insurance. Three points have been taken by the defendants, and two of them are fairly arguable. The policy was effected upon the profits on a charter. The charter-party provided for payment of a lump sum by the charterers, viz., 3900*l.* The charterers loaded a general cargo on the ship. Part of the cargo consisted of dates. The vessel was sunk by perils of the sea, and the dates were spoiled. The question is whether the freight payable in respect of those dates was totally lost or not. If it was, then the profits on the charter, which would be the difference between the lump freight and the bills of lading freights, were utterly gone, and no profit at all would be made upon the adventure, because the bills of lading freights earned would be less than the charter freight. It is said that there was not a total loss of the dates. Now, they could not be sold under a commercial contract as dates, though they were still dates. It is not requisite to a total loss that they should be so completely changed as to be altered in their nature. I do not agree with the construction that there must be such a change. Mathew, J. was right when he

said: "Total destruction is not necessary. Destruction of the merchantable character of the goods is sufficient, and, in accordance with the principle recognised in *Roux* v. *Salvador* (3 B. N. C. 266), *Dakin* v. *Oxley* (10 L. T. Rep. 268; 15 C. B. N. S. 646), and *Duthie* v. *Hilton* (19 L. T. Rep. 285; L. Rep. 4 C. P. 138), I hold that the plaintiffs were not entitled to receive freight in respect of these dates." Therefore, the bill of lading freight for the dates not being recoverable, there was no profit on the charter. Then the second point is a very minute one. It omits to notice the subject-matter of the insurance, and is not maintainable. I again agree with Mathew, J., when he says: "But that argument must go the length of maintaining that the intention of the policy was to afford protection to the assured only in the event of a total loss of all freight. I cannot think that that was what the parties meant. I am satisfied that what was intended to be the subject-matter of the insurance was the charterers' profit on the adventure, that is to say, the excess of the total bills of lading freights over and above the lump freight of 3900*l.*, and the intention was that in the event of a total loss of that profit the assured would be entitled to recover." Then, the third point raised is, that there was a concealment of a material fact. It is argued that it was a material fact that there was a charter-party at a lump freight, and not at a tonnage freight. It is clear that that was a material fact. The question is whether it was concealed. I agree that concealment means keeping back that which there is a duty to bring specifically to the notice of the underwriters. Was there any duty here to bring specifically to the notice of the underwriters the fact that the charter-party was at a lump freight? I think that, if a charter-party contains an unusual clause which is material to the underwriters to know, it is not enough to say to them only that there is a charter-party, but that the assured must tell the underwriters of the unusual clause. Here there was nothing unusual, for it is common enough that in a charter-party there should be an agreement for a lump freight. Further, it is expressly stated in the policy, that the insurance was on profit on charter. There was nothing unusual, and, therefore, if the underwriters wanted to know more, they ought to have asked for information. The assured, therefore, told all that they were under an obligation to tell. The law is thus stated by Lord Blackburn, in *Inman Steamship Company* v. *Bischoff* (*ubi sup.*): "Before the underwriters agreed to the insurance they were informed that the *City of Paris* was the Inman steamer, about to proceed on a voyage to Natal, on Government charter, and they might if they pleased have seen that charter, so that there would have been no ground for setting up any defence on the ground of non-disclosure or concealment, and no such defence was set up." In the same case Lord Watson said: "And seeing that the respondents, when they accepted the insurance, had notice that the *City of Paris* was under a contract of charter-party, I am of opinion that the policy attached to the freight therein stipulated, whether they did or did not choose to inform themselves of the particulars of the contract; and consequently that the respondents became liable for such of that freight as might be lost through any of the risks insured against during the period covered by the policy." In *The Bedouin* (*ubi sup.*), Barnes, J. said: "I cannot help thinking that the real point intended to be raised is that of so-called concealment. . . . If the clause had not been a known clause, or had been an unusual clause, there would have been a good deal of substance in that contention; but it has been proved by the witnesses, and has been practically admitted throughout the argument, that this is a universal clause in a time charter, and it seems to me that when an underwriter takes upon himself the insurance of the freight which should accrue under a time charter with such a clause in it, he takes upon himself the risk of whatever responsibility is cast upon him by the policy attaching to such freight under such a charter, in accordance with what is said in *Inman Steamship Company* v. *Bischoff* (*ubi sup.*), and I think the argument of the counsel for the plaintiffs is sound, that what the underwriter complains of as having been concealed is not a fact, but a view of the law, and that can hardly be stated as a matter of concealment." Here, therefore, the underwriters do not bring the case within that particular doctrine, because the material fact was sufficiently disclosed by the reference to the charter-party, as it was not an unusual, but a usual and common provision. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Ince, Colt,* and *Ince.*

Solicitors for the respondent, *Waltons, Johnson, Bubb,* and *Whatton.*

Oct. 28 *and Nov.* 18, 1895.

(Before Lord ESHER, M.R., KAY and RIGBY, L.JJ.)

Re AN ARBITRATION BETWEEN THE MAYOR, &c., OF BURSLEM AND THE COUNTY COUNCIL OF STAFFORDSHIRE. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Highway—Main road—Urban districts—Paved footways at side of road—Cost of maintenance—Liability of county council to make contribution—Highways and Locomotives (Amendment) Act 1878 (41 *& 42 Vict. c.* 77), *s.* 13—*Local Government Act* 1888 (51 *& 52 Vict. c.* 41), *s.* 11.

When an urban authority has retained the powers and duties of maintaining and repairing a main road within their district, the county council is bound to contribute towards the costs of the maintenance and repair of paved footways at the side of the main road, under sect. 11 *of the Local Government Act* 1888, *even if the main road was formerly a turnpike road.*

THIS was an appeal by the County Council of Staffordshire from the judgment of the Divisional Court (Grantham and Wright, JJ.) refusing to set aside an award made by the Local Government Board, under sect. 11, sub-sect. 3, of the Local Government Act 1888.

The corporation of Burslem, being the urban authority, had claimed to retain the powers and duties of repairing main roads within their district, under sect. 11, sub-sect. 2, of the Loca Government Act 1888.

Questions arose between the corporation and

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

the County Council of Staffordshire as to the amount of the annual contribution which the county council ought to pay towards the costs of the maintenance and repair of the main roads within the borough of Burslem.

The matter was referred to the arbitration of the Local Government Board, under sect. 11, subsect. 3, of the Local Government Act 1888. The Local Government Board made an award fixing the amount of the annual contribution to be paid by the county council.

The award directed contribution to be made towards the cost of maintenance and repair of paved footways at the side of the carriage-ways of main roads. Some of the main roads had been turnpike roads which had become main roads, upon ceasing to be turnpike roads, under sect. 13 of the Highways and Locomotives (Amendment) Act 1878.

The Local Government Act 1888 (51 & 52 Vict. c. 41) provides:

Sect. 11.—(1.) Every road in a county, which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act 1878, inclusive of every bridge carrying such road if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate, and such council, for the purpose of the maintenance, repair, improvement, and enlargement of, and other dealing with such road, shall have the same powers and be subject to the same duties as a highway board, and may further exercise any powers vested in the council for the purpose of the maintenance and repair of bridges, and the enactments relating to highways and bridges shall apply accordingly; and the county council shall have the same powers as a highway board for preventing and removing obstructions, and for asserting the right of the public to the use and enjoyment of the roadside wastes; and the execution of this section shall be a general county account. (2.) Provided that any urban authority may, within twelve months after the appointed day, and in case of a road in the district of such authority becoming a main road at any subsequent date then within twelve months after that date, claim to retain the powers and duties of maintaining and repairing a main road within the district of such authority, and thereupon they shall be entitled to retain the same, and, for the purpose of the maintenance, repair, improvement, and enlargement of, and other dealings with such road, shall have the same powers and be subject to the same duties as if such road were an ordinary road vested in them, and the council shall make to such authority an annual payment towards the costs of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of such road. (3.) The amount of such payment shall be such annual sum as may be from time to time agreed on, or in the absence of agreement may be determined by arbitration of the Local Government Board.

The Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) provides:

Sect. 13. For the purposes of this Act, and subject to its provisions, any road which has, within the period between the thirty-first day of December, one thousand eight hundred and seventy, and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the twenty-ninth day of September, one thousand eight hundred and seventy-eight, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor or the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.

The county council applied to the Divisional Court to set aside the award upon the ground that the Local Government Board had exceeded their jurisdiction by including a part of the cost of the maintenance and repair of the paved footways in the amount of the contribution which the county council were directed to pay.

The Divisional Court (Grantham and Wright, JJ.) dismissed the application, following the decision in *Re The Local Board of Warminster and the Council of the County of Wilts* (62 L. T. Rep. 902; 25 Q. B. Div. 450).

The county council appealed.

A. T. Lawrence (with *Littler*, Q.C.) for the county council.—The arbitrator exceeded his jurisdiction in including in the amount of his award the cost of repairing the paved footways in the town, which, it is submitted, should be borne by the town not by the county council. The Divisional Court decided merely on the authority of a previous decision of the Divisional Court:

Re The Local Board of Warminster and the Wiltshire County Council, 62 L. T. Rep. 902; 25 Q. B. Div. 450.

That case was wrongly decided, and should be overruled. The question is whether these footways were part of the "road" within sect. 11, subsect. 2, of the Local Government Act 1888. This road became a "main road" under sect. 13 of the Highway Act 1878. Sect. 15 of that Act has no application to the present case. "Such road" in sect. 13 means a disturnpiked road, that is to say, a road without footways. By 3 Geo. 4, c. 126, s. 112, turnpike trustees had power to make footways outside a town, but not inside. I admit that the footways in question, if outside the town, would be part of the main road. The primary meaning of "road" is a carriage way. Before this road ceased to be a turnpike road, the duty of maintaining the footways in question fell upon the urban sanitary authority, although it is true that it obtained contributions to the expenses from the highway board. The way in which the Turnpike Acts speak of footpaths "by the side of" a turnpike road, and references to the centre of the "road" meaning the centre of the carriage way, show that "road" was not intended to include footpaths.

Lawson Walton, Q.C. (*A. Macmorran* with him) for the corporation of Burslem.—"Road" means not merely the carriage way, but the space from fence to fence, including the space occupied by a footpath by the side of the carriage way:

Loveridge v. *Hodsoll*, 2 B. & Ad. 602.

"Main roads" are all intended by the Act to be kept in repair in the manner provided, whatever may have been their previous history, whether they are disturnpiked roads or whether they were bye-roads which have been declared to be main roads. There are no classes of different kinds of main roads. The Turnpike Acts never contemplated the purchase of additional lands for use of

footpaths, but the appropriation of part of the highway for that purpose.

A. T. Lawrence in reply.—There is no evidence here that any of the footpaths in question were made "on" the road.

Cur. adv. vult.

Nov. 18, 1895.—Lord ESHER, M.R.—The question upon this appeal is the same as that which was raised in the case of *Re Local Board of Warminster and the Council of the County of Wilts* (62 L. T. Rep. 902; 25 Q. B. Div. 450). Therefore, the real question is whether we agree with the judgment in that case or not. The point is, whether the paved footway upon or at the side of certain main roads where they pass through towns, are included in the expression "main road" for the purposes of sect. 11 of the Local Government Act 1888 (51 & 52 Vict. c. 41). Sect 11, sub-sect. 1, provides that "every road in a county, which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act 1878 . . . shall be wholy maintained and repaired by the council of the county in which the road is situate;" and sub-sect. 2 provides that "any urban authority may . . . claim to retain the powers and duties of maintaining and repairing a main road within the district of such authority, and thereupon they shall be entitled to retain the same . . . and the council shall make to such authority an annual payment towards the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of such road." That is plain enough. We have to consider that section, and whatever is a county road within the meaning of that section is to be repaired by the county council, or the county council is to pay a portion of the costs of its maintenance and repair. What is a main road within the meaning of sect. 11? Several kinds of roads will be main roads. First, a road leading from one large town to another. Secondly, there may be a turnpike road; as to that there is no difficulty. And other roads may become main roads, though they were not the high roads to anywhere; they may be delared by justices to be main roads, because they may have become such through the growth of a district or the opening of a railway station. We must not lay it down that a high road is the way between the hedges, because in some places there are no hedges, as where the road crosses a common or a village green. The road is that part which was intended by the dedicator to be the road and was accepted by the public as the road. High roads were accepted by the public as the roads from one place to another. A main road is, therefore, a road which has been accepted by the public as a road to be used as the way from one large town to another. Sometimes it is paved, but it is none the less a high road. When the road passes through a town, no doubt the footway is usually paved. Why is that? Not because it is used by the shopkeepers, but because it is used by the public who pass along it. When there is a high road with a footway at the side, are there two highways before the road comes into an urban district? It has never been so held. Are a carriage way, and the footway at the side of it, separate highways? They are not, because each part is equally a footway for the public who have a right to use the whole as a footway. For the safety of foot passengers, carts and carriages are not permitted to use the footway, and the footway is reserved for people passing on foot. Very often there is no separate footway by the side of a high road. Therefore, according to the ordinary meaning of language, there can be no doubt that a "main road" is something more than a highway. It is a road for all people for the purpose of going from one principal place to another. It does not signify what material the road is made of. It has never been doubted but that, in country parts, the whole is but one road, whether there is or is not a footway. Then as to towns. There is often no footway even in towns, and there never were two roads where it passed through a town, even if there was a footway; the whole road was but one road. The "main road," therefore, is the whole of the road. The footways are paved in towns for the use of all foot passengers, and not for the use of the inhabitants of the towns alone. Very many persons pass through the towns, and the footways would become worn out. They are paved for the benefit both of the inhabitants and of those who pass through the town. The whole is, therefore, a road within the meaning of the Act, and is a main road, the paved portion being part of the main road. By the words of sect. 11 the county council is to pay a portion of the costs of its maintenance and repair. I therefore agree with the decision in the case which has been relied on, and think that it was rightly decided in accordance with the rule that the subject-matter of an Act of Parliament must be looked at and be dealt with according to the ordinary language of ordinary people. The appeal fails, and must be dismissed.

KAY, L.J. read the following judgment:—The County Council of Staffordshire object to contribute to the repair and maintenance of various paved footways within certain urban districts in that county. Their liability to contribute depends upon sect. 11 of the Local Government Act 1888, which enacts that every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act 1878 shall "be wholly maintained and repaired" by the county council, provided that any urban authority may claim to maintain such road within their district, and in that case the county council are to contribute an annual sum towards the costs of the maintenance and repair of such road. The amount of such payments may be fixed by agreement, or by arbitration of the Local Government Board. Such an arbitration has taken place in this case, and it is sought to set aside the award because it has directed contribution to the maintenance of paved footways, in several urban districts, at the side of the carriageways. Whether or not this was right depends upon the meaning of the word road or main road in the section to which I have referred. The Act of 1888 does not contain any definition of road or main road, but refers, as I have pointed out, for the meaning of main road, to the Highways and Locomotives (Amendment) Act 1878. Sect. 13 of this statute provides that any road which, between the 31st Dec. 1870 and the passing of that Act, ceased to be a turnpike road, and any road which at the time of the passing of the Act was a turnpike road, but might afterwards cease to be such, should be deemed to be a main road;

and, by sect. 15, the county authority, at the instance of the highway authority, might declare certain roads which had never been turnpike roads to be main roads. From the papers in this case, which have been handed to me, it does not appear whether all the roads in question were originally turnpike roads or not. If there be any which were never turnpike roads, but have become main roads, I do not understand how it can be argued that a pathway by the side of the carriage way is not part of the road. Road must *primâ facie* mean the highway, and the pathway is undoubtedly part of the highway which is a main road. But the argument for the county council is rested upon the assumption that all or some of these roads were formerly turnpike roads, and is derived from the history of the legislation as to turnpike roads. The 3rd Geo. 4, c. 126, intituled "An Act to amend the general laws now in being for regulating turnpike roads in England" contains a power (sect. 111) for turnpike trustees to make and keep in repair causeways for the use of foot passengers," in, upon, or on the sides of the turnpike road, in such manner as they shall think proper. But this is restricted, as to any town, village, or hamlet, by sect. 112, which provides that nothing in the Act contained should authorise the turnpike trustees "to lay down, continue, maintain, or repair any pavement or any paved or pitched causeway or footpath, in, upon, or at the side of any turnpike road within any town, village, or hamlet where such turnpike road shall pass through the same," but such pavement, paved or pitched causeway, or footpath, is to be made, repaired, and maintained by and at the cost of the inhabitants of such town, village, or hamlet, or by other persons liable to make, maintain, and repair the same. This legislation was obviously intended to define the rights and obligations of turnpike trustees, as between them and the inhabitants of a town, village, or hamlet. It has nothing to do with the rights or obligations of the county council as to main roads. As between them and the inhabitants of a town, village, or hamlet there is no such restriction, nor does there seem to be any reason for it. After turnpikes were abolished, and before the Act of 1888, the highway authority in an urban district maintained both carriage ways and footways adjoining. Then, by the Act of 1888, the duty is cast upon the county to maintain main roads, and there is nothing to restrict the meaning of these words to the carriage way excluding the footpath at or on the side of it. If the urban authority does not claim to maintain such road the county must do so. If the urban authority makes such a claim, the county must contribute; and in either case the main road is *primâ facie* the whole highway including the footway as well as the carriage-way. Any other construction is not warranted by the words of the Act, and would involve this most inconvenient result, that there must be in every case an inquiry, (1) was the main road once a turnpike road, and (2) was the footway upon the turnpike road or outside it. The point has been decided against the county council in *Re Local Board of Warminster and County Council of Wilts* (*ubi sup.*), and I agree with that decision. The appeal must be dismissed.

RIGBY, L.J. read the following judgment:—Speaking generally I concur in the reasons given by the learned judges in *Local Board of Warminster and County Council of Wilts* (*ubi sup.*), but I think it right to give my own reasons with reference to the arguments most pressed upon us by counsel for the appellants. The ground upon which the award in this case is sought to be set aside is that the arbitrator has exceeded his jurisdiction by including in the expense thrown upon the county council, the costs of paved footways by the side of the carriage way within the borough of Burslem. A similar question, we are told, arises with reference to the cost of paved footways within other boroughs in the county, and no distinction has been suggested between the cases of the different boroughs. Sub-sect. 1, of sect. 11, of the Act of 1888, throws upon the county council the maintenance and repair of every road in the county, which is for the time being a main road within the meaning of the Act of 1878. Sub-sect. 2 enables any urban authority to claim to retain the powers and duties of maintaining and repairing a main road within their district, and thereupon they are to be entitled to retain the same, and for the purpose of the maintenance, repair, improvement, and enlargement, of and other dealing with the road, they are to have the same powers and be subject to the same duties as if the road were an ordinary road, and the county council are to make to them an annual payment towards the costs of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of the road. The roads in question are roads which were formerly turnpike roads running, as to part thereof, through the borough, and they have been disturnpiked. It is not suggested that sect. 13 of the Act of 1878 does not apply to them. The contention, however, is that in the borough only the carriage roads and not the footpaths are made main roads, and, in support of this contention, reference is made to sects. 111 and 112 of the General Turnpike Act, 3 Geo. 4, c. 126. Sect. 111 of that Act makes it lawful for the Turnpike Trustees to make and keep in repair any causeway or causeways for the use of footpassengers in, upon, or on the sides of the turnpike road, in such manner as they shall think proper. Any causeways made under this power would be part of the turnpike road. Sect. 112, however, operates as a proviso upon the other parts of the Act, including sect. 111, and enacts that nothing in the Act contained as to the making or maintaining any causeway or footway, or any matter or provision in the Act, shall extend to authorise or empower any turnpike trustees to lay down, continue, repair, or maintain any pavement, or any paved or pitched causeway or footpath, in, upon, or at the side of any turnpike road within any town, village, or hamlet, where such turnpike road shall pass through the same, unless provision shall have been specially made for the same in the Act or Acts of Parliament under which such turnpike road shall be made, maintained, or repaired; and, in default of such provision, every such pavement, paved or pitched causeway or footpath, within such town, village, or hamlet, shall be made, repaired, and maintained by and at the cost of the inhabitants or other persons liable. In this case there is no special Act containing provisions on the subject. It was argued, and may well for the present purpose be assumed, that, by road, in some part of the Turnpike Acts, carriage road alone is meant. It is, however, in my judgment, impossible

that the meaning can be so limited in the section referred to. Outside the towns the causeway must be part of the turnpike road. Within towns it is clear that they may be, though perhaps not necessary that they should always be. Take the common case of an existing road with footpaths, becoming subject to a turnpike trust within towns. The trustees may not continue these footpaths, but they remain nevertheless part of the turnpike road. So, if footpaths are made in or upon the turnpike road as contemplated by sect. 112, the portion of the road on which they are made is not taken out of the turnpike road, but still remains part of it. If a town extends its boundaries so as to include within them part of a turnpike road with footpaths, sect. 112 would apply, but the whole of the road including the footpaths would be a turnpike road though passing through a town. If this be so, I cannot avoid the conclusion that the county council are liable for the expense of paved footpaths properly forming part of the main road. They certainly would be liable in the case of footpaths existing when the road was made a turnpike road, and of all footpaths made by the turnpike trustees under sect. 3 of the general Acts, and of all made under sect. 112, in or upon the road, before it was disturnpiked. The Act of 1878 is a general one, and must receive a general interpretation. It cannot have been intended that an inquiry should be necessary into the history of every portion of the road, since there might be a different origin of the footpaths for every ten yards of a road, and, as in the case of an ordinary road, or a road made a main road under sect. 15, new footpaths may from time to time be properly made by the urban authority. Further, to ascertain the precise facts, would in many cases be impossible. In my opinion the Act of 1888, when it speaks of the main road for the time being, and speaks of the improvement and enlargement of the road, sufficiently indicates that the liability of the council is to extend to all footpaths which for the time being, are properly part of the main road for the time being; and there is nothing here to show that the paved footpaths, the costs of which the county council object to pay, are not, or indeed have not been from the first creation of the turnpike trust, part of the turnpike road which is now a main road. In my judgment the appeal fails.

Appeal dismissed.

Solicitors for the appellants, *Byrne* and *Blakiston*, for *Hand* and *Co.*, Stafford.

Solicitors for the respondents, *Sharpe, Parker*, and *Co.*, for *A. Ellis*, Burslem.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Nov. 27, 1895.

(Before CHITTY, J.)

VINE *v.* RALEIGH. (*a*)

Settled Land Act 1882—*Settlement created by will and Act of Parliament—Tenant for life or persons having powers of tenants for life.*

Under a will real estate which was directed to be purchased with the proceeds of personal estate was settled with a direction that the rents should be accumulated during the life of the testator's nephew. The nephew having survived the testator for upwards of twenty-one years, the persons who became entitled under the Thellusson Act to the rents from the expiration of that period during the remainder of the life of the nephew were the testator's next of kin, consisting of two persons, one living, and the other represented before the court by her executrixes. On a summons to determine the question whether the surviving next of kin and the executrixes of the deceased next of kin could grant leases of the real estate under the Settled Land Act:

Held, that there was a settlement within the definition of that word in sect. 2, *sub-sect.* 1, *of the Settled Land Act* 1882 *created by the will and the Thellusson Act, and that the surviving next of kin and the executrixes of the deceased next of kin had together the powers of a tenant for life under the Settled Land Acts.*

BY the will of Edward Ward Walter Raleigh, dated the 20th April 1864, he appointed Sir Edward Cholmely Dering and Charles Vine his executors, and directed that all property which he might leave in trust was to be in their confidence and custody, and, after providing for the payment of certain legacies, he directed that all the residue of his invested or moneyed property should eventually, together with accumulations, be invested in landed estate, and he directed that out of the interest derived from his property invested in funds or from rental of land the sum of 500*l.* should be paid yearly to his nephew Edward Walter Raleigh for his life, and that the surplus over and above such annuity should from time to time during the lifetime of his nephew be expended in the purchase of additional land or in the improvement of the landed estate and in maintaining in good habitable repair, houses and tenements on the property, and that should his nephew Edward Walter Raleigh marry and at his death leave a son, such son should inherit a life interest in the whole of the landed property subject to certain conditions, and that the property under similar engagements should pass on to the lawful male heir of his nephew in succession for ever, with remainder over to his nephew Walter Raleigh Amesbury, and to his male heirs after him in the event of his nephew Edward Walter Raleigh dying without male issue. The will did not contain any power to lease. Shortly after the death of the testator, which happened on the 22nd Jan. 1865, this suit was instituted for the administration of his estate, and an order had been made appointing a receiver.

In the year 1874, the then trustees of the will, with the approval of the judge and in accordance with the directions contained in the will, purchased the Mount Boone estate, near Dartmouth.

By an order of the 4th July 1883 it was ordered that Sir Edward Cholmley Dering and Lord Richard Howe Browne, the then trustees of the will, should be at liberty to present such petition under the Settled Estates Act 1877 for obtaining the leasing powers thereby conferred as they might be advised. A petition was accordingly presented by the trustees, and an order made thereon that the general powers of granting occupation leases of a small portion of the Mount

(*a*) Reported by G. WALBY KING, Esq., Barrister-at-Law.

Boone estate (the particulars whereof were set out in the schedule to the order) should vest in the petitioners and the survivor of them, or other the trustees or trustee for the time being of the will.

The period of twenty-one years from the testator's death expired on the 22nd Jan. 1886, and by an order dated the 11th March 1886 it was ordered that the receiver should, after keeping down the annuity of 500*l.* per annum directed to be paid to Edward Walter Raleigh for his life, and after maintaining in good habitable repair the houses and tenements on the property subject to the trusts of the will, divide the residue of the balances which should from time to time be certified to be due from him as from the 22nd Jan. 1886, and during the life of Edward Walter Raleigh, until further order, into equal moieties, and should pay one of such moieties to Edward Walter Raleigh as one of the next of kin of the testator, and the other of such moieties to the defendants Octavia Alexander and Jane Dorothea Curtis, as executrixes of the late defendant Caroline Amesbury, who was the other next of kin of the testator.

The trustees of the will, Sir E. C. Dering and Lord Richard H. Browne, having entered into a conditional contract to grant to the Commissioners for executing the office of Lord High Admiral, a lease of part of the Mount Boone estate, some portions of which were not included in the schedule to the order of the 11th March 1886, a summons was taken out by the trustees asking that they and the receiver might be at liberty to present to the court a petition under the Settled Estates Act 1877 for power to grant a lease in accordance with the conditional contract; and on this summons the question was raised whether Edward Walter Raleigh and the defendants Octavia Alexander and Jane Dorothea Curtis were not the proper parties to grant the lease as persons having the powers of a tenant for life under the settlement created by the will, and the Thellusson Act, which Act rendered void the direction in the will for the accumulation of the surplus rents after the expiration of twenty-one years from the testator's death, and directed that the rents so directed to be accumulated should, so long as the same were directed to be accumulated, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

Byrne, Q.C. and *Wace* for the applicants.

Levett, Q.C. and *S. Dickinson* for Edward Walter Raleigh, the surviving next of kin.

Farwell, Q.C. and *Yate Lee* for the defendants, Octavia Alexander, and Jane Dorothea Curtis.

CHITTY, J.—Under the will the personal estate was directed to be laid out in the purchase of real estate, which has been done. The real estate purchased was settled by the will. The will, however, directed that the rents should be accumulated for a period which in the result has exceeded the twenty-one years allowed by the Thellusson Act. That Act avoids the accumulations after the lapse of that time, and directs that the rent shall, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, go to and be received by such person or persons as would have been entitled thereto if such accumulations had not been directed. The period of twenty-one years elapsed in Jan. 1886, and but for the Act the accumulations would still be going on. The persons entitled under the statute are the testator's next of kin, consisting of two persons, one of whom is alive and the other is dead. The surviving next of kin is before the court, and also the executrixes of the deceased next of kin. The first question is whether there is a settlement affecting the rents in the present circumstances of the case within the meaning of sect. 2 of the Settled Land Act 1882, and in my opinion there is. Without reading the whole of the definition it is enough to say it includes a will and an Act of Parliament, and in my opinion, putting the will and the Act together, there is a settlement. It is not necessary to consider what would have been the result if the Thellusson Act had merely avoided the direction to accumulate; the Act goes beyond that, and directs to whom the rents directed to be accumulated contrary to the Act are to go. I hold, therefore, that the case falls within the Settled Land Act 1882. Then it is said that the surviving next of kin and the executrixes of the deceased next of kin constitute a tenant for life, or have the powers of a tenant for life within the meaning of the Settled Land Act 1882, either by virtue of sect. 2, sub-sect. 5, or sect. 58, sub-sect 1 (v.). In my opinion it is not necessary to say whether the case falls under one section or the other. It is plainly within sect. 58, sub-sect. 1 (v.). It is quite possible there may be a question with regard to the executrixes under sect. 2, sub-sect. 5, whether they are beneficially entitled to possession. My personal opinion is that for this purpose they are persons beneficially entitled, because they alone can receive the share of the deceased next of kin, and it would be going I think too far to say that the persons entitled under the will of the next of kin are the persons beneficially entitled to possession. But it is not necessary to decide this point. I answer the question raised by saying that the surviving next of kin and the executrixes of the deceased next of kin have the powers of a tenant for life within the meaning of the Settled Land Act 1882. The declaration will be that the persons to whom the surplus rents are directed to be paid have the powers of a tenant for life within the meaning of the Settled Land Act 1882.

Solicitors: *Patersons*, *Snow*, *Bloxam*, and *Kinder*; *Pitch* and *Smurthwaite*; *Peacock* and *Goddard*.

Wednesday, Nov. 27, 1895.

(Before CHITTY, J.)

BATES *v.* KESTERTON. (*a*)

Settled Land Act 1882—*Married women entitled in fee restrained from anticipation—Settlement—Tenants for life.*

Two married women, each entitled under a will to an equitable estate in freeholds in fee simple for her separate use without power of anticipation, having contracted to sell the property, claimed to be able to convey the same as tenants for life, or persons having the powers of a tenant for life, under the Settled Land Acts, contending that, as their husbands, if surviving them, would be

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

entitled after their deaths to an estate as tenants by the curtesy if they failed to dispose of the property by will (there being in each case issue born capable of inheriting), there was a settlement within the definition of that word in sect. 2, sub-sect. 1, of the Settled Land Act 1882.

Held, that there was but one estate in the married women, and no limitations to the husbands by virtue of any settlement; that, if the husbands took estates as tenants by the curtesy, they would do so by the general law, and that the married women were not tenants for life, or persons having the powers of a tenant for life under the Settled Land Acts.

SOLOMON HILBERT by his will, dated the 12th May 1863, bequeathed to trustees his leasehold messuages, Nos. 1 and 2, College-road, Pimlico, upon trust to pay the net yearly rents to his daughter, Mary Bates, during her life, and after her decease upon trust to pay and divide the same unto and amongst all and every the child and children of Mary Bates in equal shares as tenants in common; and the testator declared that the rents so bequeathed to each of his daughters or granddaughters should be for her sole and separate use, free from the debts, control, or engagement of any husband, and that neither of his daughters or granddaughters should have power to anticipate the same in any manner whatever.

The testator died on the 18th June 1866, and in 1890 the leasehold premises were taken compulsorily under the Lands Clauses Act by the receiver of the metropolitan police, and the purchase money was paid into court.

On the 16th June 1891 an order was made by North, J. approving of a conditional contract by which 1600*l.*, part of the purchase money, was to be invested in the purchase of a freehold messuage and premises, No. 87, South-end, Croydon, and by an indenture, dated the 20th June 1891, the freehold messuage and premises were conveyed to the use of the trustees of the will in fee simple upon the trusts expressed and contained in the will concerning the said leasehold premises, so far as the same were applicable to freehold hereditaments, and were then subsisting and capable of taking effect.

By an order, dated the 29th July 1891, made on the application of Mary Bates, in the matter of the freehold hereditaments subject to the trusts of the settlement of the leasehold hereditaments made by the will and in the matter of the Settled Land Acts 1882 to 1890, Michael Macmorran and Henry Farthing were appointed trustees of the settlement for the purposes of the Acts.

Mary Bates died on the 6th April 1893, and her children had entered into a contract for the sale of the freehold messuage and premises, No. 87, South-end, Croydon, to the defendant. Two of the children, namely, Mary Farthing and Edith Ann Giles, were married, and both had issue living, and the defendant objected to the title on the ground that the shares of Mary Farthing and Edith Ann Giles in the property were subject to the restraint on anticipation, and that a conveyance of these shares could not be made unless the restraint was removed by an order under sect. 39 of the Conveyancing Act 1881. The vendors contended that the married women were tenants for life or had the powers of tenants for life under the Settled Land Act 1882, and could convey their shares under that Act. The vendors having brought this action for specific performance of the contract, it was ultimately arranged between the parties that the only question to be determined by the court should be whether the married women were tenants for life or had the powers of tenants for life under the Settled Land Acts.

Byrne, Q.C. and *A. Macmorran* for the plaintiffs.—The effect of the restraint on anticipation is to make each of the married women tenant for life of her share with remainder to her husband if he survives her for his life as tenant by the curtesy, and therefore each share is held in trust for persons by way of succession, so that there is a settlement within sect. 2, sub-sect. 1, of the Settled Land Act 1882. The husband's interest can only be defeated by the will of his wife, which does not come into operation until her death. [CHITTY, J. referred to *Taylor* v. *Meads* (4 De G. & Sm. 597) and *Cooper* v. *Macdonald* (38 L. T. Rep. 191; 7 Ch. Div. 288).]

E. P. Hewitt for the defendant.—If the husband succeeds to his wife's share on her death it will be by operation of law, and not by virtue of the will. There is no settlement on persons by way of succession under the will.

Byrne, Q.C. in reply.

CHITTY, J.—The question arises between vendor and purchaser. The vendors contend that the two married women have the powers of or are tenants for life under the Settled Land Act 1882. The vendors' argument results in this, that because the married women are restrained from anticipation they can dispose of the property under the Settled Land Act. But I will examine the facts and the Act. To understand the argument it is necessary to go back to the will. The property is now freehold, and at the present moment it is held by the trustees upon trusts corresponding to the trusts of the leaseholds bequeathed by the will, and I must treat the property as freehold. The leasehold property was given by the will to trustees upon trust to pay the rents to the testator's daughter Mary Bates for life (she died in 1893), and upon her death to pay and divide the net yearly rents among her children in equal shares. Mary Bates had eight children born in the testator's lifetime, and who survived him, and the married women in question are entitled to two shares. The testator then declared that the rents bequeathed to his granddaughters should be for their separate use, their receipts to be a good discharge, and that neither of his granddaughters should have power to anticipate the same in any manner whatsoever. The limitation to the granddaughters, though apparently to a class with a restriction against anticipation, is a good limitation and not void for remoteness: (See *Re Russell*, 73 L. T. Rep. 195; (1895) 2 Ch. 698.) Counsel for the defendant admitted that the married women have issue born who are capable of inheriting, and it is said that, if the married women die without having disposed of their shares by will, the husbands, if they survive, will be entitled by the curtesy, and that consequently there is a settlement. One thing is quite plain, that there is only one estate created by the will, and that is limited to the married women. In

Taylor v. *Meads* (*ubi sup.*), where property was vested in trustees upon trust for a married woman, her heirs and assigns, with a power of appointment, and in default of appointment in trust for her, her heirs and assigns for ever, with a declaration that she should, notwithstanding her coverture, stand possessed of the property for her sole and separate use and benefit, and that the same should not be liable to the control of her husband, Lord Westbury said: "The estate given to Elizabeth Meads" (the married woman) "is one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that the husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman." In that case there was no restraint against anticipation, but the ground of the Lord Chancellor's decision was that the estate which the married woman took was one and entire. In *Cooper* v. *Macdonald* (*ubi sup.*) where a married woman, who under the limitations of a will, was equitable tenant in tail to her separate use of certain freehold property but restrained from anticipation, had barred the equitable entail, and died, having by her will devised the estate for the benefit of her children; and her husband having survived her claimed to be entitled to an estate by curtesy, but it was held that the restraint on anticipation did not prevent the wife from barring the entail, and acquiring the equitable fee, and that the wife, having acquired an equitable fee for her separate use, had power to dispose of the property by will, and to defeat her husband's right as tenant by the curtesy. I think, on the construction of the will before me, that there is a separate use annexed to the fee simple, and that the married women have the power, as against their husbands and their heirs, to dispose of their shares in the property by will; so long as they remain covert, they cannot dispose of the property by deed; if their husbands should die in their lifetime, they will be free from the restraint, and can dispose of the property as they think fit. In my opinion there is by this will but one estate vested in the married women, subject to the restraint against anticipation which equity has allowed to be imposed. I now come to the Act of Parliament. Sect. 2, sub-sect. 1, enacts that any instrument under or by virtue of which land now stands limited to or in trust for any persons by way of succession creates a settlement. It is said for the vendors that the effect of the restraint on anticipation brings the case within the definition of a settlement in that section, and that the land now stands limited to or in trust for persons by way of succession. In my opinion that argument is not correct. It is not under or by virtue of the will that the husbands, if they survive, will take an estate by the curtesy but by virtue of the general law. The case, however, does not stand alone on that section; it is necessary to deal with sect. 61. There is nothing in the "foregoing provisions" of the Act which makes a married woman entitled in fee simple in possession either tenant for life or a person having the powers of a tenant for life. It was obviously unnecessary. There is also nothing in the "foregoing provisions" which would apply to the case of a married woman entitled in possession to the fee simple of lands settled to her separate use, as in *Taylor* v. *Meads*. Sub-sect. 1 runs thus; "The foregoing provisions of this Act do not apply to the case of a married woman." The case of a married woman entitled in fee simple for her separate use is not within sub-sect. 2. I pass over sects. 3, 4, and 5, and I come to sub-sect. 6, which runs thus: "A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act;" so that where she is tenant for life, or has the powers of a tenant for life, the mere restraint on anticipation is not to prevent the exercise by her of the powers. The sub-section does not say that because she is restrained from anticipation therefore she is a tenant for life, or has the powers of a tenant for life. The vendor's case was founded on this, that the husband may take an estate as tenant by curtesy; that there is an initiate estate in the husband by the curtesy. The Act of 1882 enumerates among the persons who have the powers of a tenant for life "a tenant by the curtesy" (sect. 58 sub-sects (1) (viii.) That means a tenant by the curtesy in possession. Then sect. 8 of the Settled Land Act 1884 enacts that "for the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife." That means the estate of a tenant by the curtesy in possession. These references to the estate of a tenant by the curtesy do not assist the vendors in their present contention. As I have already said, there is but one estate in the married women, and no limitation to the husbands by virtue of any settlement, but if they survive their wives they may take by the general law. Putting the whole case together I am of opinion that the vendors have not succeeded in making out the proposition that because the married women are restrained from anticipation therefore they have the powers of tenants for life within the meaning of the Settled Land Act 1882.

[His Lordship, upon the application of the plaintiffs, Mary Farthing and Edith Ann Giles, made an order that for the purpose of enabling the sale to be completed the restraint on anticipation should, under sect. 39 of the Conveyancing Act 1881, be entirely removed on the production of an affidavit that the married women were not entitled to any other property under the will, and that the husbands desired this restraint to be removed.]

Solicitors: *Mead* and *Son*; *Preston, Stow*, and *Preston*.

Tuesday, Dec. 17, 1895.

(Before KEKEWICH, J.)

Re CHAPMAN; COCKS *v.* CHAPMAN. (*a*)

Trustees—Breach of trust—Investment—Unauthorised—Liability—Trustee Act 1893 *Amendment Act* 1894 (57 *Vict. c.* 10), *s.* 4.

Where trustees of a will had allowed certain mortgages to remain unrealised, and part of the money secured by such mortgages had been lost: Held, that sect. 4 *of the Trustee Act* 1893 *Amendment Act* 1894 *had not a retrospective operation*

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

so as to exempt the trustees from liability for a breach of trust committed before the passing of the Act in retaining an investment unauthorised by the instrument or by the general law; therefore the trustees were jointly and severally liable to make good to the trust estate the deficiency on the mortgages.

JAMES CHAPMAN, late of Mundford, in the county of Norfolk, teadealer, by his will, dated the 15th June 1871, appointed the defendant Martha Ann Chapman, Henry Chapman, and James Rollinson executors and trustees thereof, and gave to them all his real and personal estate upon trust for the said Martha Ann Chapman during her life, with remainder to her children when they should respectively attain the age of twenty-one years, the children of any child dying under twenty-one being entitled at the age of twenty-one to the share of the child so dying, and the testator, in default of such issue of the said Martha Ann Chapman, gave the residue of his personal estate equally between his nephews and nieces, the sons and daughters of his late two sisters, Mary Green Cocks and Sarah Tyrrell, share and share alike, when and as they should attain the age of twenty-one years, the children of any child dying under twenty-one being entitled at the age of twenty-one to the share of the child so dying. And the testator directed his executors to invest such of the trust moneys under his will as were not thereinbefore respectively directed to be invested, upon good real or Government security at interest, with full power at any time to alter and vary any of the investments directed by his said will to be made, and to re-invest the said trust moneys upon like securities without being answerable or accountable for any loss occasioned thereby. And he declared that each of his said executors should be answerable and accountable only for so much of the trust moneys under his said will as they should respectively actually receive, and each of them for her and his own separate acts, deeds, and deficiencies and defaults only, and not the one for the other or others of them, and he gave to his said executors all hereditaments vested in him upon any trust or by way of mortgage to the intent that they might be better enabled to get in, receive, and discharge all such trust estates and moneys secured by way of mortgage.

The said James Rollinson died on the 5th April 1889.

James Chapman at the time of his death was possessed of certain mortgage securities to a large amount. He died on the 28th July 1880, and his trustees and executors, Henry Chapman, since deceased, and the defendant Martha Ann Chapman, relying as they said upon the testator's judgment that the property comprised in the said mortgages respectively was a sufficient security for the several sums advanced upon the said mortgages respectively, allowed the said mortgages to remain outstanding. Subsequently, and in consequence of the general depreciation in the value of property in the places where the mortgaged lands were situated, the trustees believed it to be impossible to recover the amounts due under the mortgages, or to realise the mortgage securities except at a considerable loss, and they elected to hold the mortgage securities until a more favourable time arrived for realising them.

On the 21st Dec. 1892 the plaintiffs and the defendant Martha Ann Chapman received from the defendant Sydney Cozens Hardy a notice in the following terms:

I, the undersigned, Sydney Cozens Hardy, of the city of Norwich, gentleman, as owner of a share in the residuary personal estate of the said James Chapman, deceased, expectant upon the decease of the said Martha Ann Chapman without issue, and as mortgagee of another share in the same estate, hereby give you and each of you notice that the trustees of the will of the said James Chapman were guilty of a breach of trust in not forthwith, after the decease of the said James Chapman, investing the trust funds under the said will in good and proper securities as required by the said will or authorised by law as investments for trust funds, and I hereby give you notice that I shall hold you and the estate of the said Henry Chapman responsible for all losses, costs, and expenses arising to the trust estate by, or by reason, or on account of such breach of trust. And I hereby require you, and each of you, forthwith to take all necessary steps to invest the trust funds as required by the said will or by law, and to make good any deficiency in the trust funds.

This was an originating summons taken out by the plaintiffs, the executors of the will of the said Henry Chapman, who died on the 11th June 1891, to determine among others the following question: Whether the estate of the said Henry Chapman, or the said Martha Ann Chapman, or either of them, ought to make good any deficiencies arising on any of the said mortgages or any parts thereof. The plaintiffs admitted assets.

The defendant Martha Ann Chapman at the time when these proceedings were commenced was in possession by her tenants of all the lands comprised in the mortgage securities except the lands comprised in two mortgages which remained in the occupation of the mortgagors.

Sect. 4 of the Trustee Act 1893 Amendment Act 1894 provides:

A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law.

Warrington, Q.C. and *Gatey* for the plaintiffs.—The first question is, does the 4th section of the Trustee Act 1893 Amendment Act 1894 apply to these trustees? We submit that it does. The Act is intended to be retrospective:

Trustee Act 1893 (56 & 57 Vict. c. 53), ss. 8 and 9.
Wolstenholme on the Conveyancing and Settled Land Acts (7th edit.), p. 243.

Secondly, the claim is barred by the Statute of Limitations:

The Trustee Act 1888 (51 & 52 Vict. c. 59), s. 8, (*a*) and (*b*);
Wolstenholme (7th edit.), p. 188.

Marten, Q.C. and *Wilkinson* for the tenant for life and legal personal representative of the original testator.—The Trustee Act 1893 Amendment Act 1894 was an amending Act, and was intended to be retrospective. The 1st, 2nd, and 3rd sections altered respectively sects. 30, 41, and 44 of the Trustee Act 1893:

Attorney-General v. *Theobald*, 62 L. T. Rep. 768; 24 Q. B. Div. 557;
Ellis on the Trustee Act (5th edit.);
Rex v. *Dursley*, 3 Barn. & Ad. 465;
Freeman v. *Moyes*, 1 Ad. & Ell. 338;
Pardo v. *Bingham*, 20 L. T. Rep. 464; 4 Ch. App. 735;
Towler v. *Chatterton*, 6 Bing. 258.

Those cases illustrate the general principle upon which an Act should be deemed to have a retrospective effect. "A trustee shall not be liable," that is after the passing of the Act of 1894. As to the second point, namely, the Statute of Limitations, sub-sect. (*a*) of sect. 8 of the Trustee Act 1888 applies.

Warmington, Q.C. and *Micklem*, for Mr. Sydney Cozens Hardy, were not called on.

KEKEWICH, J.—I am called upon to say whether sect. 4 of the Trustee Act 1893 Amendment Act 1894 is retrospective or not, the question being this: According to the chief clerk's certificate the trustees ought to have called in the mortgages not later than the end of July 1881; since that date they have been guilty of a breach of trust in not calling in the mortgages. They did not do so, and on the passing of the Trustee Act 1893 Amendment Act on the 18th June 1894 they had for thirteen years been guilty of a breach of trust, and were under the obligation of making good the loss incurred under the breach of trust, that is, they were liable to make good the deficiency on the realisation of the securities. Then comes the Act of 1894, and says (sect. 4): "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust, or by the general law." I notice in passing that all I am dealing with is "breach of trust by reason only of his continuing." The question is, therefore, whether when the Act passed it relieved the trustees from an obligation under which they lay up to that time, an obligation not enforced, but enforceable. There are many cases on the general doctrine whether an Act is retrospective or not, and many cases on particular statutes. But I have the general law concisely stated by Lord Hatherley in *Pardo* v. *Bingham* (20 L. T. Rep. 464; 4 Ch. App. 735), where he says, at p. 739 of 4 Ch. App.: "The general rule of law being that, except there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to have a retrospective construction." In other words, you assume that it is not retrospective, but the assumption may be rebutted. On the next page Lord Hatherley gives a guide for deciding the intention of the Legislature. He says: "In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated." The first thing I have to do is to construe the meaning of the words before me, which is not so easy as it at first sight appears. What is the meaning of the word liable? The etymological meaning is not of much service. Regarded by jurists as modern English, the word has not a distinct meaning in ancient law. It is a single word for expressing "under an obligation" or "obliged." A trustee is not under an obligation or obliged. That does not help us: it only explains the word, and does not show whether the word "shall" must be construed prospectively or retrospectively. I must therefore take Lord Hatherley's words as a guide. The statute is remedial. Lord Hatherley says I must look at the remedy sought to be applied. I must see whether the Legislature in passing the Act was minded to relieve trustees of liability to which up to that time they had been subject. I will not fall back upon maxims or rules to construe remedial statutes otherwise than other statutes. I am not entitled to give to the statute an interpretation more favourable to trustees than if it was not remedial. I must give the statute the best meaning I can. I look at the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what alterations in the law the Legislature contemplated. The general scope is of no assistance. It is an amending statute for the purpose of amending two or three clauses of the Trustee Act of 1893. With the exception of this fourth section there is no reference to the general law. Three sections are devoted to amending the Act of 1893. Having done that there is no scope or purview to give me a guide, so I pass on. But I look at the scope and purview of sect. 4. It is no doubt to relieve trustees from liability for breach of trust. That question received the attention of the Legislature for many years. The Trustee Act of 1888 was one of a large remedial character, and the Act of 1893 repealed the whole of that Act except sections 1 and 8, and re-enacted the other remedial sections. The Trustee Act 1893 Amendment Act 1894 does not mention the Trustee Act 1888. But the Trustee Act 1888 and the Act of 1893 constitute a code, and the Act of 1894 must be regarded as an amendment of that code; and to find the scope and purview of the Act of 1894 one must look at the Trustee Act 1888 as well as the Trustee Act 1893. The Legislature must be taken to have passed the Act of 1894, affording relief to trustees beyond the relief offered by the Act of 1888. The Act of 1888 introduced large measures of relief, and we must see how far trustees were relieved up to that time. Up to then no statute of limitations ran in favour of trustees, but by sect. 8 of the Trustee Act 1888 the Statute of Limitations may be pleaded by trustees. Now sub-sect. 3 of sect. 8 of the Act of 1888 provides that: "This section shall apply only to actions or other proceedings commenced after the 1st day of Jan., one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations." As regards *cestuis que trust*, their rights were reserved until after the 1st Jan. 1890. Then turning to sects. 8 and 9 of the Trustee Act 1893, sub-sect. 4 of sect. 8 says: "This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending in reference thereto on the 24th day of Dec. 1888." The section is thus made expressly retrospective. Sub-sect. 2 of sect. 9 says: "This section applies to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the 24th day of Dec. 1888." So that in the provisions of the Trustee Act 1893, which this Act of 1894 sought to amend, I find special provision for the commencement of the relief, special conditions as regards the relief, and the time at which it shall commence. I have nothing of that kind here, and it is strange that the language is slightly altered. In sect. 8 of the Trustee Act 1893 the words are, "A trustee shall not be chargeable with breach of trust;" that is

to say, he shall not be made to pay. The words in sect. 4 of the Act of 1894 are: "A trustee shall not be liable for breach of trust." I do not derive much assistance from the meaning of the words. It is curious that the Legislature should use the word liable instead of chargeable, and should add no directions as to when the liability should cease. As to the general scope and purview of the statute, I see nothing retrospective in its operation. What was the former state of the law? It was that then trustees were liable. It is said that the remedy of the *cestui que trust* shall be taken away. I cannot assume that the Legislature by one line of the statute meant to take it away. I cannot hold that sect. 4 of the Trustee Act 1893 Amendment Act 1894 is retrospective, so as to relieve trustees from an obligation which existed at the date of the Act. Declaration that the estate of the said Henry Chapman, deceased, and the defendant Martha Ann Chapman personally, are jointly and severally liable, and that the plaintiffs by reason of their admission of assets are personally liable, to make good to the estate of James Chapman, the testator in the chief clerk's certificate mentioned, all loss which has already accrued or may hereafter accrue by reason of the said Henry Chapman and Martha Ann Chapman having improperly allowed to remain outstanding after the end of July 1881 the said mortgages in the said schedule mentioned, but this declaration is to be without prejudice to any question as between the defendant Martha Ann Chapman and the estate of Henry Chapman, deceased.

Solicitors: *H. A. Maude*, for *Francis* and *Back*, Norwich; *Waterhouse, Winterbotham*, and *Co.*

Thursday, Nov. 28, 1895.

(Before KEKEWICH, J.)

Re WHEELER AND DE ROCHOW'S TRUSTS. (*a*)

Trustee — Power of appointing new trustees — Bankruptcy of trustee—Trustee "unfit to act"— Person nominated for the purpose of appointing new trustees by the instrument—Trustee Act 1893 (56 *&* 57 *Vict. c.* 53), *s.* 10.

Under a marriage settlement made in 1864, *the husband was given the power of appointing new trustees by deed in the event of any of the trustees of the settlement dying, desiring to be discharged from or refusing, declining, or becoming incapable to act in the execution of the trusts. One of the trustees became a bankrupt and absconded. The husband purported, in exercise of the powers given him by the settlement and under the Trustee Act* 1893, *to appoint a new trustee in his place.*

Held, that the settlement having specified the cases in which the power of appointing new trustees might be exercised and not having provided for the particular event of bankruptcy or unfitness, the husband was not the person nominated for the purpose of appointing new trustees by the instrument in that particular event within sect. 10 *of the Trustee Act* 1893; *and that the appointment made by him was invalid.*

ADJOURNED SUMMONS.

A settlement, dated the 16th March 1864, made upon the marriage of Mr. A. E. De Rochow and Mrs. E. S. Wheeler (afterwards De Rochow) contained the following proviso:

Provided also, and it is hereby further agreed and declared that, in case the trustees hereby constituted or any of them, or any trustee or trustees to be appointed under this present provision or by the Court of Chancery, or by any other competent authority, shall die, desire to be discharged from, or refuse, decline, or become incapable to act in the execution of the trusts or powers herein contained, then and so often as the same shall happen it shall be lawful for the said A. E. De Rochow and E. S. Wheeler, or the survivor of them, and as to the said E. S. Wheeler notwithstanding her now intended or any future coverture, and whether covert or sole . . . by any deed or deeds to appoint any other person or persons to supply the place of the trustee or trustees respectively, so dying, desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid.

L. M. Wynne, Alfred Dixon and A. L. Wheeler were the duly appointed trustees of the settlement. Mrs. E. J. De Rochow died in 1892. There was no issue of the marriage. On the 9th March 1895 L. M. Wynne was adjudicated a bankrupt. He had previously absconded and his whereabouts was unknown. By a deed dated the 13th July 1895 A. E. De Rochow purported in exercise of the powers conferred upon him by the marriage settlement, and by virtue of the provisions of the Trustee Act 1893 to appoint J. T. B. Sewell to be trustee in the place of L. M. Wynne, and to act conjointly with the two other trustees for all the purposes of the marriage settlement.

Cross summonses were taken out (1) by A. E. De Rochow, and J. T. B. Sewell asking that under sect. 35 of the Trustee Act 1893 the right to call for a transfer of and to transfer certain trust funds subject to the trusts of the marriage settlement, and then standing in the names of L. M. Wynne, Alfred Dixon and A. L. Wheeler, and to receive any dividends due or to accrue due thereon might vest in the said Alfred Dixon, A. L. Wheeler and J. T. B. Sewell; and (2) by beneficiaries entitled under the marriage settlement to the trust funds subject to the life estate of A. E. De Rochow asking for an order that under sects. 25 (1) and 35 (1) of the Trustee Act 1893 Major-General Henry Cole Magenis might be appointed a trustee of the marriage settlement in substitution for L. M. Wynne, and that the right to transfer or call for a transfer of the stocks and funds subject to the trusts of the settlement might be vested in such new trustee jointly with Alfred Dixon and A. L. Wheeler.

Bramwell Davis, Q.C. and *F. H. Maugham* for A. E. De Rochow and J. T. B. Sewell.—The appointment made by the deed of the 13th July 1895 is valid, for, although there is no power given by the settlement to appoint new trustees in the particular event which has happened, Mr. De Rochow is enabled to appoint by virtue of sect. 10 (1) of the Trustee Act 1893, which provides that, "Where a trustee either original or substituted, whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representative of the last surviving or continuing trustee may by writing appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable as aforesaid." L. M. Wynne has been adjudicated a bankrupt; he is therefore "unfit to act," and Mr. De Rochow is "the person nominated for the purpose of appointing new trustees by the instrument." The Act is cumulative and adds to the powers given by the settlement which Mr. De Rochow was the person to exercise. *Cecil* v. *Langdon* (51 L. T. Rep. 618; 28 Ch. Div. 1) is not directly in point. They also referred to

Re Coates to Parsons, 56 L. T. Rep. 16; 34 Ch. Div. 370.

The words in sect. 31 of the Conveyancing Act 1881, "the person or persons nominated for this purpose by the instrument, if any, creating the trust" are changed in sect. 10 of the Trustee Act 1893, to "the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust," which show that the later Act was intended to be wider than the former so as to give the person nominated the power of appointing new trustees under the Act, even although the instrument contained powers of appointing in certain events, and at the same time did not include all the events provided for by the Act. We rely on

Re Walker and Hughes' Contract, 49 L. T. Rep. 597; 24 Ch. Div. 698.

Warrington, Q.C. and *G. Borthwick* for the beneficiaries.—Mr. De Rochow has no power to make this appointment under sect. 10 of the Trustee Act or otherwise, for the power in the settlement expressly specifies the cases in which the appointment may be made, and includes only some of the cases mentioned in sect. 10. Although Wynne may be unfit he is not incapable, his case is therefore not provided for. The difference in language between sect. 10 of the Trustee Act 1893 and sect. 31 of the Conveyancing Act 1881 is merely grammatical. This case is governed by *Cecil* v. *Langdon* (*ubi sup.*). Sub-sect. 5 of sect. 10 of the Trustee Act 1893 provides that that section "applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to any provisions therein contained." Here the terms of the instrument do not provide for the case of bankruptcy. Under sect. 25 (1) of the Trustee Act 1893 the court is in particular given power to appoint a new trustee in the place of a bankrupt trustee.

Bramwell Davis, Q.C. replied.

KEKEWICH, J.—This proviso for the appointment of new trustees, which is now to be found in sect. 10 of the Trustee Act 1893 and in the same or nearly the same language in preceding Acts of Parliament, is of a remedial character, that is to say, it was devised in order to avoid difficulties and to enable them to be overcome without the necessity of having resort to the court, thus enabling new trustees to be appointed by deed in cases in which it might not have been possible to do so formerly. Therefore the court is, I think, justified, not in stretching or unduly straining the language of the Act certainly, but still in adopting any fair construction which will enable a larger effect to be given to this legislative provision. The language of the Act must not, however, be strained even although, on the other hand, one may be apprehensive of giving it too narrow a construction as it appears Lindley, L.J. was in the case of *Cecil* v. *Langdon* (*ubi sup.*). One must keep within the meaning of the statute, especially if it be seen that there may be danger in giving it a more extensive construction. That principle must afford a guide in construing the meaning of this proviso. The words of sect. 10 of the Trustee Act 1893 which create the difficulty are "then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust." I leave out what follows, and I do not pause to consider the meaning of the words "if any." These words are not new, they are a slight variation on the words to be found in sect. 31 of the Conveyancing and Law of Property Act 1881, which are themselves a slight variation—for this purpose not a variation at all—in the language used in sect. 27 of Lord Cranworth's Act. That last Act was the first Act which ever contained any proviso of this kind at all, and up to that time it had been a common form to insert in marriage settlements a power or proviso directing that the appointment of new trustees should, in certain specified events, be vested in the husband and the wife and the survivor of them, and in wills and other cases in other persons, such as the tenant for life, and sometimes the tenant for life in succession. It was then very common to say that some persons should have the power of appointing new trustees in that way. But up to that time it was most unusual, indeed, I think I may say it had never been done at all, to insert a proviso generally that such and such persons should have the power of appointing new trustees without mentioning the events in which the power was given, because there being no over-riding statutory provisions like those in Lord Cranworth's Act the words would have meant nothing unless all the cases in which the appointment could be made were actually set forth *seriatim*. Then, in consequence of Lord Cranworth's Act, it became the practice of conveyancers to insert a provision that the power of appointing new trustees generally should be vested in certain persons, naming them, without mentioning the events in which the power was to arise, and in all subsequent legislation one is entitled to suppose that that practice of conveyancers was present to the minds of the legislators and of the gentlemen who drafted this proviso. Keeping that fact in mind I do not think there is much difficulty here in understanding what is really intended. It is intended, and sub-sect. 5 of sect. 10 of the Trustee Act 1893 bears it out, that there should be an enlargement of the powers conferred by a settlor or testator, and that there should be a power of appointing new trustees without resort to the court and outside any provisions of that kind made by the instrument, not so as to oust them, but so as to be an extension of them. That was

no doubt the intention of the Legislature. Then we have these words, "the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust." What does that mean? It means, in the first place, simply the persons who are nominated to appoint new trustees by such a power as I have mentioned just now. That is easy enough. But can the Legislature be taken to have considered only those cases where there is a mere nomination? Does it not intend that where the power is vested in persons in certain events which are expressed in the instrument they are to be empowered under the Act to appoint new trustees in events not contemplated by the instrument? There is one strong reason urged why that should be so. Certain events are contemplated by the instrument itself, and the Act of Parliament is intended to be more extensive, and it may very well be intended that persons who are given by the instrument power to appoint new trustees in the events therein set out should also have those powers in the events specified by the Act. But before you adopt that construction you must consider this, that everything is made subject to the provisions of the instrument itself, and apart from sub-sect. 5 of sect. 10 one must not be hasty in supposing that the Legislature intended to interfere with contracts which it does not declare to be void. And if that construction is adopted, there are many cases to which it would be difficult to apply this provision of sect. 10. For instance, it is not uncommon to provide by a marriage settlement or a will that the power of appointing new trustees shall be as regards one part of the settled property or funds vested in one set of persons and as regards another in another set of persons. Each set are "persons nominated for the purpose of appointing new trustees," and I do not doubt in the case of a marriage settlement that while the persons nominated for the purpose of appointing new trustees over the wife's property would be the persons to exercise the power given by the Act when occasion arises over that property, the persons nominated by the instrument to appoint new trustees over the husband's property would be the persons to exercise the powers under the Act over that property. In the first case therefore that occurs to the mind, one by no means improbable, it is found that the Act does not mean literally what it says, and that the persons nominated by the instrument are not in all cases the persons to exercise the powers of appointing given by the Act. Testators frequently make provisions respecting the appointment of new trustees for special purposes; for instance, some are appointed for carrying on their business and others for the management of their estates. If the wider meaning were given to the Act, in all these cases the difficulty would occur, and I cannot help concluding that the Act means that only the persons nominated for the purpose of appointing new trustees *ad hoc*, that is to say, with reference to the particular property you are dealing with, may appoint. This is a sensible limitation which can be easily read into deed or will. It therefore follows that the power conferred by the Act is not of so extensive a character as is contended for, but really means that only the persons nominated in the particular events, and for the particular property, are the persons who are to have the power of appointing new trustees under sect. 10 of the Trustee Act 1893. That construction harmonises with what I have said that one must not jump to the conclusion that the Legislature meant to interfere with contracts. A testator or settlor might well think that a person who was competent to appoint new trustees in some events was not competent to do so in others. Therefore I think that, as in this case the instrument does not confer the power of appointing new trustees in the event of the bankruptcy of a trustee, and although Wynne may be unfit, the powers conferred by the instrument are inapplicable. The powers given by the Legislature must be exercised by the persons appointed by the Legislature and not by the persons nominated by the instrument, they not being nominated *ad hoc*. Then it is said there is no occasion for me to give a decision in this case as *res integra*, for that the matter is concluded by authority, and *Cecil v. Langdon* (*ubi sup.*) is cited. But I think that my construction is right, and at any rate it is in harmony with that of the Lords Justices in *Cecil* v. *Langdon* (*ubi sup.*), although the point was not there directly before them. I do not think therefore that I am concluded from expressing my opinion by authority. Then it is said there is a decision of North, J. in *Re Walter and Hughes' Contract* (*ubi sup.*) in which it is contended he expresses a different opinion from the conclusion at which I have arrived. But I do not think he was dealing with this point. He only repeats in his own language the provisions of sect. 31 of the Conveyancing Act 1881. He says: "I think the intention of sect. 31 was that "whenever a person had been nominated by the instrument creating the trust, as the person to appoint new trustees he should be the person who should have the power of filling up any vacancy occurring under the provisions of sect. 31." He may have meant, I do not say his language is not capable of that construction, "notwithstanding that the event in which the vacancy occurred was not contemplated by the settlement," but he didn't say so directly, and therefore I do not think I am precluded by what was said in that case from forming my own conclusion on this point. Then there is one other point mentioned by Mr. Maugham. He says there is a difference between the language of sect. 31 of the Conveyancing Act 1881 and that of sect. 10 of the Trustee Act 1893, and no doubt there is a change of language which is worth attention; but I think that, although the 10th section of the Act of 1893 is more artistically drawn, it is really a mere amendment in drafting without any real alteration in the meaning. The result is, that the vesting order asked for by the first summons cannot be made. On that summons there will be no order. On the second summons there must be an order appointing new trustees followed by a vesting order.

Solicitors: *Dixon, Weld*, and *Dixon*; *Blunt* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Dec. 12 *and* 13, 1895.

(Before the PRESIDENT (Sir Francis Jeune) and TRINITY MASTERS.)

THE ALBIS. (*a*)

Collision — Steamships — Narrowing of lights — Indications of risk—Regulations for Preventing Collisions at Sea, art. 18.

Where two steamships are approaching one another at sea in such a position as to pass in safety, the closing in and coming more into line of the masthead and a side light is not necessarily such an indication that the ship is altering her course so as to cause risk of collision and to impose upon the other ship the duty to obey art. 18 *of the Regulations.*

THIS was an action of collision *in rem* by the owners of the steamship *Boldon* against the steamship *Albis*.

The defendants counter-claimed.

The facts alleged by the plaintiffs were as follows:

Shortly before 10.15 p.m. on the 2nd Aug. 1895 the *Boldon*, a screw steamship of 720 tons register, was in the North Sea on a voyage from the Tyne to London. She was steering S.W. by S. mag., making about eight and a half knots an hour. In these circumstances those on board the *Boldon* saw the masthead light of the *Albis* distant about three miles, and bearing about a point on the starboard bow. Shortly after the green light came into view, and then the *Albis*, after momentarily showing all three lights, approached showing only the masthead and green lights and in a position to pass the *Boldon* safely starboard side to starboard side. But when the *Albis* was about a quarter of a mile distant from the *Boldon*, and bore about three points on her starboard bow, she opened her red light apparently under a port helm and caused danger of collision, and notwithstanding that the engines of the *Boldon* were immediately reversed full speed astern and two short blasts and, immediately afterwards, three short blasts were blown on her whistle, and the *Albis* was loudly hailed, the *Albis* came on at great speed under a port helm, and with her stem struck the starboard bow of the *Boldon* a violent blow, cutting her down below the water line, causing her so much damage that she had to be beached to escape from foundering.

The defendants alleged that the two vessels approached each other red light to red light, and in a position to pass clear port side to port side until the *Boldon* was within about a quarter of a mile of the *Albis*, when she suddenly opened her green light about two points on the port bow of the *Albis* and shut in her red light apparently under a starboard helm, and came into collision with the *Albis*.

Aspinall, Q.C. and *Stephens* for the plaintiffs.—The *Albis* was alone to blame.

Bucknill, Q.C. and Dr. *Stubbs*, for the defendants, *contrâ*.—The *Boldon* is alone to blame, but, even assuming the plaintiff's story to be correct, the indication afforded to the *Boldon* by the narrowing of the masthead and green lights of the *Albis* was sufficient to indicate risk of collision, and she should have obeyed art. 18 as soon as she noticed it:

The Stanmore, 53 L. T. Rep. 10; 5 Asp. Mar. Law Cas. 441; 10 P. Div. 134.

She was wrong in not reversing until the *Albis* opened her red light. If the narrowing of the lights conveyed no indication of risk to the mind of the master of the *Boldon*, it ought to have done so. Even if he did not notice the narrowing, he should have seen and understood the course of the *Albis* from the swing of her hull, and should have acted for her.

Aspinall, Q.C. in reply.—Narrowing of masthead light and side light alone is not such an indication as imposes a duty to act at once with engines or otherwise. The effect of such narrowing depends on the relative position of the two lights. The *Boldon* was entitled to wait until the *Albis* opened her red light.

The PRESIDENT (Sir Francis Jeune) found that the vessels were approaching each other starboard side to starboard side, and that the *Albis* was to blame for improperly porting, and proceeded:—Now as to the conduct of the *Boldon* herself. That is a matter which I have had to consider very carefully with the Trinity Masters, because these cases always must run somewhat fine. In this case I accept her story substantially for this purpose. I think the *Albis* was some three points upon the *Boldon's* starboard bow. She then, as suddenly as could be done, swung round and opened her red light, and, as soon as the red light was seen, and not till then, the *Boldon* went astern. The whole question is, ought she to have gone astern before this? Those are the facts as I find them. Ought she to have gone astern before? I have been referred to the case of *The Stanmore* (*ubi sup.*) where it is said, under circumstances not unlike those of the present case, that inasmuch as the officer in command of the vessel saw by the narrowing of the masthead and green lights that the vessel was altering her course, Lord Hannen, and afterwards the Court of Appeal, held that that was sufficient indication to put upon him an obligation to act. But the whole point of that case was that he did have the indication present to his mind. There is no such thing in this case. Mr. Bucknill says that if he did not have it he ought to have had it, and that, if he did not see the lights coming in line in this way, he ought to have seen the swing of the hull, because by that means he could have seen the course of the vessel, and ought then to have appreciated that she was under port helm. That is a matter upon which I thought it right to consult the Trinity Masters carefully, because, I confess, it is not clear to my mind what the exact effect to the eye of seeing the hull of the vessel coming towards you may be, whether you would see it so quickly as it is suggested you ought. The Trinity Masters tell me that in their judgment there would not necessarily be to a person of reasonable care and skill such a sufficient indication from the swing of the hull, apart from the lights, as would be enough to put a duty on a seaman to act. Then there remains the point of the lights narrowing. About that, I confess, I have a somewhat clearer view, because it depends entirely upon the relative

(*a*) Reported by BUTLER ASPINALL, and F. A. SATOW, Esqrs., Barristers-at-Law.

position of the masthead and coloured lights, and, although it is thought by some people that there should be such a relative position, of course, there is no such rule. I think it is dangerous to say that a man must and should so necessarily know the effect of the change of the relative position of the masthead and coloured lights as to compel him to act immediately upon noticing such change. Of course, if he did notice, as in the case of *The Stanmore*, and has the effect produced in his mind, it is another thing. Those are the facts as I find them, and upon those facts I have asked the Trinity Masters whether or no a seaman of ordinary and proper skill, acting under those circumstances, ought to be supposed to have acted without reasonable and proper skill if he did not reverse before he saw the red light. They tell me that in their judgment it ought not to be so held, and that he does not show a want of reasonable skill, proper for a competent seaman, if he does not reverse until the time at which the *Boldon* did in fact reverse. The effect, therefore, must be that I hold the *Albis* alone to blame.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Stokes* and *Stokes.*

House of Lords.

Nov. 29 *and Dec.* 2, 1895.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, MACNAGHTEN, MORRIS, SHAND, and DAVEY.)

FORD'S HOTEL COMPANY LIMITED *v.* BARTLETT. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Practice — Arbitration — Stay of proceedings — Application for extension of time — Step in proceedings — Arbitration Act 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*Supreme Court of Judicature (Procedure) Act* 1894 (57 & 58 *Vict. c.* 16), *s.* 1 —*Appeal to House of Lords.*

An application for an order for the extension of the time for the delivery of a defence is a "step in the proceedings" within the meaning of sect. 4 *of the Arbitration Act* 1889, *and a defendant who has obtained such order is not entitled to apply for a stay of proceedings under that section.*

Judgment of the Court of Appeal affirmed.

Sect. 1 *of the Supreme Court of Judicature (Procedure) Act* 1894 *does not apply to appeals from the Court of Appeal to the House of Lords.*

THIS was an appeal from a judgment of the Court of Appeal (Lopes and Rigby, L.JJ.), reversing an order of Collins, J. made at chambers, dismissing an appeal from an order of a master to stay proceedings in the action under sect. 4 of the Arbitration Act 1889 (52 & 53 Vict. c. 49).

The case is reported in 72 L. T. Rep. 529, and (1895) 1 Q. B. 850.

The action was brought by the respondent against the appellant for the price of work done under a building contract, which contained an arbitration clause in case of any dispute arising. The defendants took out a summons at chambers for an extension of time for delivering their defence, and obtained an order. They afterwards applied for and obtained an order for a stay of proceedings as above mentioned.

Boyle (*Murphy*, Q.C. with him) for the respondent, took a preliminary objection that the appeal would not lie, as sect. 3 of the Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59) is repealed by implication by sect. 1 of the Supreme Court of Judicature (Procedure) Act 1894 (57 & 58 Vict. c. 16), which provides that in interlocutory matters there shall be no appeal without leave, with certain exceptions which do not apply to this case, and in this case the Court of Appeal refused leave.

The House overruled the objection, being of opinion that the section of the Act of 1894 only applied to appeals from a court of first instance to the Court of Appeal.

Dodd, Q.C., *A. Statham*, and *Nagle*, for the appellants, contended that the court had an inherent jurisdiction to stay proceedings in an action at any time on sufficient grounds:

Reichel v. *Magrath*, 61 L. T. Rep. 131; 14 App. Cas. 665.

This application for extension of time was not a "step in the proceedings" within the meaning of the Act. See

Chappell v. *North*, 65 L. T. Rep. 23; (1891) 2 Q. B. 252;

Brighton Marine Palace Company v. *Woodhouse*, 68 L. T. Rep. 669; (1893) 2 Ch. 486;

Ives and Barker v. *Willans*, 69 L. T. Rep. 710; (1894) 1 Ch. 68; affirmed on appeal, 70 L. T. Rep. 674; (1894) 2 Ch. 478.

A "step" is passing from one stage to another in the process; anything that puts the case a stage forward, or in a better position, is a step, but an application for further time only prevents the other side from signing judgment in default of pleading, but it does not advance matters in the action at all. They also referred to

Turnock v. *Sartoris*, 62 L. T. Rep. 209; 43 Ch. Div. 150;

Richards v. *Cullerne*, 7 Q. B. Div. 623;

Hampden v. *Wallis*, 50 L. T. Rep. 515; 26 Ch. Div. 746;

Spincer v. *Watts*, 61 L. T. Rep. 711; 23 Q. B. Div. 350;

Willesford v. *Watson*, 28 L. T. Rep. 428; L. Rep. 8 Ch. 473.

Murphy, Q.C. and *Boyle*, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: I cannot help thinking that this is a very plain case, and we have had at least as much time occupied in its consideration as the matter deserves. The 4th section of the Arbitration Act provides that a person who has by any contract agreed to go to arbitration may be compelled to observe that contractual obligation if some proceeding before the court is taken in order to stay the proceedings. In this provision there come the words which your Lordships have to construe,

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

"before delivering any pleadings or taking any other steps in the proceedings." Now, the sole question upon which we have been engaged so long is, whether a summons taken out in this form, "Let all parties concerned attend the master at chambers on Saturday, the 9th March 1895, at 10.30 a.m., on the hearing of an application on the part of the defendants that they may have one month's further time to deliver defence herein," is a "step in the proceedings." It seems to me that it is a "step in the proceedings." I am not going to give any definition of what "a step in the proceedings" may be; it is enough for this case to say that this is "a step in the proceedings." There can be no doubt that what was in the mind of the Legislature was this: One of the great scandals which induced the Legislature to interfere by statutory provision was the delay of arbitrations; and another was the costs applicable to arbitrations, which had to be incurred notwithstanding that the proceedings did not go on, so that there were a great number of proceedings for which the parties had to pay, although they furnished no ultimate decision of their rights. The intention of the Legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the litigation should be conducted according to the original agreement was, that they should at once, and before any further proceedings were taken, specify the *terminus a quo*, and that if an application to stay proceedings was made under those circumstances, then that the court should enforce the contractual obligation to go to arbitration. That seems to me to be a very wise provision, that costs shall not be thrown away in beginning to litigate—that costs shall not be so absolutely useless as that the proceedings from which they arose shall not furnish any part of the materials upon which the judgment was ultimately to be arrived at. That was the evil against which this provision was levelled. When one remembers that this is a question now coming before your Lordships on appeal on a mere point of procedure upon which no less than six judges, I think, have expressed an opinion adverse to the contention of the appellants, and no one judge, as I understand, who has had the matter argued before him has expressed a different opinion, it is a strong thing, upon such a mere question of procedure, to come up to the highest Court of Appeal and discuss it over again. I am not unmindful of what has been suggested, namely, that Collins, J. made an order apparently founded on a different view of the statute; but one knows perfectly well what happens at chambers. There is no one able to tell us exactly what Collins, J. did say, but we know that proceedings at chambers are conducted in a very hasty way sometimes; the judge merely says "Order," or "No order," and there is an end of the matter. All the judges before whom the question has been argued have expressed the opinion which I confess that I entertain strongly myself, that this is a "step in the proceedings," and the party has lost his right to have the matter determined by the agreed arbitrator by taking a step which in its terms amounted to asking for further time in order to deliver his defence. I have designedly avoided saying anything about the other point which one of the appellants' counsel attempted to argue, namely, that, apart from the Act of 1889, the court has inherent jurisdiction to stay proceedings in an action. Nothing appears to me more mischievous as a precedent than, when a case of this sort, involving simply a question of procedure, is taken on appeal from court to court on one ground, that the parties, when they come before the last Court of Appeal, should attempt to raise a question resting on wholly different grounds—a question not depending upon the statute at all, and one which has not been considered by any one of the judges before whom the case has come. Under these circumstances I apprehend that your Lordships will not think it right to consider such a point at all. Confining myself to the one point which has been litigated here, I entertain no doubt whatever that the appeal ought to be dismissed with costs, and I move your Lordships accordingly.

Lord WATSON.—My Lords: I am of the same opinion. The only question raised by this appeal is an exceedingly small one, and in my opinion it has been rightly decided by the learned judges in the Appeal Court. I can see no reason to doubt that an order obtained upon a summons for extension of time for lodging a defence is a "step in the proceedings" by the defendant within the meaning of sect. 4 of the Arbitration Act 1889.

Lords MACNAGHTEN and MORRIS concurred.

Lord SHAND.—My Lords: I am also of opinion that the application by the appellants for an extension of time to deliver their defence, upon which an order giving fourteen days' time was obtained, was a "step in the proceedings." The proceeding in question was unlike that in the cases which have been mentioned, where agents, without coming into court at all, have given an extra-judicial and voluntary consent, because the proceeding took place judicially in chambers, which was the same as if it had been in court. It is true that the application came before a master, and not before the judge; but he was sitting as representing the judge, and the proceeding was therefore unquestionably judicial, and a proceeding in the cause. I think further that the proceeding of presenting such a summons and supporting it before the master implied a statement to the effect that the appellants intended to defend the action. It was on that representation only that the order of court was obtained. Having regard to the provisions of the Arbitration Act, this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration. On these grounds I am of opinion with your Lordships that the appellants' summons, with what followed on it, was a proceeding in the cause, or a step in the judicial proceedings, and that the judgment of the Court of Appeal ought to be affirmed.

Lord DAVEY concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *W. L. Cooper*, for *Morgan* and *Co.*, Chepstow.

Solicitors for the respondents, *Munns* and *Longden*.

Nov. 12, 14, *and* 15, *and Dec.* 18, 1895.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, SHAND, and DAVEY.)

MARSDEN *v.* MOSER. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Patent—Infringement—Specification—Claim of "any other suitable driving motion"—Validity—Amendment—Patents, Designs, and Trade Marks Act 1883 (46 & 47 *Vict. c.* 57), *ss.* 18-21.

Where a specification has been amended under the Patents Act 1883, *the amended claim is to be substituted for all purposes for the original claim, and no argument against the validity of the patent can be founded upon an alleged discrepancy between them.*

An inventor took out a patent for certain improvements in machinery to be driven in a manner described, or by "any other suitable driving motion."

Held (*affirming the judgment of the court below*), *that this alternative claim did not make the patent invalid, the particular source from which the motive power was obtained not being essential, or claimed as a part of the patent.*

THIS was an appeal from a judgment of the Court of Appeal (Lindley, Lopes, and Smith, L.JJ.), given in July 1893, who had reversed a decision of the Vice-Chancellor of the Duchy of Lancaster, given in March 1893. The action was brought by the respondent against the appellant for the infringement of a patent granted to him in Sept. 1885, for improvements in machinery employed in finishing woven fabrics.

The Vice-Chancellor held that the invention could not be the subject-matter of a patent, and that it was further invalidated by an amendment of the specification which had enlarged the scope of the claim, but his judgment was reversed on appeal as above mentioned.

Bousfield, Q.C., *Astbury*, Q.C., and *Frost*, for the appellant, contended that the respondent claimed by his specification "any suitable driving motion," which was too broad and invalidated the patent; further, the amended specification differed from the original specification, and claimed an invention substantially larger. The invention is not the proper subject of a patent, and has been anticipated.

Moulton, Q.C., *Pankhurst*, and *Walter*, for the respondent, were only called upon on the point of the effect of the amendment, which they argued had not the effect contended for, but only removed an ambiguity.

Astbury, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 18.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury). — My Lords: I have had an opportunity of reading the judgment prepared by Lord Watson, and I entirely concur in the opinion at which he has arrived. I, therefore, move your Lordships, that the judgment appealed from be affirmed, and the appeal dismissed with costs.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Lord WATSON.—My Lords: In the argument upon this appeal it was not disputed that, if the respondent has a good patent, it has been infringed. Accordingly, the only questions submitted for your Lordships' decision related to the validity of the instrument. The patent impeached is for improvements in the construction of apparatus employed in preparing woven fabrics for the market, by raising (as it is termed) the pile or wool on the surface of the cloth. In the improved apparatus, as well as in the different forms of mechanism previously used for the same purpose, the object desired is effected by passing the fabric operated upon over a cylinder composed of a series of rollers, each of which is free to rotate upon its own axis, and has metal or other points projecting from its surface suitable for raising the pile or wool. It is shown by the proof, and it was conceded in the appellant's argument, that the apparatus which the respondent asserts that he has invented, has been of great commercial utility. The invalidity of the patent was maintained on these three grounds: (1) That the improvements of the patentee do not constitute the proper subject of a patent; (2) that these improvements were anticipated by reason of their having been disclosed in earlier patents; and (3) that the claim of the patentee is bad, because it embraces matters beyond the scope of his invention, as disclosed in the specification. The first and second of these objections are, in my opinion, devoid of substance. There could hardly be more appropriate matter for a patent than the introduction of mechanism, admittedly novel, into an old combination, with the practical result of converting a comparatively defective apparatus into an effective and useful machine. Again, the anticipation upon which the appellant chiefly relied consisted in the fact that an earlier patentee had expressed the obvious truism, that the motion of the individual rollers in a raising cylinder might be either accelerated or retarded, but without indicating any method by which that object could be accomplished so as to produce a useful result. Both points have been so fully and so satisfactorily disposed of by the learned judges of the Appeal Court, that I shall not notice them further, but shall proceed to consider the third objection, which, although it does not appear to me to be well founded, is at least more plausible. Before adverting to the particular terms of the respondent's claim, and the objections which have been taken to it, I have to observe that his improved apparatus is described in the specification with reference to the motive power generally employed in manufactories where machines of that class are used. But it does not, in my opinion, follow that the patentee, when he came to claiming the invention which he had first generally and then particularly described, in accordance with patent law, was thereby precluded from indicating that the motive power described was not an essential feature of his invention, and from claiming his combination as a novelty, whether the force necessary in order to set and keep it in motion was derived from the source described, or from any other suitable source. The claim of the respondent was duly amended, in conformity with the provisions of sects. 18 to 21, inclusive, of the Act of 1883 (46 & 47 Vict. c. 57). The argument against its validity was rested, in the first place, upon an alleged discrepancy between its terms and

those of the original claim; and in the second place, upon a comparison of its scope with the invention described in the body of the specification. I am satisfied that the first of these objections is one which your Lordships are not at liberty to entertain. In my opinion, the very object of the Act of 1883 was to make an amended claim, when admitted by the proper authorities, a complete substitute. to all effects and purposes, for the claim originally lodged by the patentee. The validity of the amended claim must, therefore, be determined in the same way, and on the same footing, as if it had formed part of the original specification; and the claim, as it stood before amendment cannot be competently referred to, except as an aid in the construction of its language after amendment. The second and only relevant objection urged against the validity of the amended claim was that the introduction of the words "or any other driving motion," as an alternative, has the necessary effect of extending the claim beyond the limits of the invention described in the body of the specification. The alternative words so introduced occur in the original as well as in the amended claim, and in both cases they appear to me when fairly construed, to have precisely the same import. I think that, in substance, they do nothing more than convey an intimation to the public having an interest in the matter, that the patentee does not claim, as an essential part of the combination which he has invented, the source from which motive power is taken for actuating the rollers. In that view of their meaning, the words in question do not appear to me to amount to an expansion of the patent beyond the limits described, but constitute a legitimate qualification of the patentee's claim, by excluding from it a feature which he does not regard as essential. For these reasons I agree with your Lordships that the judgment appealed from must be affirmed.

Lord SHAND.—My Lords: The plaintiff in the specification relating to his letters patent, which were obtained in 1885, has described his invention as one for "Improvements in gig mills employed in the finishing of woven fabrics." It has been clearly proved by the evidence that the plaintiff's improvements on the machinery or apparatus which had been previously in use were substantial and beneficial. They effected a complete change in the trade of manufacturing the fabric known as "flannelette," and that trade, in consequence of the plaintiff's invention, became a commercial success, which it had not previously been. From the judgments of the learned Vice-Chancellor and Judges of the Court of Appeal, it is apparent that the argument for the appellant was mainly rested on the contention that the plaintiff's invention had been anticipated by one or more of the earlier letters patent produced in evidence. This view was no longer maintained in the argument before your Lordships. It was indeed conceded that the plaintiff's apparatus, as shown in the model produced, was not only novel, but of such merit as to form a valid invention, and the only grounds on which the patent was said to be invalid were (1) that the plaintiff by the amendment of his specification in 1891 had enlarged his claim beyond that originally made; and (2) that, in any view, his claim as made in the amended specification, extended beyond the limits of the invention described in the specification itself, and was also so wide as to embrace apparatus described in previous patents, or at least improperly to prevent the apparatus so described from being fitted with such additions as would permit of their being used to effect the same results as are obtained by the plaintiff's invention. I am of opinion, with your Lordships, that neither of these contentions is well founded. The amendment made consisted, in the first place, of a disclaimer of any right to the exclusive use of rollers arranged round the cylinder, and to this disclaimer no objection could be stated; and, in the next place, of a transposition from one line to another of the claim of the word "independent" as descriptive of the motion or actuating motive power. This last alteration appears to have been intended only to state the claim more clearly than had been done in the original specification, and I am unable to see that it altered or enlarged the claim in any way; but the argument is excluded by the terms of sub-sect. 9 of sect. 18 of the Patents, Designs, and Trade Marks Act of 1883, which provides that leave to amend, once given by the comptroller-general, shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and that the amendment shall, in all courts and for all purposes, be deemed to form part of the specification. I agree with your Lordships in holding that the amended specification does not extend the claim beyond the limits of the invention described in the specification, and does not prevent the use of any apparatus previously patented. The plaintiff's improvements as described constituted a new combination of apparatus securing a motion of the rollers not only independent of the motion of the central cylinder, and variable as might be desired, but "known" in the sense of being certain in its extent and operation. His claim is said to be invalid, because it seeks to protect not only the apparatus specially described in the specification and relative drawings, having the rollers driven by means of countershafts, but further and alternatively by means of "any other suitable driving motion." It is said the patent is invalid because of this alternative to the use of countershafts as the means of driving the rollers. I agree in thinking that this argument cannot be sustained. The essential features of the plaintiff's improvements consist not to any extent in the source from which the driving power used to propel the rollers is obtained, but in the arrangement of the apparatus so as to utilise that power when applied, and to secure not merely a degree or rate of motion independent of that of the cylinder, but a motion which can be readily varied with a known and certain result. The particular source from which the driving power is obtained is not, however, in any way indicated as an essential feature of the invention. Whether the driving power for the rollers be obtained from the cylinder, or the source which drives the cylinder, or from some other source seems to be immaterial. The invention consists in that part of the apparatus to which the power is applied, whether the power is taken from one engine or another, whether from the same engine which drives the cylinder, or from some other source independent of this. In this view of the plaintiff's invention, the claim to the improved apparatus does not include any particular means of driving the rollers, except when employed as part of the combination specially

described; and the words "or any other suitable driving motion" really include only driving power "suitable" to produce a "variable and known motion" by adopting the essential features of the apparatus in the application and utilisation of the power in the particular mode of driving the rollers described in the specification and relative drawings. On these grounds, and as the infringement complained of has not been denied, I am of opinion that the judgment of the Court of Appeal should be affirmed.

Lord DAVEY.—My Lords: It is apparent that this case has been argued by the appellant on grounds different from those on which the defence was mainly based before the Vice-Chancellor and the Court of Appeal. The only point which was substantially relied on was that the claim as amended was too wide, and would embrace machines in use before the patent, and also machines not within the description in the specification. I propose to confine my observations to this point. The appellant cannot, of course, complain of any irregularity in the amendment, and no such irregularity, if there be any, will affect the validity of the patent, as, by sect. 18, sub-sect. 9, of the Patent Act 1883, the leave to amend is conclusive as to the right to make the amendment, and the amendment is for all purposes to be deemed to be part of the specification. We must therefore read the amended specification precisely as if it were the original one. The appellant based his contention that it was too wide on two grounds—(1) that it was not confined to machines in which the countershaft or machinery which actuates the raising rollers receives its motion from the main shaft of the cylinder itself; (2) that the words at the end of the claim, "or any other suitable driving motion," are so general that they would cover machines in which the raising rollers of the drum are made to revolve on their own axes by contact with a fixed cog-wheel or a fixed strap. On the first ground, I will assume that the construction suggested is correct, and that machines in which the motive power actuating the countershaft and the rollers is derived from an outside source are within the claim. But I do not think that this would invalidate the patent, as it is obviously a detail only of the description, not affecting the substance of the invention. And I agree with your Lordships that the amendment has not in any way enlarged the claim in this respect. The second ground of objection seems to me to ignore and leave out of sight the whole point of the invention. The patentee aims at giving a "variable but known" motion to the rollers. As I understand the evidence and the case as presented to us by the appellant's counsel, previous inventors had suggested means of giving a "known" motion to the rollers, whilst others had suggested means of giving a more or less variable motion. But the known motion was not variable, and the variable motion was not known, *i.e.*, you could not at pleasure run your rollers at any required and known ratio of speed to the speed of the cylinder. The patentee has succeeded in effecting his object by imparting motion to the ring or strap on which the rollers bear or are made to move, and he tells you that he does this "by means of a countershaft" in connection with a stepped or cone pulley receiving its motion from the main shaft. But the patentee says, in effect, a countershaft is only machinery and a means to an end, and any other driving motion may be used provided it is "suitable"—suitable to what? Why, to effecting the object for which he employs the countershaft arrangement, viz., transmitting motion to the driving belt, ring, wheel, or other machinery on which the rollers turn. I think that the real meaning of the words on which so much comment has been expended is to give notice to the world that the patentee does not intend to confine his patent to the particular machinery of a countershaft described. It is, in my opinion, idle to suggest that the claim covers machines in which the machinery is not suitable to effect the object which the patentee's invention effects.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Jaques* and *Co.*, for *E. Robinson Walker*, Manchester.

Solicitors for the respondent, *Pritchard, Englefield*, and *Co.*, for *Sampson* and *Price*, Manchester.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 13 *and* 16, 1895.

(Before LINDLEY, SMITH, and RIGBY, L.JJ.)

DEUTSCHE BANK (LONDON AGENCY) *v.* BERIBO AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of exchange — Foreign bill — Negotiation — Payment under a mistake of fact as to bill having been met — Action for repayment — Estoppel.

A., the indorsee of a bill of exchange, resident abroad, indorsed it to the defendants, his agents in London, for the purpose of collection. The defendants indorsed the bill to the plaintiffs, and sent it to them for the same purpose, and they forwarded it to their agents.

The plaintiffs, under a misunderstanding, informed the defendants that the bill had been paid, and sent them a cheque for the amount. Thereupon the defendants intimated the same to A., and credited him with the amount of the bill.

It was decided by Mathew, J., on the authority of Skyring *v.* Greenwood and Cox (4 *B. & C.* 281), *that, as the plaintiffs had wrongfully informed the defendants that the bill had been paid, they could not recover the amount of the bill when the defendants had nothing to do with the mistake of fact; and also that the plaintiffs were estopped by the representation which they had made to the defendants, and upon which the defendants had acted. On appeal:*

Held (affirming the decision of Mathew, J.), that the action failed.

THIS action was brought by the plaintiffs against the defendants to recover 104*l.* 1*s.* 10*d.*, the amount, with interest and costs, of a foreign bill of exchange dated the 23rd Dec. 1894, which had been indorsed to J. R. Benatar, carrying on business in Morocco, who indorsed it to the defendants, his agents in London, for collection.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

The bill became due at the end of Jan. 1895 for payment in Brussels.

The defendants indorsed it to the plaintiffs, and sent it on to them for collection, asking that they should be specially advised of its payment, and that no expenses should be incurred in the collection of it.

The plaintiffs sent it to their agents in Belgium, asking in their turn for a special advice upon its payment.

The Belgian agents sent a reply to the plaintiffs substantially to the effect that they had credited the plaintiffs with the amount of the bill as on the 4th Feb.

On that date the defendants called on the plaintiffs in London and asked if the bill had been met. The plaintiffs, without making any inquiry of their agents, informed the defendants that it had been paid, and the same day sent a cheque to them for the amount of it, less commission. The defendants thereupon intimated the same to Benatar, and credited him with the amount of the bill.

On the 8th Feb. the Belgian agents informed the plaintiffs that the bill had not been met, and that they had protested it, whereupon the plaintiffs called upon the defendants the next day and informed them of this.

The plaintiffs alleged that the bill was duly presented for payment but was dishonoured, and that the same was thereupon protested for non-payment, whereof the defendants had due notice. In the alternative the plaintiffs claimed to recover the amount of the bill from the defendants as money paid under a mistake of fact.

On the 9th Aug. 1895 the action came on for trial before Mathew, J., who gave judgment as follows:—

Mathew, J.—This case was tried before me upon the facts as appearing from the correspondence which was put in, and it gives rise to a question of some importance. The facts were these: A gentleman of the name of Benatar, carrying on business in Morocco, sold to a firm of Pierard and Co., of Antwerp, a quantity of canary seed, and in payment he received from Pierard and Co. a bill of a somewhat unusual kind. It was a bill drawn by Pierard and Co. on themselves, and accepted by them, and indorsed to Benatar. Benatar forwarded this instrument to the defendants, his correspondents in London. They indorsed it to the plaintiffs, for the purpose of collection only. The defendants apparently had considerable doubts and anxiety about the bill, and they handed it to the plaintiffs to collect, with the direction that they (the defendants) were to be informed whether the bill was met or not, and that no expense should be incurred in case it was not met. That was a sufficient intimation, and a protest would not be necessary, because notice of dishonour would be of no importance. Clearly as between Benatar and the defendants there was no discount of the bill—no transfer of the bill for any consideration other than for the purpose of collection. Therefore, in the event of its dishonour no notice would be necessary. The plaintiffs sent the bill on the 24th Jan. 1895 to their agents at Antwerp, and in their letter they asked their agents to advise specially of the payment of the bill. They did not intimate, and one can understand why, that it was not desired that any expense should be incurred of a protest. On the 26th Jan. the Antwerp agents wrote to the plaintiffs, and the form of the letter gave rise to the mistake which subsequently occurred. In that advice the plaintiffs were informed that they were credited with the amount of the bill as from the 4th Feb., the intention being that if the bill were not paid on the 4th Feb. they should be debited with the amount. But this intimation appears to have been misunderstood, and to have been treated as an intimation that the bill was met. On the 4th Feb. it was then recorded by the clerk of the plaintiffs that the bill had been collected. On that day the defendants called to inquire about the bill, and to their surprise, I cannot help thinking, were informed that the bill had been collected, and on the next day they received the amount from the plaintiffs. Upon their being informed that the bill had been met they immediately telegraphed to their correspondent abroad, Benatar, and informed him that the bill had been collected. On the same day or the next they wrote informing Benatar that the money had been received and had been credited to Benatar. On the 8th Feb., without any further explanation from the Antwerp agents to the plaintiffs, the bill was returned duly protested and not paid, and on the next day, the 9th Feb., the clerk of the plaintiffs called upon the defendants and demanded repayment of the amount that had been handed to them, on the ground that it had been paid under a mistake. On the 11th Feb. the defendants telegraphed to Benatar informing him, in a few words, of the condition of things, and on the 15th Feb. Benatar telegraphed to the defendants, the result of the telegram being that Benatar refused to return the money. He said that the money had been collected, and he would not repay it. Those are the circumstances under which the action came before me. The plaintiffs persisted in their demand on the defendants for the repayment of the amount, and they brought their action. They brought their action first on the bill as a dishonoured bill, of which they were indorsees, from the defendants, and in the alternative for money had and received—money paid under a mistake of fact. I have to decide whether that claim can be maintained or not. I have come to the conclusion that the plaintiffs cannot recover from the defendants the amount of the bill. Now in the course of the argument the attention of counsel was called by me to the well-known case of *Skyring* v. *Greenwood and Cox* (4 B. & C. 281) as an authority which probably would be decisive of the present case. It was alleged by the plaintiffs here that the money had been paid under a mistake of fact to the defendants, and it may be said that, if there was a mistake, it was a mistake with which they had nothing to do. The defendants employed the plaintiffs to collect the amount of the bill, and to inform them accurately as to whether the bill had been paid or not. Unfortunately the plaintiffs, by the mistake of one of their servants, were guilty of a breach of duty towards the defendants. They failed to inform them accurately. They informed them of that which was not the fact, namely, that the money had been received, and they handed them the money. Upon what ground of law or of equity can they say that they can get rid of the consequences of their breach

of duty because they had made a mistake? I am not aware of any such principle. The case to which I have referred is a clear illustration, as it seems to me, of the principle applicable to this litigation. In *Skyring* v. *Greenwood* (*ubi sup.*) Cox and Co. the army agents had credited one of their customers with the amount of extra pay, to which amount of extra pay it appears he was not entitled, and Cox and Co. were informed that he was not entitled to it, but by inadvertence they failed to inform him on the subject, and failed to cease to credit him as they might have done with the amounts which previously it appeared he had been receiving. For four or five years they had gone on crediting him with the amount, and from time to time he had drawn the money and spent it. At the time of the customer's death there was a considerable sum standing to his credit, and his administratrix sought to recover this amount, and she was met by an attempt on the part of Cox and Co. to set off payments that had been previously made, or with which he was credited, as payments made under a mistake of fact. It will be found on examining the case that the judges decided that the money could not be recovered, because the mistake was one with which the customer had nothing to do, and a mistake that arose from a breach of duty on the part of Cox and Co. towards him. On principle that case would appear to be distinctly applicable to the present case. The same principle may be detected in two other cases, namely, *Chambers* v. *Miller* (13 C. B. N. S. 125) and *Pollard* v. *The Bank of England* (25 L. T. Rep. 415; L. Rep. 6 Q. B. 623). In the one case a bill, and in the other case a cheque, was paid under the impression that the customer had got assets in the hands of the banker to meet the respective documents. It turned out that there were no effects, and that the bank in each case need not have paid, and perhaps ought not to have paid the bill or the cheque. Although the attempt was made to correct the mistake immediately, in the case of the cheque the money had been handed over, and a person to whom it was handed over was engaged in counting the money. It was held that it could not be recovered back, because it had been paid to a person, under a mistake of fact no doubt, so far as the person paying it was concerned, but a mistake of fact with which it was held that the defendants in each case had nothing to do. On these grounds alone I should have thought that the defendants here were clearly entitled to succeed. But there is another ground on which I cannot conceive how it is possible for the plaintiffs to escape, and that is the ground of estoppel. Here the money was paid, and on the faith of that payment the correspondent abroad, Benatar, was credited in account. It seems to me on principle the same as if the money had been paid to him, or the money paid to some third person by his direction. The plaintiffs, if they recovered from the defendants, would leave the defendants in the position of having to get that money back, which they paid on the faith of the plaintiffs' statement to them. That they would have uncommonly little chance, as a matter of business, of ever recovering the money from Benatar, their correspondent in Morocco, is abundantly clear from the excellent argument of that gentleman, in the two letters of the 15th Feb. and 22nd Feb. 1895, where he said that, when he heard that he was credited in account with the amount, he paid for this very canary seed, relying upon the fact that that bill had been met, and credit had been given him. Of course, if Benatar succeeded in showing that—this correspondence is before me to act upon—the defendants would have no ground whatever for recovering from Benatar. An account had been stated between them and him upon the faith of this representation made by the plaintiffs to the defendants. On this ground of estoppel also, I conceive that the defendants are entitled to my judgment. I therefore give judgment for them, and with costs.

From that decision the plaintiffs now appealed.

Robson, Q.C. and *F. M. Abrahams* for the appellants.—This appeal involves a question of law on the authorities, and also a question of fact. As regards the authorities, those relied on by Mathew, J. were:

Skyring v. *Greenwood and Cox*, 4 B. & C. 281;
Chambers v. *Miller*, 13 C. B. N. S. 125;
Pollard v. *The Bank of England*, 25 L. T. Rep. 415; L. Rep. 6 Q. B. 623.

All those cases are, we submit, quite distinguishable from the present. [Lindley, L.J.—Are there any cases in your favour before you pass to the question of fact?] We cannot find any case precisely in point. Then, as regards the facts, we submit that there is no evidence to justify the decision of the learned judge.

Reginald M. Bray and *Clarke Williams* for the respondents.

F. M. Abrahams replied.

The Court (Lindley, Smith, and Rigby, LJ.J.), without considering that part of the judgment of Mathew, J. which was based on the authorities, came to the conclusion that the view taken by the learned judge as regarded the facts was right; and that therefore the appeal ought to be dismissed, with costs. *Appeal dismissed.*

Solicitors for the appellants, *Michael Abrahams, Sons*, and *Co.*

Solicitors for the respondents, *J. T. Freeman* and *Co.*

Nov. 21, 22, 25, *and Dec.* 18, 1895.

(Before Lord Herschell, Smith and Rigby, L.JJ.)

Dallmeyer *v.* Dallmeyer. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Will—Advancement — Interest—Accumulation of income—Equal division of residue and accumulations—Option to take testator's business at a valuation — Advancement of part of share of residue.

By his will a testator, who died in 1883, *gave his sons in succession, according to seniority, the option of taking his business at a valuation, and declared that the son taking it should be debited with the value thereof on the division of the testator's residuary real and personal estate. The testator devised and bequeathed all his residuary personal estate to trustees upon trust to convert the same and pay an annuity to his wife and invest and accumulate the surplus income until his youngest child should attain twenty-one, when the whole fund was to be divided between his*

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

children equally and the issue of deceased children per stirpes. *The testator empowered his trustees to maintain and educate his children, and to advance part of their shares to them, such advances to be taken in part satisfaction of their shares of residue. There was no tenant for life under the will. The testator's eldest son took the business, which was valued at* 15,000*l.*, *and his second son received advances to the amount of* 8200*l.* *His youngest child attained twenty-one in* 1894.

Held, that the testator's eldest son was not chargeable with interest on the value of the business.

Held also (dissentiente *Rigby, L.J.*), *that the second son was not chargeable with interest on the amount advanced to him.*

Decision of Kekewich, J. affirmed.

THE questions to be decided in this case were, whether a son of a testator was under the will liable to bring into hotchpot interest on the value of the testator's business from the date when he had taken it at a valuation under the provisions of the will; and also whether another son of the testator was liable to bring into hotchpot interest on sums paid to him under a power of advancement.

The testator, J. H. Dallmeyer, was at his death carrying on the business of an optician at 19, Bloomsbury-street, London, and was seised of a mansion and grounds at Hampstead, and possessed of personal estate of considerable value.

By his will, dated the 18th Feb. 1880, divided into numbered clauses, after certain specific bequests, the testator by clause (3) declared that his sons, Thomas, Sydney, and Owen should have the option in succession according to seniority, after attaining twenty-one, of succeeding to his business of optician, and that,

Immediately on any son of mine electing to succeed to such business, the whole of the said business and the capital thereof and the stock-in-trade, machinery, plant, and effects employed therein, and the benefit of all contracts subsisting, and all book-debts due to me in respect thereof at the time of my decease, and the lease of the messuage, offices, and buildings situate at No. 19, Bloomsbury-street aforesaid, in which the said business is carried on, and the office and other furniture and effects used for the purposes thereof, shall, subject to and charged with the contingent payment thereout hereinafter mentioned, belong to him, and he shall be debited with the value thereof, estimated in such manner as my trustees shall think fit, in the division of my residuary estate, and in case such value shall exceed the total amount of the expectant share of such son in my residuary estate (estimated in manner aforesaid) at the time such option is declared, he shall refund such excess to my residuary estate, by instalments or otherwise, in such manner and at such time or times as my trustees shall determine.

By clause (5) the testator bequeathed certain pecuniary legacies, including the following:

To my son who shall elect to succeed to my said business, the sum of 500*l.* to be paid to him as soon as may be after he shall have declared such election, and commenced to carry on my said business,

and

Unto and equally between such of my children (except the son who shall elect to succeed to my said business) as being sons attain the age of twenty-five years, or being daughters attain the age of twenty-one years or marry under that age, the sum of 4000*l.*

Then followed a direction (clause 6) that the legacy of 4000*l.* should carry interest at the rate of 5 per cent. per annum from his decease, to be applied by his trustees at their discretion in or towards their respective maintenance and education during minority, and as to sons in or towards their maintenance, education, or benefit until they should attain the age of twenty-five. And the testator authorised his trustees, at any time after any of his said sons should have attained the age of twenty-one years, to advance either the whole or any part of his then expectant share in the said legacy of 4000*l.* in or towards establishing him in business. Clause (7) contained a devise and bequest of all the testator's real and all his personal estate not otherwise disposed of by his will or any codicil thereto to his wife and other trustees, upon trusts for sale and conversion, with power to postpone, and a declaration that his sons Thomas, Sydney, and Owen should have in succession the option of purchasing his mansion and grounds, called Sunnyfield, at a price calculated at three-fourths of the amount of a valuation to be made as therein directed. By clause (8) the testator directed that his trustees should, out of the moneys to arise from the sale and conversion of or forming part of his residuary estate, pay his funeral and testamentary expenses and debts and legacies and the legacy duty therein mentioned, and should invest the residue of such moneys in the investments therein mentioned, and should (clause 9), out of the income of the said trust premises, pay to his wife whilst his widow an annuity of 600*l.*, reducible to 100*l.* on her marrying again.

Clauses 11, 12, and 13 were as follows:

Clause (11.) My trustees may at their discretion, at any time or times before the period of distribution hereinafter mentioned, apply out of the surplus income of the said trust premises in or towards the maintenance or education of any son or daughter of mine such yearly sums, and in such manner, as my trustees shall think fit, all sums so advanced for the maintenance or education of any son or daughter of mine who shall have attained the age of twenty-one years, to be taken in part satisfaction of the share to which he or she, or his or her issue, may respectively become entitled of the said trust premises.

(12.) My trustees shall invest in their names the surplus income of the said trust premises, after satisfying the said annuities, the discretionary power next hereinbefore contained, and all expenses incident to the execution of the trusts of this my will, upon such securities as are hereinbefore specified, with the like power of transposition, and by similar investments shall accumulate at compound interest the resulting income for the term of twenty-one years from my decease, if any child of mine shall so long live and be under the age of twenty-one years. And shall, on the determination of the said term, upon the attainment of the age of twenty-one years by my youngest living child, which determination is hereinafter referred to as the period of distribution, stand possessed of the said trust premises with the accumulations thereof (subject to such of the trusts hereinbefore contained as shall be then subsisting), in trust for my child or children living at the period of distribution, and the issue then living of any child or children dying before such period, such objects to take as tenants in common according to the stocks, and not to the number of individuals composing the class, the shares of children to be paid immediately, and the shares of other issue being males at the age of twenty-one years, or being females at that age or marriage.

(13.) My trustees at any time or times before the

period of distribution may apply out of the capital of the said trust premises any sum or sums of money not exceeding in the whole one-half of the capital share in or towards the establishment of each or any son of mine in any profession or business to be approved of by my trustees, or his advancement in the world in any other manner which may appear to them expedient, the sums so advanced to be taken in part satisfaction of the shares to which my said sons or their issue may respectively become entitled of the said trust premises.

The testator died on the 30th Dec. 1883, and his will was duly proved. He left five children —namely, the sons, Thomas, Sydney, and Owen, mentioned in his will, and two daughters. Thomas, the eldest son, was born in 1859, and therefore attained the age of twenty-one in his father's lifetime. The youngest child, a daughter, attained the age of twenty-one in 1894, and thereupon the term of twenty-one years during which accumulations were directed to be made came to an end, and the residuary trust premises, comprising a considerable sum arising from accumulations, became distributable. In 1884 Thomas, the eldest son, under the provisions of clause (3) elected to succeed to the testator's business, and the value of the business and assets was ascertained by the trustees at a sum of over 15,000*l.*, which did not exceed the total amount of the expectant share of Thomas in the residuary estate at the time when the option to succeed was declared. Sydney, the second son, had received, in three separate sums, 8200*l.*, under the power of advancement contained in clause (13), and some of the younger children had received, after attaining twenty-one, certain sums under the power of advancement contained in clause (11).

An originating summons was taken out by the trustees asking (*inter alia*) for the determination of the questions whether Thomas should be charged, on the division of the testator's residuary real and personal estate and accumulations, with interest on the value of the business; and also whether Sydney should be charged with interest on the advances he had received.

Kekewich, J. held that no interest was chargeable in either case, and from this decision the three other children of the testator appealed.

Renshaw, Q.C. and *Sargant* for the appellants. —Thomas, having exercised the option given him by the clause (3) of the will of taking the business in 1884, must pay interest on the amount at which it was valued from that date until the period of distribution in 1894. It must be treated as an advance to him of that amount. Though nothing is said in the will about the payment of interest, advanced children must pay interest on the amount advanced to them:

Re Rees; *Rees* v. *George*, 44 L. T. Rep. 241; 17 Ch. Div. 701, 703;
Hilton v. *Hilton*, L. Rep. 14 Eq. 468;
Ackroyd v. *Ackroyd*, L. Rep. 18 Eq. 313;
Andrewes v. *George*, 3 Sim. 393.

The testator has directed the accumulation of the surplus income of his residuary estate until the period of distribution, and then the whole amount is to be divided among the children. The income will be lessened by the interest on the amount advanced, and therefore in due course of administration interest must be charged on these sums, otherwise the shares in the residuary estate of the children not advanced will be lessened by their share of the income which would have accrued on the amount advanced.

Bramwell Davis, Q.C. and *P. F. Wheeler* for Thomas.—On the true construction of clause (3) no interest is to be paid by Thomas on the value of the business. He is to be "debited with the value thereof," and no mention is made of interest. There is no ambiguity in the clause, and therefore the court will not consider other cases:

Re Tredwell; *Jeffray* v. *Tredwell*, 65 L. T. Rep. 399, 403; (1891) 2 Ch. 640, 653.

The rule which it is contended is established by the cases cited, that interest is payable on advances, is a rule of administration where the testator has made an advance.

Warrington, Q.C. and *B. Horsbrugh* for Sydney. —No interest is payable on the sums paid to Sydney. They were advanced under the power given to the trustees by clause (13), which provides that any sums so advanced "are to be taken in part satisfaction of" the share. That is different to clause (3), which says that the son shall "be debited" with the amount at which the business is valued. The case against Sydney is put on the assumption that the whole estate, including accumulated income, is to be divided when the youngest child attains twenty-one. But taking the whole will together, the true construction is that the testator has not directed the accumulation of the whole estate, but only an accumulation of what remains when the trustees have exercised all their powers under the will. It is said that, if no interest is paid on the sums advanced, the unadvanced children will suffer; but it is not unreasonable to suppose that the testator intended that. The testator does not say in clause (13) that the sums advanced are to be brought into account or into hotchpot, but that they are "to be taken in part satisfaction" of that child's share of his estate. There is no general rule of administration that interest on advances shall be paid. The cases were all considered by Jessel, M.R. in *Re Rees*; *Rees* v. *George* (*ubi sup.*), and in all of them the court was dealing not with a case like this, but with cases where the children were to take the estate equally and the period of distribution was the death of the testator, though there was a tenant for life. *Hilton* v. *Hilton* (*ubi sup.*) depended to a great extent on the wording of that will. In *Poole* v. *Poole* (25 L. T. Rep. 771; L. Rep. 7 Ch. App. 17) it was held that interest was not payable. I admit that interest on any sums advanced must be paid from the period of distribution.

Rowden for the trustees.

Renshaw in reply. *Cur. adv. vult.*

Dec. 18.—Lord Herschell.—In this case two questions arise upon the construction of the will of Mr. Dallmeyer. The first turns upon a bequest by which his sons in order of seniority after attaining twenty-one were to have the option of succeeding to his business of an optician, such option to be intimated by notice in writing to his trustees and executors. The testator declared that, immediately on any son electing to succeed to the business, the whole of the business and the capital thereof, and the stock-in-trade, &c., employed therein, should, subject to and charged with the contingent payment thereout therein-

after mentioned, "belong to him, and he shall be debited with the value thereof estimated in such manner as" the trustees should think fit, in the division of his residuary estate, and in case such value should exceed the total amount of the expectant share of such son in his residuary estate (estimated in manner aforesaid) at the time the option was declared, he was to refund such excess to the testator's residuary estate by instalments or otherwise in such manner and at such times as the trustees should determine. The testator directed his trustees to invest the surplus income of his residuary estate, and to accumulate the same at compound interest for the term of twenty-one years from his decease, if any child of his should so long live and be under the age of twenty-one years, and upon the determination of the said term, which he thereafter referred to as the period of distribution, "stand possessed of the said trust premises with the accumulations thereof (subject to such of the trusts thereinbefore contained as shall be then subsisting) in trust for his child or children living at the period of distribution, and the issue then living of any child or children dying before such period. One of the testator's sons exercised the option of succeeding to the business. The value of the business at the time he declared his option did not exceed the total amount of his expectant share in the residue, so that no payment was to be made by him. The time of distribution having now arrived, he has of course to be debited with the value of the business in the division of the testator's residuary estate. It is contended that he should also be debited with interest upon the sum representing that value from the time when he succeeded to the business. I can find nothing in the will to justify such a conclusion. The testator has expressly defined what the position of a son taking the business is to be. The value of the business is to be ascertained at the time he exercises his option; the amount of his expectant share in the residuary estate is to be also then determined. If the value of the business exceeds the amount of such expectant share he is to refund the excess to the trustees at such times and by such instalments as the trustees may determine. The business is to belong to him on these terms, and I can see no warrant for adding the further term now contended for. The other question which arises has reference to a claim to debit interest upon advances made to another of the testator's sons. The clause of his will immediately following that which directed the accumulation of the income or the residuary estate, and fixed the period of distribution thereof (No. 13) contained a clause empowering the trustees at any time or times before the period of distribution to apply out of the capital of the said trust premises any sums, not exceeding in the whole one half of the capital share, in or towards the establishment of any of his sons in any profession or business or his advancement in the world in any other manner appearing to the trustees expedient, "the sums so advanced to be taken in part satisfaction of the shares to which my said sons or their issue may respectively become entitled of the said trust premises." Advances were made to one of the sons from time to time amounting in the whole to 8200*l.* It is not disputed that he must be debited with these in part satisfaction of the share to which he is entitled, but it is contended that in addition to this he ought to be debited with interest on those advances from the time they were respectively made. The contention is based on the fact that the testator directed the accumulation of the surplus income of the whole of the trust premises, that the advances made diminished *pro tanto* the amount of the trust premises bearing interest, and consequently the accumulations, and that if the son who received advances is allowed to have an equal share of the accumulations he will obtain an advantage over his brothers and sisters, while the scheme of the testator was that there should be equality. If the contention be tenable I think it follows that the son receiving advances must be debited with compound interest on the sums advanced, and not simple interest merely. If this be not done the equal treatment which is alleged as the justification of debiting interest will not be secured. I think the matter in controversy must be determined by a study of the language used by the testator. No case was cited in which any such rule was laid down governing the present case. In the case of *Re Rees; Rees* v. *George* (*ubi sup.*), the authorities, with reference to debiting interest on sums advanced were reviewed by the late Master of the Rolls. The attempt there made was to debit a child with interest in respect of sums advanced during the father's lifetime, and which were to be brought into hotchpot upon the distribution of the estate. The Master of the Rolls decided that interest ought to be debited from the period of distribution only. I can find nothing in that decision, or in the language of the Master of the Rolls, when read as it must be in connection with the point he was then considering, which supports the appellants' contention. I feel free, therefore, to allow myself to be guided by what appears to me to be the intention of the testator as indicated by the language he has used, untrammelled by any technical rule. The first observation I have to make on the words of the will is, that it prescribes only that the sums advanced are to be taken as part satisfaction of the shares to which his sons may become entitled in the trust premises. It does not provide that the sums advanced with "interest thereon" shall be thus taken in part satisfaction. I turn then to the clause which ascertains the share to which the children are entitled. It no doubt directs the investment of the surplus income of the whole residuary estate and its accumulations at compound interest, but this must be read subject to the clause immediately following which sanctions the diminution of the trust premises to the extent of the sums advanced under its authority. They then cease to bear any income which the trustees can invest. The surplus income which is to be invested and accumulated must, in my opinion, refer to the income of the trust premises which the trustees receive. When the period of distribution arrives the trustees are to stand possessed of "the said trust premises with the accumulations thereof" in trust for the children. This, I think, must mean the accumulations actually in the hands of the trustees as the result of their investment and accumulation of the surplus income. I cannot see any warrant for treating the sums advanced to a son as if they had continued part of the trust premises vested in the trustees, the income of which was

to be accumulated and so added to the actual accumulations, as a condition of allowing the son who has received the advances to share equally in the accumulations with the other children. Of course the same result in a matter of figures might be arrived at in other ways than by debiting compound interest on the advances. It was suggested during the argument that the accumulations ought to be regarded as accretions to the expectant shares of the several children, and that as from time to time advances were received by one of them his interest in the accumulations ought to be treated as *pro tanto* diminished. But this is not, in my opinion, the scheme of the will. The persons who are to share in the division of the trust premises and the accumulations thereof are to be ascertained only at the period of distribution. I quite admit that the conclusion at which I have arrived does involve some inequality of treatment. The son who has obtained advances will be placed in a position of advantage as compared with the other children, but I am not satisfied that the testator did not so intend. When a father makes advances to some of his children during his lifetime it is conceded that, though the sums advanced are to be taken into account when he has directed division amongst his children of his residuary estate, no interest is to be debited in respect of the advances. Yet in this case the result is, that there is not complete equality of treatment. The child who has obtained the advances may have had the use of the money many years before the other children receive anything, and it may not unreasonably be presumed that if the father had retained the money and received the income thereof the estate left by him for distribution would have been greater. In the present case, having postponed the division of his estate for a lengthened period, it seems to me that he may have intended to put his trustees *in loco parentis* so far as advances to his children were concerned, and that these advances should be treated in the same manner as if made by himself. I do not dwell upon this, or assert that it was his intention; I only give it as a reason why I am not prepared to depart from that which I understand to be the meaning of the provision which the testator has inserted in his will. Moreover I think that it would not in all cases necessarily secure fair treatment if effect were given to the contention of the appellants. It may be that no injustice would be done where, as in the present case, an adult child receives advances; but the clause which authorises these advances is not limited to such a case. It would apply equally where the trustees paid a sum of money for the purpose of apprenticing an infant or establishing him in some profession or business, and I can well conceive hardship arising in such a case if interest could be debited in respect of such advance in the manner proposed. For these reasons I think that the judgment should be affirmed, and the appeal dismissed with costs.

SMITH, L.J.—Two questions arise in this case. The one is, whether the testator's eldest son, Thomas, upon the division of his father's residuary estate (which in the events which have happened became divisible upon the 23rd April 1894) amongst his children, is to be debited with interest upon the value of his father's business from the time when he succeeded to it under the provisions of his father's will in 1884 down to the period of distribution in 1894. The other is, whether the testator's second son, Sydney, is in like manner to be debited with interest down to the same period upon sums amounting to 8200*l.*, advanced to him for his advancement in life by the trustees of his father's will pursuant to its provisions. As regards the eldest son, Thomas, the testator by his will declared that upon his electing to succeed to his business the same should belong to him, and that he should be debited with its value at the time he elected to succeed to it, when the time came for the division of the testator's residuary estate, which was to be when his youngest child came of age; and the will declared that in case such value should exceed the total amount of the expectant share of Thomas in the residuary estate he should refund the excess to that estate by instalments or otherwise as the trustees should determine. As regards Sydney, the second son, the testator, after making certain devises and bequests, gave his trustees absolute discretion at any time before the period of distribution (which as before stated was to be when the youngest child came of age) to apply the surplus income of the trust premises towards the maintenance and education of his children, and declared that any sums so advanced to a child after he attained twenty-one were to be taken in part satisfaction of the share such child should become entitled to in the trust property. He also gave his trustees power during that period to apply out of the capital of the trust premises any sum not exceeding one half of any son's capital share, in and towards establishing that son in any profession and business to be approved by his trustees, and the sums so advanced were to be taken in part satisfaction of the share to which that son would become entitled upon the division of the residuary estate. The will also directed that any surplus income there might be, after satisfying the annuities given by the will, and making the discretionary advances to the sons and the expenses incidental to the trust, should be accumulated at compound interest by the trustees, who, at the period of distribution, were to stand possessed of the trust premises with the accumulation thereof in trust for the testator's children then living as tenants in common. The above is what the will directs as far as is material to the points in hand. Now, taking the will, it seems to me clear that the testator has not directed that Thomas was to be debited with interest upon the value of the business to which he had succeeded when the time came for the division of the residuary estate. The words are "he shall be debited with the value thereof," and in case such value shall exceed, as I read it, what is coming to him when the residuary estate is divided, then he is to refund such excess in such way as the trustees may direct. There is not a word about his being debited with interest when the division takes place over and above the value of the business. The appellants would read this clause as if it ran "he shall be debited with the value thereof with interest thereon," which is clearly not what the will says, nor, as far as I can see, what the testator intended. Now, as regards the moneys advanced to Sydney for his advancement in life, the will directs that the sums so advanced are to be taken in part satisfaction of

the share he is entitled to upon the distribution of the testator's residuary estate. Here, again, there is no direction that the moneys which the trustees may advance to Sydney for his advancement in life are to be charged with interest upon the division of the residuary estate. As regards these advances the trustees are placed by the testator in the same position as he would have been in had he not died. They are to do what presumably the father might have done had he been alive. It is not, in my experience, the usual thing for a father when he makes provision for his son in life to charge him with interest upon money he then advances to him, and unless it be stipulated for I certainly should draw the inference that the advances were made free of interest, not that they were to be interest-bearing loans. By the will the testator has not directed that either Thomas or Sydney is to be debited with interest upon what they may receive out of the testator's estate prior to the division of his residuary estate when that might take place. But it was argued for the appellants that, as regards the advancements made to Sydney, unless the will directed the contrary, the rule of the court of equity was that, in dividing the residuary estate of a testator which was to be equally divided amongst his children, money advanced by way of advancement of a child in life was always debited with interest from the time of its having been so advanced down to the period of distribution of the residuary estate. The reason assigned for this rule was, that otherwise those of the children who had not had advances made to them for their advancement in life were not on an equality when the time came for the distribution of the estate with those who had had such advances; inasmuch as those to whom advances had been made had had the use of the money advanced, and had deprived the estate of its use, and if it had not been advanced the interest accruing thereon would have gone to swell those accumulations in which all, when the division came, were to participate equally. But this, with submission, begs the question as to what the children at the time of distribution were to participate in equally. In my judgment, by this will it is directed that the children are to participate equally in the capital of the testator's estate, together with the accumulations which may happen to have been made after making the advances and other disbursements as directed by the will, subject to this, that in making the division Thomas and Sydney are to bring into account what they have in fact had out of the testator's estate, the one the value of the business, the other the moneys advanced. It is in whatever the trustees might have in hand when the period of distribution arises that the children then living are to participate as tenants in common, not in what the trustees might have had if no advancement to the sons had been made. If the rule exists, and the reason assigned for it is well founded, surely the money advanced to Sydney for his advancement in life must be debited with compound interest, and not merely with simple interest, for the hypothesis is, that the child advanced must make good to the estate that which he has had to the impoverishment of the estate, which cannot be brought about unless compound interest upon the advances is calculated. Authorities were then resorted to to support the existence of the rule, and *Re Rees; Rees v. George* (*ubi sup.*), in which the cases on the subject are collected in the judgment of Sir George Jessel, was referred to. Neither the case itself nor the cases therein cited are authorities for the proposition now contended for, viz., that interest is to be debited from the date of the advances made till the period of division of the residuary estate. In my judgment, whether you look to the suggested reason for the rule or to the cases cited, the appellants fail to establish the existence of the rule, and my brother Kekewich was quite right both on the construction of the will and upon the non-existence of the rule contended for, and this appeal must be dismissed with costs.

RIGBY, L.J., after stating the facts set out above, continued:—I regret that as to one part of the judgments delivered, that is to say, as to the advances out of residue, I am unable to concur. The questions raised in the appeal are, whether Thomas, Sydney, and the younger children respectively are to bring into hotchpot any and what interest on the value of the business and the advances. Kekewich, J. decided that the capital sums only were to be brought into hotchpot. It was conceded on the appeal that interest on all the sums must be brought into account as from the date when the residuary estate ought to have been distributed; that is to say, from the date of the youngest child attaining twenty-one, and that the order appealed against must to that extent be varied. The contest was therefore confined to the periods which elapsed before that date. The case of Thomas, with regard to the value of the business, depends upon considerations different from those affecting the advances. By advances throughout, in my judgment, are meant not advances on loan, but gifts by way of advancement. The Court of Chancery never assumed jurisdiction to correct any inequality between children where that inequality was brought about by the plain disposition of the parent made during lifetime or by will. It only interfered to prevent inequality or a greater inequality than the parent had plainly intended in cases where the parent having had occasion for expressing his intention had done so by directing an equal division, or as the case might be, a definite inequality. Thus, with reference to advances made to children by a parent during his lifetime, followed by a will taking no notice of the advances, the will was treated as precluding the taking of the earlier advances into consideration. But advances made after the date of the will were, as a general rule, treated, in the absence of express declaration to the contrary, as operating as an ademption of the whole or part of the testamentary provision for the advanced child according as the advances were equal to or greater than or were less than the testamentary provision. A will can have no effect except on property which the testator has at the time of making it or afterwards acquires. Advances made before the date of the will cannot come out of the property dealt with by the will, and the fact of such advances having been made does not, if they are not mentioned in the will, affect the scheme of distribution which the testator intends to apply to the property. But although, of course, the will can only operate on property which the testator has at the time of his death, that event

may happen at any moment, and it has been thought a reasonable presumption that the scheme of distribution indicated by the will should not be disturbed by advances subsequently made. The business and its assets form in the event which has happened no part of the residuary estate of the testator. No presumption of equality arises with reference to this gift, but the testator's intention must have effect given to it according to the terms of the will. He could, of course, impose any terms which appeared satisfactory to him. As in the case of his mansion and grounds called Sunnyfield, where three-quarters only of the value was to be paid by the son exercising the right of pre-emption, he might make the terms as favourable as he pleased to the son succeeding without infringing any doctrine of a court of equity. What he really does is to direct a value to be placed on the assets, which are to belong at once to the son, and that the son is to be "debited" with that value "in the division of my residuary estate." If the son died before the division he never would be debited at all and he would get the business for nothing. The only provision for payment at all arises in case the value should be in excess of the expectant share of the son, and then payment was to be made of the excess only, and by such instalments as the trustees should think fit. There is no reason for departing from this scheme, and the son is only to be debited on the division, though as from the date fixed for distribution he will of course be debited with interest. The advance to Sydney and the younger children stand on a wholly different footing. Clause (12) dealing with the residuary estate divides the assets into equal shares, so that we get the testator's direction for equality as the governing rule in dealing with residue—a rule not to be departed from without plain reason to be derived from other parts of the will. It is important to observe that the real and substantial question is how far an advanced child is to share in the accumulations arising from the residue as diminished by the advances made to him. He cannot be charged with any part either of a capital sum advanced or of interest thereon so as to be made liable to repay. The charging of interest in such a case is only an arithmetical device adopted for the purpose of ascertaining how much more he is to receive. The true principle applicable to advances out of a fund which independently of the advances is to be equally divided is, that the unadvanced are not to be in a better or worse position except so far as is expressly provided by the settlor, by reason of the advance; in other words, the unadvanced children are to be placed as far as possible in the same position as if no advances had been made. All the cases cited in *Re Rees*; *Rees* v. *George* (*ubi sup.*), where the subject was discussed at length by the late Master of the Rolls, Sir George Jessel, recognise and profess to go upon this principle. In *Hilton* v. *Hilton* (*ubi sup.*) Malins, V.C. uses language (L. Rep. 14 Eq. 475, 476) which seems to me to be an enunciation of this principle. In *Field* v. *Seward* (5 Ch. Div. 538) Bacon, V.C. says it is necessary, in order to carry out the testator's intention, that there should be as far as possible equality. In *Re Rees*; *Rees* v. *George* (*ubi sup.*), the testator had given his widow a life interest in his residue, and subject thereto had directed his trustees to divide his residue among his children who being sons should attain the age of twenty-one, or being daughters should attain twenty-one or marry under that age, with a direction that advances, whether made in his lifetime or under the power in the will, should be brought into hotchpot. Sir George Jessel says (17 Ch. Div. 704): "He," the testator, "means that none of the children who have not been advanced or who have received less than others shall suffer"; and lower down, "Therefore charging interest is only to be regarded as a mode of calculation by which in order to place the children on an equality the estate is put in the same position as if no advance had been made." True it is that in the case before him interest was charged on advances only from the widow's death; but that was expressly rested on the ground that until her death she took the whole income, and so the children, on whose account alone that hotchpot clause was introduced, could take no benefit from interest charged before that date, and would lose nothing by its being withheld. Turning again to the will before us we find three clauses of advancement, one in clause (6), to advance any son who has attained twenty-one either the whole or any part of his then expectant share of the legacy of 4000*l.* The second is in clause (11), dealing with yearly sums applied out of surplus income for the maintenance or education of any son or daughter who shall have attained twenty-one years, which are to be taken in part satisfaction of the share to which he or she, or his or her issue, may respectively become entitled of the said trust premises. The third is clause (13), which authorises advances out of capital to an extent not exceeding in the whole one half of the capital share, and directs that the sums advanced are to be taken in part satisfaction of the shares to which his sons or their issue may respectively become entitled of the said trust premises. The directions as to part satisfaction contained in clauses (11) and (13) are necessary to ensure that the advances shall be charged not only against the advanced children themselves, but also against their issue, and do not show any intention that advances under these powers are to be treated on a different footing from advances out of the legacy of 4000*l.* Any advances made to a son out of the 4000*l.* legacy would clearly disentitle the son advanced to subsequent interest in respect of the advance, so that, if the whole 4000*l.* were advanced to a son, he would get no subsequent interest. The distinction between clauses (11) and (13) as to advances out of income and capital, respectively, seems intended only for the purpose of fixing the amount that may be advanced, since any income not advanced under clause (11) at once becomes capital. In clause (13), where the capital share is mentioned, share must mean expectant or presumptive share, since before the period for distribution there can be no vested share. What then is the meaning of the words "taken in part satisfaction" occurring in clauses (11) and (13)? It would seem that they should have their literal meaning, and that the advances should be treated as satisfying *pro tanto* the expectant share in respect of which they are made at the time when they are taken. At any rate it is not right, unless there is a clear necessity to say that they must be taken as meaning the same thing in effect as a direction that the advanced

child or his issue "shall be debited" in the division of the residuary estate, which is the phrase used in clause (3) with reference to the value of the business. It would seem therefore, and the equality which as to residue is the governing rule expressed in clause (12), requires (unless the unadvanced children are to be the worse for the advance) that the share to which an advanced child or his issue may be entitled in expectancy is to be treated as diminished by the amount of the advance as from the date when the advance is taken or made. The strict rights of the children on this view of the will would be worked out by a declaration that, as between the children, the accumulations from time to time of residue are to belong to them in the same proportions in which they are for the time being entitled in expectancy to the corpus, including past accumulations, with consequential directions. To give effect to this, rests would have to be taken at the end of each year as to the younger children's advances, and at the dates of the actual advances to Sydney with regard to his advances. The result would give to each child the exact part of the accumulation earned by his expectant share for the time being. After the period of distribution a charge of interest on the value of the business and on the advances would have to be made, and, as the accumulations of residue have still continued, 4 per cent interest ought to be charged. Mr. Renshaw argued, and I think was logically bound to argue, that, if the plan of charging interest against advances during the period of accumulation were adopted, such interest should be compound interest, but the plan above suggested has the merit of carrying out exactly what could only be done approximately by the method of charging interest, and showing upon the face of the order made the precise reason for the adjustment. It would readily be carried into effect by an accountant without involving more complicated accounts taking than is involved in many orders of the court made in recent times.

Solicitors: *King, Wigg,* and *Co.*; *Steadman Van Praagh, Sims,* and *Co.*; *Waddington* and *Cheeseman.*

Monday, Jan. 13.

(Before Lord ESHER, M.R., SMITH and RIGBY, L.JJ.)

BARRY *v.* THE PERUVIAN CORPORATION LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Commercial cause—Entry in commercial list—Application by plaintiff before appearance of defendant.

Upon an application by the plaintiff in an action in the Queen's Bench Division, before the defendant has entered an appearance, and before the time limited for his appearance has expired, the judge charged with commercial business may order that the cause be entered in the commercial list.

The judge may direct that the costs of such an application shall be costs in the cause.

THIS was an *ex parte* application by the defendants for leave to appeal.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The action was for demurrage, and was brought in the Queen's Bench Division.

The plaintiff served on the defendants along with the writ of summons, a summons asking that the cause should be entered in the commercial list.

Before the defendants had entered an appearance, and before the time limited for appearance had expired, Mathew, J., the judge charged with commercial business, heard the plaintiff's summons. The learned judge ordered the cause to be entered in the commercial list, directed that the costs of the application should be costs in the cause, and gave the defendants liberty to apply.

The defendants afterwards entered an appearance, and applied to Mathew, J. for leave to issue a summons for the rehearing of the plaintiff's application.

Mathew, J. refused leave.

The defendants applied to the Court of Appeal for leave to appeal from the order made by Mathew, J. upon the plaintiff's application, and from his refusal of the defendants' application.

Lauriston Batten for the defendants.—Mathew, J. had no jurisdiction to make this order before the defendants had entered an appearance. An order has been made under which the defendants may be liable to pay the costs of it. The defendants were therefore entitled to be heard.

Lord ESHER, M.R.—We have talked this matter over with the Lord Chief Justice and with Mathew, J., and we wish now to lay down a rule of practice with regard to the new system of putting cases in the Queen's Bench Division into a commercial list. Nothing has been done to alter the ordinary rules of the court as to questions of venue, or to alter the legal effect of any writ or procedure. The causes in the commercial list are of the same kind as ordinary actions in the Queen's Bench Division, except that they have to do with ordinary transactions among merchants, and are of a kind which have for long been commonly spoken of among lawyers as commercial cases. With regard to these cases no rules have been made of such a binding nature as those made by the Rule Committee. There is simply a practice with regard to them which has been agreed to by the judges of the Queen's Bench Division. Now what right had the judges to deal in this way with commercial causes? The mode of dealing with cases in that division, subject to the rules of the Supreme Court, is not to attach them to particular judges. The parties to a cause in the Queen's Bench Division can not object to their action being tried by any particular judge of that division. The Crown has provided a number of judges who have absolute power to deal according to law with the cases in the division. They can determine which judge shall sit in which court, and when London actions were tried at the Guildhall they decided which judge should sit in the city and which should sit in these courts. The parties to an action had nothing to do with the question which judge should try it. Now, for the benefit of suitors, the judges have decided that commercial cases shall be put in train to be tried before one or two or three or four particular judges, as the case may be. It has been arranged that that judge shall deal with cases in that list. But these cases

still remain in the Queen's Bench Division. The judges have decided that either party to an action may make an application that it should be put in the commercial list, and a case put in that list may be dealt with by the judge charged with commercial business, sitting at chambers. When such an application is made the judge may, if the cause be a commercial cause, enter it in the commercial list. He can do that on the application of the plaintiff immediately the writ in the action has been served, and he can do it without hearing what the defendant may wish to say in opposition. But if the cause be not a commercial cause, the defendant has the right to insist that it should not go into the commercial list and that it should be tried according to the ordinary practice. If the cause is a commercial cause and the judge puts it into the commercial list on the plaintiff's application, there it must remain. The only ground upon which the defendant can appeal from the judge's decision is that the cause is not a commercial cause. Now, the entry of a cause in the commercial list is a step in the cause which entails some expense, though not very much; and it was argued here that the defendant ought not to be made liable to have to pay the costs of a summons upon which he is not heard. If the defendant wins the action an order that the costs of the summons shall be costs in the cause cannot hurt him. If he loses he must pay for the expense of a right step taken in the cause at the right time. Therefore the ordinary practice, when the judge grants an application by a plaintiff that the cause should be entered in the commercial list, will be that the costs of the application will be ordered to be costs in the cause. In the present case the cause is admittedly a commercial cause, and I think that Mathew, J. was perfectly right in making the order that he has made. As to the objection that the order was made before the defendants had appeared in the action, I think that there is nothing in it. The application must therefore be dismissed. I have said nothing as to an application by a defendant that a cause should be put in the commercial list, but, of course, he could not make such an application before he has appeared.

Smith, L.J.—This is an application for leave to appeal against two orders made by my brother Mathew. The question before us has nothing to do with change of venue. As to that my brother Mathew had no jurisdiction different from any other judge of the Queen's Bench Division. Now it is not disputed that the present action is a commercial cause. Immediately upon the service of the writ, before the defendants had entered an appearance, the plaintiff applied to Mathew, J. to put the cause into the commercial list. The learned judge granted the application. It is now said that he had no jurisdiction to do so before the defendants had appeared. I do not agree with that contention. The regulations made for the despatch of commercial business were clearly intended to enable the judge charged with that business to take seisin of a commercial cause at the earliest possible moment. Take the case of the plaintiff in a commercial cause brought in the Queen's Bench Division who desires to make an application for substituted service. If no application could be made to the judge charged with commercial business before the defendant had entered an appearance, the plaintiff in such a case as that would have to go before a master in the ordinary way. That is not what was intended by the regulations that have been made for the despatch of commercial business. Therefore I think that Mathew, J. had power to make an order, before the defendants had entered an appearance, that this cause should be entered in the commercial list, provided that it is a commercial cause. I think, too, that he was quite justified in refusing to hear the defendants' application. If the cause was a commercial cause he could order it to be entered in the commercial list wholly irrespective of any objection by the defendants. The only ground upon which a defendant can object to such an order is that the cause is not a commercial cause. That is not the ground of the defendants' application in the present case. They admit that the cause is a commercial cause, and the only ground of their application now is, that the learned judge had no jurisdiction to make the order which they complain of because the defendants had not then entered an appearance. As to the costs of the plaintiff's application, Mathew, J. ordered that they should be costs in the cause. That was not an order made against the defendants behind their backs. The costs of entering a case in the commercial list are in the same position as the costs of a writ of summons or of an order for substituted service. I think that the order of Mathew, J. was entirely right, and this application must be refused.

Rigby, L.J.—I am of the same opinion. The moment that one arrives at the conclusion, which seems to me to be inevitable, that the existence of a separate list for commercial causes is not a matter on which the parties to an action are entitled to address arguments to the court, except upon the point whether the action is or is not a commercial cause, the matter seems to me to be perfectly simple. The plaintiff in a commercial cause has an absolute right to go before the judge who is charged with commercial business the moment that the writ is issued, and to ask that the cause be entered in the commercial list. If the cause is a commercial cause the defendant has no ground for objecting to that application. If that were not the proper practice, what would be the alternative? Suppose that the plaintiff asked the judge for leave to serve the defendant, though he had not appeared to the writ, with a summons asking that the cause should be entered in the commercial list. Then as the defendant could only oppose the application on the ground that the cause was not a commercial cause, there would be two steps taken instead of one, and the result would simply be that if the defendant proved unsuccessful in the action he would have to pay the costs of two applications instead of one only. It is obviously to the advantage of the defendant that the matter should be treated in the way that Mathew, J. has treated it. The present case is clearly a commercial cause, but it seems that in applications of this sort it is the practice of Mathew, J., in order to meet a possible objection that the cause is not a commercial cause, to give the defendant liberty to apply. But the defendant cannot object to the order for the entry of the cause in the commercial list upon any other ground than that the cause is not a commercial cause. There is no conceivable way in which a defendant can be injured by such an order as Mathew, J. has here made. The question

whether or not a commercial cause shall be entered in the commercial list is a question for the court.

Application refused.

Solicitors: *Smiles, Ollard, Yates,* and *Ollard.*

Monday, Jan. 20.

(Before Smith and Rigby, L.JJ.)

D'Errico *v.* Samuel and another. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice — Action of tort — Remittal to County Court—County Courts Act 1888 (51 *&* 52 *Vict. c.* 43), *s.* 66.

An action of tort which has been ordered under sect. 66 *of the County Courts Act* 1888 *to be remitted to a County Court, remains in the High Court until the plaintiff has lodged the original writ and the order with the registrar of such court.*

This was an appeal from a decision of Lawrance, J. at chambers, reversing an order of the master on the ground that it had been made without jurisdiction since the action had been remitted to the City of London Court.

The action was an action of tort, and was commenced in the High Court.

On the 19th Nov. 1895 the plaintiff obtained leave to deliver interrogatories.

On the 25th Nov. the defendants obtained an order, under sect. 66 of the County Courts Act 1888, for the remittal of the action to the City of London Court unless the plaintiff should within seven days give security for their costs. By consent this time was afterwards enlarged to the 12th Dec.

On the 26th Nov. the interrogatories were delivered.

On the 10th Dec. the plaintiff took out a summons for further and better answers.

On the 12th Dec. the time allowed to the plaintiff for giving security for the defendants' costs expired, and the order of the 25th Nov. for the remittal of the action to the City of London Court became absolute.

On the 13th Dec. the master made an order for the delivery by the defendants of further and better answers to the plaintiff's interrogatories.

On the 18th Dec Lawrance, J., on appeal, reversed this order of the master on the ground that, as the action had been remitted to the County Court there was no jurisdiction in the High Court to make the order which was complained of.

The plaintiff now appealed from the decision of Lawrance, J.

By the County Courts Act 1888 (51 & 52 Vict. c. 43) it is provided by sect. 66 that, in an action of tort brought in the High Court, the judge may upon an affidavit by the defendant make an order that, unless the plaintiff shall within a time to be mentioned give full security for the defendants' costs,

> The action be remitted for trial before a court to be named in the order, and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such court . . . and the action and all proceedings therein shall be tried and taken in such court as if the action had originally been commenced therein. . . ."

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

The plaintiff did not lodge the original writ and the order with the registrar of the City of London Court.

Witt, Q.C. (*Rockingham Gill* with him) for the plaintiff.—The master had jurisdiction to order further and better answers to the plaintiff's interrogatories, because the action is still in the High Court. An action, though an order for its remittal to a County Court has been made under sect. 66, remains in the High Court until the plaintiff lodges the original writ and the order with the registrar. The order for remittal does not of itself transfer the action. That was decided by the Court of Appeal to have been the effect of sect. 10 of the County Courts Act 1867 (30 & 31 Vict. 142):

> *Welply* v. *Buhl,* 37 L. T. Rep. 640; 38 L. T. Rep. 115; 3 Q. B. Div. 253;
> *Driscol* v. *King,* 49 L. T. Rep. 599.

Upon this point the provisions of sect. 66 of the County Courts Act 1888 are identical with the provisions of sect. 10 of the Act of 1867.

P. Rose-Innes for the defendants.—The provisions of sect. 66 of the Act of 1888 are not altogether identical with those of sect. 10 of the Act of 1867. Under the Act of 1867 an action was remitted merely for trial; while an action remitted under sect. 66 is wholly remitted to the County Court and ceases to be any longer in the High Court. The remittal takes place immediately the order becomes absolute. See observations of the judges in

> *Harris* v. *Judge,* 67 L. T. Rep. 19; (1892) 2 Q. B. 565;
> *Duke* v. *Davis,* 69 L. T. Rep. 490; (1893) 2 Q. B. 260.

If that is not so, a plaintiff could by refusing to lodge the writ and order with the registrar nullify the order and put the defendant to the expense of proceedings in the High Court.

Smith, L.J.—I think that this appeal must be allowed. The master held that he had jurisdiction to make an order that the defendants should deliver further and better answers to the plaintiff's interrogatories. Lawrance, J. held that the master was wrong. The plaintiff has now appealed from the decision of the learned judge. Proceedings had been taken by the defendants under sect. 66 of the County Courts Act 1888 to have the action remitted to the City of London Court. Now, as regards the question which has arisen in this case, namely, what is the point of time at which an action of tort which has been commenced in the High Court becomes an action in the County Court so as to take away the jurisdiction of the High Court over it, the provisions of sect. 66 are the same as those of sect. 10 in the County Courts Act 1867. The words of the two sections are identical until you come to that part of them which has reference to matters arising after the moment when the action has become a County Court action. There is a change in the law applicable to the action after that moment, but until the action has become a County Court action the law is the same, upon the point now in question, as it was before the passing of the Act of 1888. Now, in *Welply* v. *Buhl* (*ubi sup.*) the very point argued here was raised upon the construction of sect. 10 of the County Courts Acts 1867. The Court of Appeal

there held that, until the plaintiff had lodged the writ and the order remitting the action with the registrar of the County Court, the action remained in the Superior Court. The present case is therefore absolutely concluded by authority. The two cases which have been referred to on behalf of the defendant, *Harris* v. *Judge* (*ubi sup.*) and *Duke* v. *Davis* (*ubi sup.*), do not touch the point. There is no hardship on the defendants in our decision because sect. 66 provides that the taxation of the costs of proceedings taken after the order has been made that the action is to be remitted, shall be, not on the High Court scale, but on the County Court scale. The master had jurisdiction to order the defendants to give further and better answers to the interrogatories, and this appeal must therefore be allowed.

RIGBY, L.J.—I am of the same opinion. An action does not cease to be an action in the High Court immediately upon an order being made for its remittal to a County Court under sect. 66. That is clearly so, because it is the duty of the plaintiff when such an order is made, to take the case into the County Court. If he should refuse to do so there would be no effective remittal. As Smith, L.J. has pointed out there is no hardship on the defendants in our deciding thus, because the costs incurred in the High Court after the order for remittal was made are to be taxed on the County Court scale. There is no distinction between the present case and the decision of the Court of Appeal in *Welply* v. *Buhl* (*ubi sup.*), and we must therefore allow this appeal.

Appeal allowed.

Solicitor for the plaintiff, *C. T. Wilkinson.*

Solicitors for the defendants, *Micklem* and *Hollingworth.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Dec. 10 *and* 11, 1895.

(Before NORTH, J.)

Re THE EARL OF ORFORD; NEVILLE *v.* CARTWRIGHT; CARTWRIGHT *v.* THE DUC DEL BALZO. (*a*)

Administration—Estate duty—Finance Act 1894 (57 *&* 58 *Vict. c.* 30), *s.* 14—*Appointment—Residue—Specific shares—Incidence of duty—Costs.*

By a marriage settlement, made in 1841, *funds amounting to* 100,000*l. or thereabouts were settled upon trusts to invest in land to be conveyed to the use of the husband for life, with remainder, in the events which happened, subject to certain terms of years for raising portions and other sums to the amount of* 40,000*l., to such uses as the wife should by will appoint. The wife died in Nov.* 1886, *having by her will appointed* 35,000*l. out of the fund to A., and subject thereto the residue to other persons. The husband died in Dec.* 1894, *after the passing of the Finance Act* 1894. *The fund had never been invested in land. It was admitted that the fund became liable to estate duty on the death of the husband, and that the trustees of the settlement were bound to pay it in the first instance. Several summonses were taken out relating to the property comprised in the settlement, raising, amongst others, the question how, as between the appointees of the* 35,000*l. and the residue, the estate duty and the costs of the summonses were to be borne.*

Held, on the construction of the Finance Act 1894, *that in all cases where duty becomes payable for which the executor is not made accountable by sect.* 6 (1), *the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares, and not thrown wholly on the residue.*

Held also, that, according to the general practice of the court, the costs of administration of an appointed fund, and therefore of the summonses in this case, must be borne rateably by all the appointed shares, and not thrown on the residue.

BY a settlement dated the 9th Nov. 1841, made on the marriage of the late Earl and Countess of Orford, certain moneys and securities belonging to the countess were assigned to trustees upon trust to convert into money and to invest the proceeds in the purchase of lands to be settled to the use of trustees for a term of 500 years upon trust to raise portions for the younger children of the marriage (under which in the events which happened 15,000*l.* became raisable), with remainder to the use of the earl for life, with remainder, after certain terms of years, the trusts of which failed to take effect, to the use of the sons of the marriage successively in tail male, with remainder to trustees upon trust to raise 25,000*l.* to be held upon the trusts therein mentioned, and subject thereto, in case the countess should die in the lifetime of the earl, upon such trusts as the countess should by will or codicil appoint.

There were no sons of the marriage, and only two daughters, who were respectively married to the Duc del Balzo and the Prince Palagonia.

By her will, dated the 12th Dec. 1877, the countess, in exercise of the power given her by the settlement, appointed all the property which she had power to appoint under the settlement to trustees in trust to sell, and out of the proceeds to pay 25,000*l.* to her daughter, the Duchess del Balzo, but with a gift over to Lord Exmouth in case her daughter disentailed certain other property (which event happened), and appointed the residue to her daughter for life, and after her death to be laid out in the purchase of lands to be settled to go with the title of Viscount Exmouth.

By a second codicil to her will, dated the 12th June 1886, the countess directed that the trustees of her will should stand possessed of the moneys to arise from the conversion of the funds appointed to them by her will in exercise of the power contained in the settlement, upon trust out of the said moneys, in the first place, to pay to her daughter the duchess the sum of 35,000*l.*, absolutely free from all limitations and restrictions or liability to forfeiture whatsoever, and subject to such payment should stand possessed of the residue of the moneys upon the trusts and with and subject to the powers and provisions which would under her will have been applicable thereto if such residue had been the whole of the same trust moneys, including the provisions in

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

her will contained as to the sum of 25,000*l.* thereby directed to be paid thereout, and in all other respects she confirmed the will.

The countess died on the 9th Nov. 1886.

The Earl of Orford died on the 7th Dec. 1894. The summons *Neville* v. *Cartwright* was taken out to ascertain the rights of the different parties under the settlement, and the summons *Cartwright* v. *The Duc del Balzo* was taken out to ascertain the rights of the persons interested under the countess's will. The two summonses came on for hearing together, with several others relating to some parts of the same estates. The Inland Revenue authorities had claimed that estate duty became payable on the appointed fund on the death of the earl. It was admitted that this was so, and that the trustees of the settlement were bound to pay it in the first instance.

The only question raised in any of the summonses which requires a report was, how the estate duty and the costs of these summonses were to be borne as between the beneficiaries.

The sections in the Finance Act 1894 upon which the argument turned are:—

Sect. 1. In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called "estate duty," at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty.

Sect. 6.—(1.) Estate duty shall be a stamp duty, collected and recovered as hereinafter mentioned. (2.) The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment. (4.) Estate duty, so far as not paid by the executor, shall be collected upon an account setting forth the particulars of the property, and delivered to the commissioners within six months after the death by the person accountable for the duty, or within such further time as the commissioners may allow.

Sect. 8.—(3.) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death. (4.) Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing, or the management thereof, is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act, or such later time as the commissioners allow, deliver to the commissioners and verify an account, to the best of his knowledge and belief, of the property.

Sect. 14.—(1.) In the case of property which does not pass to the executor as such an amount equal to the proper rateable part of the estate duty may be recovered by the person who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary. (2.) Any dispute as to the proportion of estate duty to be borne by any property or person, may be determined upon application by any person interested in manner directed by rules of court, either by the High Court, or, where the amount in dispute is less than fifty pounds, by a County Court for the county or place in which the person recovering the same resides, or the property in respect of which the duty is paid is situate.

Vernon Smith, Q.C. and *MacSwinney* for the Duchess del Balzo.—The codicil clearly directs that the 35,000*l.* should be paid in priority to the sums given by the duchess's will. These sums are therefore in the position of residue, and we contend that the duty and costs ought to be paid out of that residue in exoneration of the 35,000*l.* No case appears to have been decided under the Finance Act 1894. But the estate duty under this Act is substituted for the account duty imposed by the Customs and Inland Revenue Acts of 1881 and 1889, and for probate duty. Stirling, J., in *Re Bourne*; *Martin* v. *Martin* (67 L. T. Rep. 586; (1893) 1 Ch. 188), decided that account duty must be borne, as probate duty was, by the residue. The cases of *Re Croft*; *Deane* v. *Croft* (66 L. T. Rep. 157; (1892) 1 Ch. 652), and *Re Shaw*; *Tucket* v. *Shaw* (71 L. T. Rep. 873; (1895) 1 Ch. 343) were cases in which there was no residue, all the appointed sums ranking equally. If this had been personal estate the matter would be quite clear, for the duty would have to be paid by the executor. This is notional real estate, but the general effect of the Act is to assimilate real and personal estate, and to put both in the same position by subjecting them to a new duty which is analogous to probate duty and must be paid in the same way. Sect. 14 applies only to land subject to a charge, as, for example, a charge of portions; it does not apply to a case like this, where the whole land is directed to be sold and the proceeds paid to different persons. In *Re Croft* (*ubi sup.*) the question was treated as depending on the testator's intention. The duchess clearly intended here that this sum should be paid free of all charges. As to costs. The countess was not appointing an aliquot part of an ascertained fund; she appointed a specific sum and then the residue. The general rule therefore applies that all the costs must be paid out of residue:

Petre v. *Petre*, 18 L. T. Rep. O. S. 14; 14 Beav. 197.

Swinfen Eady, Q.C. and *B. Farrer* for Lord Exmouth.—There is no ground under the Act or under the will for the contention that the 35,000*l.* is not to bear its share of duty. This is not part of the earl's estate; his executor has nothing to do with it. The trustees of the settlement were the persons to pay in the first instance, and, if they do not pay, sect. 8 clearly makes the beneficiaries liable. The estate duty on this property is analogous to an increased succession duty and

not to probate duty. The case is not within the principle of *Re Bourne* (*ubi sup.*), it much more closely resembles the cases of *Re Croft* and *Re Shaw* (*ubi sup.*). Looking at all the sections of the Act it is clear that, where the estate duty is a substitute for the probate duty, it is to be paid by the executor, and probably out of residue; but where it is a substitute for succession duty it is to be paid by the beneficiaries in proportion to their shares. On the construction of the codicil there is no true residue at all. There is a great difference between the residue of an appointed fund and the residue of an estate. In the case of an appointed fund, in the absence of express direction, each share bears its proportion of costs and testamentary expenses, including duties. Even probate duty has been apportioned:

Re Lambert's Estate; *Stanton* v. *Lambert*, 59 L. T. Rep. 429; 39 Ch. Div. 626.

The rule is stated in *Warren* v. *Postlethwaite* (5 L. T. Rep. O. S. 387, 388; 2 Coll. C. C. 108, 123), and has been followed ever since.

Vernon Smith, Q.C. in reply.

Seward Brice, Q.C. and *Rowden*; *Gurdon*; and *A. Adams* appeared for other parties not concerned in this particular question.

NORTH, J.—In this case two questions arise: first, as to the estate duty; and secondly, as to the costs. [His Lordship stated the effect of the settlement, and the will and codicil of the countess, and the facts of the case as above.] The property to which the appointment relates is said to be about 100,000*l.*, out of which the sums of 25,000*l.* and 15,000*l.*, which rank before the sums appointed, must be paid. That leaves 60,000*l.*, and it is clear from the codicil that the 35,000*l.* appointed to the countess is to be paid first out of that sum, and that she, having survived her mother, is to take it absolutely free from all limitations or restrictions, or liability to forfeiture. Then the first question is, whether any duty has to be paid in respect of that sum of 35,000*l.* The earl died in Dec. 1894, after the Finance Act 1894 had come into operation, and we have to look to that Act to see whether duty is payable or not. [His Lordship read sect. 1, and continued:] Among the other Acts, the effect of which was put an end to by that section was the Probate Act, so that probate duty is no longer payable in the cases to which this Act applies. Then the next important section is the 6th. [His Lordship read sect. 6, sub-sects. (1) (2) and (4) and continued:] The property we are dealing with now is property which was set free to pass upon the death of the earl in 1894. But it is not under his will that it is disposed of, nor is it his property at all. The executor therefore cannot have to pay any duty upon it. He is only bound to pay estate duty in respect of all the personal property which the deceased was competent to dispose of at his death, and this is not property which the Earl of Orford could dispose of. It is a case, therefore, in which sub-sect. (4) applies, and not sub-sect. 2. [His Lordship then read sect. 8, sub-sect. (3) and continued:] Under those sections there are two things laid down. The executor of the deceased is to specify in a proper account all the property in respect of which estate duty is payable on the death of the deceased, whether it is the property of the deceased or not; but his accountability is limited to the personal property that belonged to the deceased. Then sect. 8, sub-sect. (4) says: [His Lordship read it.] That sub-section is dealing with such a case as we have here. The executor of the earl is not liable for the estate duty on this property appointed by the countess, and therefore this section applies. If the executor had been liable he would have been the person to render this account; but, as he is not, the account is to be rendered first—I do not say primarily, but as the first person mentioned in this section—by the beneficiary; secondly, by the trustee, if any, or other the person through whose hands the money has gone to the beneficiary; thirdly, by any person who has got the property itself from the beneficiary. All those things point clearly to the person upon whom the duty is to fall under this section as being the person beneficially entitled to the property in respect of which the duty is payable. Then we come to sect. 14. I think that is the only other section I need refer to. [His Lordship read sect. 14.] Therefore the section contemplates that, in all cases coming within it if the executor or person who has to pay the duty, the trustee, or whoever he may be, has paid the duty before handing over a share or a sum of money, then he may charge against the person to whom he is handing over the money, or recover from him if necessary, the amount required for the duty. Now, looking at those sections, it is said that what I have to consider is that it is clear from the Act, and that it has been decided by Stirling, J., that this estate duty is analogous to probate duty, and that the incidence of estate duty must therefore be the same as that of probate duty. Stirling, J. has, in a case which has been referred to, so decided with respect to account duty upon the estate of a testator who was dealing with his own estate. But the case I have to deal with is quite a different case from that. It is not a case of dealing with the testator's own estate. It is only a case of property passing under limitations with which the person dying has nothing to do, except that his death sets the property free; it passes under those limitations on his death to persons who take, and in this case they take what is at the present time landed estate with respect to which there is no probate duty existing at all, and never was. Now, that being so, I must look at the provisions of this Act itself, to say upon whom the estate duty payable in respect of real estate is to fall, and it seems to me that under the sections I have read it is intended it shall fall upon the beneficiary and not upon anyone else, and that it should fall on the beneficiary or beneficiaries, as the case may be, according to their respective interests. The 2nd sub-section of sect. 14 shows that, inasmuch as there may be difficulties at times in ascertaining what the duty is, or dispute about it, provision is made that, if there is any dispute as to the proportion of estate duty to be borne by any property or person, it may be determined by application to the court. It may be very difficult indeed to arrive at the precise value, but, if there is a dispute with respect to it, then it may be settled in the way that I have mentioned. Under those circumstances it seems to me that those provisions of the Act are reasonably clear, and show that in this case the duchess, who takes 35,000*l.* must bear the estate duty payable in respect of

that amount. I should say so, independently of the 14th section of the Act, but I think that section also applies. I think that the sum of 35,000*l.* is, to use the language of that section, "money charged upon the property." The fund is real estate, but the way in which it is charged is this. There is a direction to sell the estate, and pay that amount out of the proceeds thereof. That seems to me clearly to amount to a charge of, this money upon the estate. The legatee is of course entitled to have the amount raised out of the estate, but if the legacy is paid off there is an end of the matter, the legatee has no further interest, and cannot enforce any trust for sale. If the persons entitled behind the legatee raise the money by mortgage and pay off the legatee, he could not insist upon the property being sold. Even if a sale was necessary the legatee could not insist on a sale of more than was necessary to pay off the sum. All the legatee's claim is, to have the 35,000*l.* raised out of the estate by resorting to a sale of a sufficient part if necessary, but if it can be raised out of the estate in any other way, such as by mortgage, he has no right to insist on a sale. Therefore the legatee has in my opinion under that 14th section a charge upon the estate for the sum of 35,000*l.*, and, if that is so, we have these words in the 14th section: In the case of such property as this "an amount equal to the proper rateable part of the estate duty may be recovered by the person who being authorised or required to pay the estate duty in respect of any property has paid such duty from the person entitled to any sum charged on such property." Now, the persons who under the settlement are liable in the first place to account for the duty are, I suppose, the trustees of the settlement. I do not know exactly what has been done yet, but *primâ facie* it would appear that they are the persons to account. But, if not, the persons to account for the duty in respect of this 35,000*l.* would be the executors of the Countess of Orford, to whom the money is appointed, and to whom it would have to be paid. If they have paid the duty themselves they clearly, in my opinion, would be entitled to charge it against the duchess in respect of this 35,000*l.*, or, if that sum had been paid to her, they might recover the duty back from her under this section. As to costs, I think the rule is now established that, in the case of an appointed fund, the costs must be paid rateably out of the appointed shares and not out of the residue. The rule was laid down in *Warren* v. *Postlethwaite* (*ubi sup.*) in 1846. In 1851, in *Petre* v. *Petre* (*ubi sup.*), which was cited by Mr. Vernon Smith as an adverse decision, the Master of the Rolls seems to have come to a different conclusion. But the cases of *Trollope* v. *Routledge* (10 L. T. Rep. O. S. 224; 1 De G. & S. 662) and *Moore* v. *Dixon* (15 Ch. Div. 566) seem to me to have established the rule. It is true that *Petre* v. *Petre* was not quoted in those cases, but I do not think that decision would justify me in departing from the modern rule. The costs, therefore, must be borne rateably.

Solicitors: *Caprons, Dalton, Hitchins,* and *Brabant; Burch, Whitehead,* and *Davidson; Nicholls, Manisty,* and *Co.*

Saturday, Dec. 21, 1895.

(Before NORTH, J.)

SYMES *v.* SYMES. (*a*)

Appointment — Contingent remainder — Executory devise — Life estate—Tenants in common or joint tenants.

Under a settlement made on the marriage of D. S. and A. S. certain lands were limited after the death of the survivor to the use of such of the children or remoter issue of the marriage as D. S. and A. S. should jointly appoint. There was one child only of the marriage, J. D. S. By deed-poll, dated the 2nd Sept. 1848, *D. S. and A. S. appointed the lands, after the death of the survivor of D. S. and A. S., to the use of three children of the said J. D. S., who were then living, by name, and all other the child or children of the said J. D. S. who should happen to be living at the decease of the survivor of the said D. S. and A. S., and to the heirs and assigns of such of them as should attain the age of twenty-five years, equally as tenants in common and not as joint tenants. A. S. survived her husband D. S., and died on the 5th Nov.* 1873. *At that date there were seven children of the said J. D. S. living, of whom the three named in the deed-poll had attained twenty-five; the other four were then under twenty-five, but afterwards attained that age. This was a special case stated for the opinion of the court on the question whether the appointment made by the deed-poll was valid, and what estates were thereby created.*

Held, that the appointment must be construed as creating legal contingent remainders, which must vest, if at all, at the death of A. S., and that there was a valid appointment to all the children of J. D. S. who were living at the death of A. S., as tenants in common for life, with remainder to such of the same children as had at that date attained twenty-five, as tenants in common in fee.

SPECIAL CASE.

By an indenture of settlement dated the 3rd Feb. 1819, made on the marriage of David Symes with Ann his wife, then Ann Pidsley, spinster, David Symes covenanted to bar his estate tail in an undivided fourth share of certain hereditaments, and to settle it to the use of himself for life, and from and after his death to trustees during the life of Ann Pidsley upon the trusts therein mentioned, and after her death to the use of trustees for a term, the trusts whereof never arose, with remainder "to the use of such child or children of the body of the said David Symes, on the body of Ann Pidsley to be begotten, or of the issue of any such child or children, in such parts shares, and proportions, and for such estate and estates, interest and interests, and charged and chargeable to and with the payment of any sum or sums of money to any other of the same children, and for such estate and estates as David Symes and Ann Pidsley should jointly by deed direct, limit, or appoint." And in default of such appointment, to the use of the first and other sons of the marriage successively in tail male.

The marriage took place, and by means of a recovery and a deed of the 2nd June 1819 the estate tail of David Symes was barred, and his undivided share in the hereditaments settled to

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

uses exactly corresponding with those stated in the settlement.

There was only one child of the marriage, viz., John David Symes the elder. He married in 1843, and had seven children, of whom three, John David Symes the younger, William Henry Symes, and Mary Elizabeth Symes (afterwards Done) were born before the date of the appointment herinafter mentioned.

By a deed-poll, dated the 2nd Sept. 1848, David Symes and Ann Symes jointly appointed that the share should, from and after the decease of the survivor of them the said David Symes and Ann Symes, be

To the use of the said J. D. Symes the younger, William Henry Symes, and Mary Elizabeth Done, and all other the child and children of the said J. D. Symes the elder, who should happen to be living at the decease of the survivor of the said David Symes and Ann Symes, and to the heirs and assigns of such of them as should attain the age of twenty-five years, equally as tenants in common and not as joint tenants . . . but in case either of them, the said J. D. Symes the younger, William Henry Symes, and Mary Elizabeth Done, and any such child or children as aforesaid, should depart this life under the age of twenty-five years, then immediately after such his or her decease to the use of the survivors or other of them, their, his, or her heirs and assigns.

And it was by such deed-poll provided that, in case the appointment intended to be thereby made to or in favour of the after-born children of J. D. Symes the elder should from any cause fail of effect, then David Symes and Ann Symes, in further exercise of their power, declared and appointed that those presents "should operate as an appointment of the said hereditaments to the said J. D. Symes the younger, William Henry Symes, and Mary Elizabeth Done, or such of them as should attain the age of twenty-five years as aforesaid, their several and respective heirs and assigns."

David Symes died on the 24th May 1867, and Ann Symes died on the 3rd May 1873.

The three children of J. D. Symes the elder named in the deed of appointment all attained the age of twenty-five years before the death of Ann Symes; the other four children were all born in the lifetime of Ann Symes, but had not attained the age of twenty-five years at her death. They all subsequently lived to attain that age.

John David Symes the younger died on the 25th June 1892 leaving no male issue.

William Henry Symes died on the 25th June 1892, leaving the plaintiff, his eldest son, and the heir in tail male of John David Symes the elder.

Frederick George Symes, one of the younger children, died in 1894.

From the death of Ann Symes each of the seven children of J. D. Symes the elder, or their heirs and devisees, had been in uninterrupted and undisputed enjoyment and receipt of one equal seventh part of the rents and profits of the share.

This was a special case filed on the 30th Nov. 1895, in which the eldest son of William Henry Symes was plaintiff and the other six children of J. D. Symes the elder or their representatives were defendants. The questions submitted to the court were: (1) Whether the appointments purported to be made by the deed-poll of the 2nd Sept. 1848 were wholly invalid, and, if so, whether the plaintiff became on the death of John David Symes the younger entitled for an estate in tail male in possession to the share in question. (2) Whether any appointment of the share was validly made, and, if so, what estates and in favour of what persons were thereby created. (3) Whether, in the event of the plaintiff not being entitled as suggested in question (1), he was entitled to the share for an estate in tail male in remainder expectant upon the decease of the last survivor of the other children. (4) Whether the defendants had acquired an indefeasible title by virtue of the Statute of Limitations.

Vernon Smith, Q.C. and *Waggett* for the plaintiff.—We contend that the true construction of the deed of appointment is, that it first creates a life estate in all the children of J. D. Symes the elder who should be living at the death of the survivor of David Symes and Ann Symes as joint tenants; and then there is a further gift to all those who should attain twenty-five in fee. This is intended to take effect by way of executory limitation, and it is void because the class to take may not be capable of being ascertained within the limits of the rule against perpetuities:

Blight v. *Hartnoll*, 45 L. T. Rep. 524; 19 Ch. Div. 294.

There are no words of limitation to the first gift, and therefore the children take as tenants for life, and the words "equally as tenants in common" refer only to the executory limitation over, so they must take as joint tenants:

Re Atkinson; Wilson v. *Atkinson*, 66 L. T. Rep. 717; (1892) 3 Ch. 52;

Re The Tiverton Market Act; Ex parte Tanner, 20 Beav. 374.

The appointment in remainder being bad, the plaintiff is entitled to an estate in tail male expectant on the death of the survivor of the children of J. D. Symes the elder. If, on the other hand, these children take as tenants in common for life, the plaintiff is entitled to an estate in tail male in one-seventh on the death of each child.

Swinfen Eady, Q.C. and *G. Curtis Price* for the defendants.—We submit that, on the true construction of the deed of appointment, the gift to the children of J. D. Symes the elder coalesces with that to the heirs and assigns of those who attain twenty-five; and we have a gift in fee to such of the children as attain twenty-five. This gift is clearly made by way of legal remainder, and therefore could only take effect in favour of those children who had attained twenty-five at the termination of the previous life estates, that is, at the death of Ann Symes. If the first part of the gift to the children living at the death of Ann Symes creates a joint tenancy, and therefore the two estates do not coalesce, then there is a legal remainder ready to take effect *so instanti* on the determination of the life estate given to the children as joint tenants. That remainder would be perfectly good. Another possible construction would be, that there is a gift by way of executory use to all the children who attain twenty-five. That would be void altogether, and in that case all the defendants have acquired indefeasible estates by possession under the Statute of Limitations.

NORTH, J.—The question in this case is, what is the true construction of a deed of appointment

executed on the 2nd Sept. 1848. In 1819 David Symes was tenant in tail of an undivided fourth share of certain property. Nothing turns upon the title to the other three-fourths, and it is more convenient to treat the undivided share as the whole. By articles dated the 3rd Feb. 1819 he agreed to settle this property, and after his marriage he barred his estate tail, and settled the property in accordance with the articles. [His Lordship stated the settlement above set out and proceeded:] There was only one child of this marriage, viz., John David Symes the elder, and in 1848 David Symes and his wife exercised the joint power of appointment given them by the settlement. For some reason which does not appear they passed over their son, and made an appointment in favour only of his children, the grandchildren of the marriage. [His Lordship read the appointment and continued:] Mrs. Symes survived her husband and died in Nov. 1873, and on her death the appointment took effect. There were seven children of the marriage of J. D. Symes the elder, three of whom were born before the date of the appointment, and had attained twenty-five at the death of Mrs. Symes. The other four were born between the date of the appointment and Mrs. Symes' death, but had not attained twenty-five at the latter date. Now the first limitation in the appointment with which we have to deal is clearly a legal contingent remainder. It is to the children who should happen to be living at the death of the survivor. That is perfectly good, because it must vest, if at all, at the death of Mrs. Symes, the tenant for life, who was living at the date of the settlement. The grandchildren who should be living at that time were to take immediate vested interests. That is a perfectly good limitation. It is clear that they were intended to take an immediate interest. The words give such an interest, and the gift over, "if any such child or children as aforesaid should depart this life under the age of twenty-five years, then immediately after such his or her decease to the use of the survivors," is by way of shifting use, and shows that those children were to take some immediate interest, not to wait till they attained twenty-five before taking anything. Then the question arises, what is the extent of the interests they take? It is clear they can only take life interests, for there are no words of limitation, and by virtue of the subsequent clause the interest of any grandchild who dies under twenty-five comes to an end. Then what becomes of the inheritance? There is this limitation, "and to the heirs and assigns of such of them as shall attain the age of twenty-five years." It is plain that the class to whom the inheritance is limited is not the same as that to which the life estates have been given. It is to such members of the class previously named as should attain twenty-five. It might in the event have included all the members of the former class, but it is not the same. This again is clearly a contingent remainder. It must vest at the time when the prior life estate comes to an end, that is, at the death of Mrs. Symes, or not at all; and it would vest in the grandchildren who had attained twenty-five at the time at which it must vest or fail. The remainder therefore vested at the death of Mrs. Symes in the three eldest grandchildren who had then attained twenty-five, to the exclusion of the other four. There are some cases in which a gift somewhat similar to this has been construed as an executory devise, and not as a contingent remainder. But in those cases there were words in the instruments in question which enabled the court to say they were clearly intended to operate as executory devises. In the present case I cannot find any words which justify me in construing the limitations as executory. An example of the cases to which I am referring is *Re Lechmere and Lloyd* (45 L. T. Rep. 551; 18 Ch. Div. 524). That was a devise to E. for her life, and "after her decease to such of her children living at her death, and such issue then living of her children then deceased as either before or after her decease shall being a male or males attain the age of twenty-one years, or being a female or females attain that age or marry, in fee simple, to take if more than one as tenants in common." E. survived the testator and died, leaving five children who had attained twenty-one, and two who were infants. There it was quite clear that all the children who attained twenty-one at any time were intended to take, and Sir G. Jessel, M.R. held that the devise could not take effect as a remainder in respect of those children who survived the tenant for life, but had not attained twenty-one at her death, and must, therefore, in order to let in those children, be construed as an executory devise. But in his judgment the Master of the Rolls put the very case which is before me (45 L. T. Rep. 552; 18 Ch. Div. 528), and said: "If the devise be to A. for life, and after her death simply to a class of children who shall attain twenty-one or marry, I agree that those members of the class who have not attained twenty-one or married at the death of the tenant for life, though they may do so afterwards, cannot take according to the rule in *Festing* v. *Allen* (12 M. & W. 279)"; and inasmuch as the condition of attaining the prescribed age must be fulfilled at the death of the tenant for life, it is immaterial whether that age is twenty-one or twenty-five. The decision of the Master of the Rolls was followed in *Miles* v. *Jarvis* (49 L. T. Rep. 162; 24 Ch. Div. 633), and *Dean* v. *Dean* (65 L. T. Rep. 65; (1891) 3 Ch. 150). But in each case there were words showing that children born or attaining the prescribed age after the death of the tenant for life were intended to take. The result is, therefore, that there is a good gift to all the grandchildren for life, and the inheritance is well given to the three children who had attained twenty-one at Mrs. Symes' death. I do not know whether the appointors quite understood what they were doing. I think, from the subsequent proviso in case the appointment failed, that they did not. [His Lordship read this proviso.] Though this alternative gift did not take effect, it shows an obvious intention on the part of the donors that, if for any reason the seven children could not take, the three who were living at the date of the appointment should do so. I have already said that the grandchildren who had not attained twenty-five at the death of Mrs. Symes took estates for life only, and I think they took as tenants in common. [His Lordship read again the words of the appointment.] I think the appointment first describes the persons who are to take, and then the way in which they are to take, and as a matter of construction I think the words as "tenants in common" apply to all that goes before. In the case of the grandchildren who

take remainders in fee the remainders will coalesce with their respective life estates. The result is, that the two surviving children who had not attained twenty-five at the death of the tenant for life are each entitled to one-seventh of the property for life, and subject thereto the three children who had attained twenty-five at that date take the whole as tenants in common in fee. The point stated in the case as to the Statute of Limitations does not arise, because, on the construction I have put on the deed, all the rents were paid to the right persons until the death of Frederick George Symes in 1894.

Solicitors: *Guscotte, Wadham,* and *Bradbury; Yarde* and *Loader.*

QUEEN'S BENCH DIVISION.

Saturday, Dec. 21, 1895.

(Before Lord Russell, C.J., Wills and Wright, JJ.)

Re Arton. (*a*)

Extradition—Requisition by foreign Government — Political offence — Good faith of foreign Government—Power of courts to inquire into—Extradition Act 1870 (33 *&* 34 *Vict. c.* 52), *s.* 3.

Sect. 3 *of the Extradition Act* 1870 *provides that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.*

Held, that, to come within this section, the political offence must be one which has been already committed; and that it is not sufficient to show that if the accused be surrendered he will or may be tried or punished for some offence of a political character not yet committed, such as for contempt of court in refusing to disclose political secrets, or answer questions relating to his political knowledge:

Held, also, that the courts of this country have no power to enter into, and ought not to enter into, the question whether the demand for the extradition of the accused has been made by the foreign Government in good faith and in the interests of justice, or merely from political considerations.

Motion on behalf of Emile Arton, now a prisoner in Her Majesty's prison at Holloway, for an order *nisi* calling on the Secretary of State for the Home Department, Sir John Bridge, chief magistrate at Bow-street, and the Government of the French Republic, to show cause why a writ of *habeas corpus* should not issue to bring the body of Arton into court to abide judgment.

Arton had been arrested in London on the 16th Nov. 1895, on a warrant which had been issued in Paris, and which arrived in this country in July 1892. He was brought before Sir John Bridge, and an order of committal had been made against him for the purpose of being extradited to the French Government. The order of committal had been made in respect of six separate offences, which were described therein as (1) falsification of accounts and using falsified accounts, (2) fraud as agent or trustee, (3) obtaining money and goods by false pretences, (4) crimes against the bankruptcy laws, (5) larceny, (6) embezzlement.

The grounds upon which the present motion was made were four, namely, (1) that the person in custody has been committed for offences not within the Extradition Treaty made between England and France; (2) that the accused was committed for offences of which the depositions disclosed no *primâ facie* proof; (3) that the demand for the extradition is not made in good faith and in the interests of justice; and (4) that the offences for which the accused is committed are political in their character, and that the surrender has been demanded from political motives. With regard to the first ground of objection it was said that the crime of *faux*, mentioned in the committal order, and translated as "falsification of accounts and using falsified accounts," did not come within any of the crimes specified in clause 3 of the Extradition Treaty with France (1878), which set out the crimes in respect of which extradition may be granted. As a rule was granted upon this point, and as the second ground of objection was not insisted upon, and a rule refused thereon, it is unnecessary to refer to them further.

The Extradition Act 1870 (33 & 34 Vict. c. 52) provides:

Sect. 3. The following restrictions shall be observed with respect to the surrender of fugitive criminals: (1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

C. W. Mathews in support of the motion.—[Lord Russell, C.J.—We wish you to deal with the last ground of your application, and postpone the ground that the demand for the extradition was not made in good faith.] That course will prejudice me with regard to the last point, as I had hoped by going through the facts and showing that the demand was not made in good faith, to strengthen my argument upon the last ground. Although it may seem to raise a difficulty in the first instance to suggest that the offences which are here charged are offences of a political character, yet the case of *Re Castioni* (64 L. T. Rep. 344; (1891) 1 Q. B. 149) shows that a case, which was a *primâ facie* case of murder, was in the result held to be an offence of a political character, and the court arrived at that conclusion by going into all the circumstances of the case. The man there was charged and his extradition demanded for the crime of murder, and in the first instance the same difficulty presented itself as here, because those who had to deal with the case *primâ facie* could not imagine how that could come within the description of a political offence. What enabled the court to come to that conclusion was the fact that the court had before it the history of the rising in the course of which the person was killed, for whose murder Castioni was charged, and returned for extradition. [Lord Russell, C.J.—What you have to show, as the section prescribes, is that the offence in respect of which the surrender is demanded, is one of a political character, or that the requisition for his

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

surrender is with a view to try or punish him for an offence of a political character.] If this man be returned to France an effort will be made to try him for an offence of a political character. He will be tried as he discloses or refuses to disclose political secrets to the French Government. [Lord Russell, C.J.—What is the name or the character of the political offence for which he will be tried?] I cannot give the names of the offences *quâ* political offences, but I can show that his punishment will depend upon his disclosure or failure to disclose what is deemed to be within his political knowledge. That may be a grave reflection to make, and for that reason I was desirous of placing before the court the circumstances which go to establish a strong *primâ facie* case that it will be so. He will be punished in respect of a political offence, and that offence is—though I cannot give it a particular name—that he will not give information which it has been avowed they will extract from him by interrogatories as soon as they get him back. Indirectly he will be tried for a political offence; he must either answer the questions put to him, or else, being in contempt, he must remain in prison until he does answer them, and so purge his contempt. That clearly shows that he will be punished for an offence of a political character, the withholding of information which is exclusively political in its character. I come to the point I have passed over that this requisition is not made in good faith on the part of the French Government. [Lord Russell, C.J.—We think we cannot hear you upon that point that the application by the French Government is not made in good faith. It is impossible for us to listen to such a contention, as it is an inquiry into which this court is utterly unable, and has no authority, to enter.] He also referred to

Re Bellencoutre, 64 L. T. Rep. 461; (1891) 2 Q. B. 122.

Lord Russell, C.J.—In this case it is not necessary that the court should consider the general law of extradition except for the purpose of pointing out the distinction between its political and its strictly judicial aspect, with the latter of which alone we have to deal. Extradition is founded upon the broad principle that it is in the interests of civilised communities that crimes, acknowledged by civilised communities to be such, should not go unpunished; and it is part of the comity of nations that one state shall assist another in order to bring those who commit such crimes to justice. But the application of that principle and the conditions upon which extradition shall be granted, the class of crimes in respect of which it should be granted, and the formalities to be observed in the obtaining of extradition, are all matters primarily for the two political powers in question to arrange in the first instance by treaty, and then having arranged it by treaty, to express in a legislative enactment what are the conditions, the limitations, and the class of crimes with respect to which extradition ought to be granted. And it is to the expression of the legislature, and the expression of the legislature alone, in an Act or Acts of Parliament that judicial tribunals can refer. The Act or Acts of Parliament are at once the sole source and the strict limitation of the judicial functions of the court. We are sitting here as judges, and as judges only, and we have nothing to do with political questions or political considerations, except in so far as they are introduced into the Act or Acts of Parliament which we are called upon to construe. The grounds on which this motion is made are four. [His Lordship dealt with the first two grounds and proceeded:] Passing over the third ground for the moment, I come to the fourth, which is, that the offences for which the prisoner is committed are political in their character, and that the surrender has been demanded from political motives. As to that point there is no doubt that, if the learned counsel had been able to show that the surrender was demanded for an offence of a political character, or with a view to try or punish the accused for an offence of a political character—if either of those alternative propositions could have been established—it would furnish a ground either for the intervention of this court, or for a declaration by this court that for such an offence no extradition could legally under the Act of Parliament be made. Is there any real ground for either of these suggestions? First, is this an offence of a political character, or is any one of the offences an offence of a political character? The bare enumeration of them seems to me to be a sufficient answer to that suggestion; the bare enumeration of them shows that they are completely divested of any offence of a political character. Then can it be said that the requisition is made with a view to try or punish the accused for an offence of a political character? It seems to me to be perfectly clear that what that means is this, that with regard to a person whose extradition is demanded for having committed an offence of a political character, the pretence of another and a different crime which does come within the Extradition Act and the Treaty is resorted to as a pretence and excuse for demanding his extradition in order that he may be tried and punished for a political offence which he has already committed. During the argument I several times asked the question, what is the political offence, or the offence of a political character, which it can be alleged the accused has committed? The answer to that was, that it is impossible to give it a name or to describe it. I, therefore, come to the conclusion, as regards that point, that there is no evidence to warrant us in coming to the conclusion either that the offence in respect of which surrender is demanded is one of a political character, or that the requisition for his surrender has been made to try or punish him for an offence of a political character. I now come to the ground I have passed over, namely, that the demand for extradition was not made in good faith and in the interests of justice. I pointed out that this was a very grave and serious statement to put forward, and one which ought not to be put forward unless, indeed, there are very strong grounds for supporting it. It means to convey a reflection of the gravest kind upon the motives and actions of a responsible Government of a neighbouring and friendly Power, and impliedly some of the observations made involve grave imputations, not lightly to be made, upon the judicial authority or authorities of that friendly Power. This bears upon the political aspect of the question. Into its consideration matters enter of which this court is utterly incompetent to judge, and of which, as I conceive, it has no authority to judge. They are conside-

rations, if they exist at all, to be addressed to the executive of this country, and they cannot enter, and ought not to enter, into the judicial consideration of this question, which to my mind turns solely upon the terms of the Act of Parliament and the Treaty on which that Act was made. Upon these grounds there will be no rule granted.

Wills, J.—I am entirely of the same opinion. With regard to the argument that the requisition for Arton's surrender has been made with a view to try or punish him for an offence of a political character, I think it is impossible to doubt—applying the ordinary principles of construction—that the offence of a political character of which the Act speaks must be one which has been already committed. It is admitted that no suggestion can be made of any conduct of the prisoner which can be so described, or which can fulfil the condition I have mentioned, namely, that the prisoner has already committed a political offence against the laws of France; but it is said that, if there is sufficient evidence to justify him being properly given up for the crimes in respect of which he is charged, the consequence will be that when he gets into the hands of the French judicial authorities he will be compelled either to disclose the matters which he knows, and which it is said other people are interested in knowing also, or to undergo indefinite imprisonment until he does answer the questions. The same considerations which induce us to say that we cannot enter into the question whether the executive of a foreign country at peace with us is honest or dishonest in the discharge of its duty, ought to lead us to refuse to entertain the question whether it is probable that the French courts will depart from their own laws. We must assume that the French courts will proceed to administer justice according to their own laws; and so long as they do that, or whether they do it or not, we have no right to interfere beforehand to prevent them from exercising in this particular case the kind of procedure which they exercise with regard to any criminals who may be brought within their jurisdiction. The prisoner in the present case will either comply with their law or he will not. If he complies with their law, he will have committed no offence for which he will be either tried or punished; if he does not conform to their law, he must take the consequences. It seems to me that that is an absolute and complete answer to the argument addressed to us on that head.

Wright, J. concurred.

Motion refused.

Solicitor for the applicant, *Arthur Newton.*

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Dec. 5, 1895.

(Before Lindley, Smith and Rigby, L.JJ.)

Re Lord and Fullerton's Contract. (*a*)

APPEAL FROM THE COUNTY PALATINE COURT OF LANCASTER.

Trustee—Disclaimer—Property out of the jurisdiction—Partial disclaimer.

Where a trust estate consists of property in England, and also of property out of the jurisdiction of the court, a trustee, though resident abroad, cannot disclaim the trusts of the property in England only.

Samuel Lord, by his will dated the 26th Dec. 1888, appointed his daughter M. T. Lord, his sons J. T. Lord and S. Lord, and J. S. Lyle and J. T. Bradbury, to be executors and trustees thereof, and devised and bequeathed all his residuary real and personal estate to the trustees upon trust to sell the same and to hold the proceeds thereof upon the trusts therein mentioned.

The testator was possessed of real estate in England and America.

The testator died on the 23rd May 1889, and his will was duly proved by M. T. Lord, J. T. Lord, and J. T. Bradbury, power being reserved to J. S. Lyle and S. Lord to come in and prove the will.

On the 19th Sept. 1889, by a deed-poll of that date, J. S. Lyle renounced the office of trustee and executor under the will, and all interest and power over the real and personal estate devised and bequeathed by the will.

On the 15th Feb. 1890 S. Lord the younger, who resided in America, executed a deed-poll, which recited the will of the testator, Samuel Lord, his death and the grant of probate, and S. Lord, the younger thereby declared that he had from the time of the decease of S. Lord, the testator, refused to act as a trustee or executor of the said will so far as the same related to property real and personal without the bounds of the United States of America, and that he disclaimed and renounced the said office of trustee and executor and all interest in and power over the real and personal estate "without the bounds of the United States of America," devised and bequeathed by the said will.

In 1895 the three trustees who proved the will entered into a contract under the power of sale contained in it to sell a part of the testator's land situated in England to the appellant, Hugh Fullerton.

The purchaser took the objection that the three vendors could not make a good title on the ground that S. Lord the younger only disclaimed the trusts of property "without the bounds of the United States of America," and that a person to whom an estate is given in trust cannot retain part and disclaim the other part; and he therefore insisted that S. Lord the younger must join in the conveyance to him.

(*a*) Reported by W. C. Bias, Esq., Barrister-at-Law.

The vendors declined to make him a party, and the purchaser took out a summons in the County Palatine Court of Lancaster under the Vendor and Purchaser Act 1874 asking for a declaration that a good title to the hereditaments had not been made out by the vendors; and that they could not make an effectual conveyance to him, as Samuel Lord the younger had not effectually disclaimed the trusts of the will.

The summons was heard by the registrar, sitting as Deputy Chancellor, who held that a good title was shown, and that S. Lord the younger was not a necessary party to the conveyance, on the ground that the deed-poll of the 15th Feb. 1890 was an effectual disclaimer of the trusts of the will.

From this decision the purchaser appealed.

Farwell, Q.C. and *G. H. Norris* for the appellant.—On the true construction of the deed of the 15th Feb. 1890 it is a disclaimer of the trusts of the English property only, and not of the American property. A trustee cannot disclaim as to a part of the property, and this disclaimer is nugatory. The will makes a common fund of the proceeds of all the real and personal estate:

Ward v. *Butler*, 2 Molloy, 533;
Mucklow v. *Fuller*, Jac. 198;
Re Gordon; *Roberts* v. *Gordon*, 37 L. T. Rep. 627; 6 Ch. Div. 531;
Cummins v. *Cummins*, 3 Jones & La. 64, 92;
Urch v. *Walker*, 3 Myl. & Cr. 702;
Guthrie v. *Walrond*, 47 L. T. Rep. 614; 22 Ch. Div. 573.

It does not make any difference that the property is in a different country. Otherwise where is the line to be drawn? An English trustee cannot disclaim as to property in Ireland, nor could a trustee living in Cornwall disclaim as to property situated in Yorkshire.

Warmington, Q.C. and *Cochran* for the vendors.—This English property was not vested in S. Lord the younger at the date of this contract. There is no evidence that he has done anything with reference to it or intermeddled with it in any way, and he did not join in taking out probate of the will. The disclaimer does not show any acceptance of the office of trustee or executor. This court has no jurisdiction over the property in America; it is governed by the law of that country. The fact that the property not disclaimed is out of the jurisdiction of the court makes this case different to the cases cited. This is therefore a good disclaimer as to the property in England. The will must be read as two separate trust documents, the one referring to the property in England and the other to the property in America. He has shown by his conduct that he disclaims the office of trustee, and therefore he has disclaimed the legal estate in this land:

Re Birchall; *Birchall* v. *Ashton*, 60 L. T. Rep. 369; 40 Ch. Div. 436.

Lindley, L.J.—This is an appeal from the decision of the Deputy Chancellor of the Duchy of Lancaster, and by his order the court declared that the deed of disclaimer, to which I will refer presently, dated the 15th Feb. 1890, was a good and effectual disclaimer by Samuel Lord of the trusts of the will of the testator, and that Samuel Lord was not a necessary party to the conveyance to the purchaser of the hereditaments comprised in the contract, and that a good title had been made out by the vendor in accordance with the contract. The purchaser appeals from that decision. The point raised is a short one, but it is an important one. It arises in this way: The testator in this case, who was a Mr. Samuel Lord, made a will by which he appointed five persons to be executors and trustees. The general tenor of his will was, that he devised his real and personal estate to those five persons upon certain trusts, those trusts being applicable to the whole of the property. Three of those persons out of the five so named have proved the will in this country in the ordinary way, and have acted as trustees. Power was reserved to two of the five trustees who were in America to come in and prove the will. They have not come in, and have executed deeds of disclaimer. With respect to one, his deed of disclaimer is satisfactory, and no point arises upon it. With respect to the other gentleman, who is the son of the testator, he has executed a deed which the vendors say gets rid of him, but the purchaser says it does not. The first thing is to read it and construe it. It is a deed-poll, dated the 15th Feb. 1890, executed by Mr. Lord and attested by a notary public in New York. It recites the will of the testator, and his death and the probate of the will, and then it goes on to declare that Samuel Lord, the son, the trustee who is in America, has from the time of the decease of the said Samuel Lord, the testator, refused to act as a trustee or executor of the will so far as the same relates to the property real and personal without the bounds of the United States, and that he has disclaimed and renounced the said office of trustee and executor, and all interest in and power over the real and personal estate without the bounds of the United States devised and bequeathed by the will and codicil. Now, the case of the purchaser is this: There is a devise of real estate to five persons. The property has been put up for sale by three of them, and he requires that all the five shall either concur, or that the three who are acting in this country shall produce, instead of the concurrence of the other two, such deeds of disclaimer as show that the three alone can properly deal with the property according to the trusts of the will. The purchaser is satisfied as to one trustee, but as to the other, Mr. Lord, the son, he is not satisfied, and he says his disclaimer is inoperative. First of all he says, upon the true construction of this document, it cannot be regarded as a disclaimer of the office of trustee and executor generally, but it must be read as a disclaimer of that office limited to such property as is without the bounds of the United States. Now, if this document can be fairly read as an absolute disclaimer of the office of trustee and executor, I think that the purchaser's objection would be untenable, and as I understand the decision in the court below, it was held that the document was a general disclaimer of the office of trustee. But I think that is not in accordance with the true construction of the language. It is quite obvious to me that when this gentleman says that he has refused to act as a trustee or executor of the will as far as the same relates to property real and personal without the bounds of the United States, and then goes on to disclaim and renounce the said office of trustee, and all interest in and power over the real and personal estate without the bounds of the United States, you cannot take the words "disclaim and

renounce the office of trustee and executor" without the limiting words which confine it to the real and personal estate without the bounds of the United States. On the true construction of the document I do not think that the view taken in the court below is in accordance with the language. Therefore the point is reduced to this: treating this as a partial disclaimer, as a disclaimer of the office of trustee and executor so far as the property in this country is concerned, will that enable the three trustees who are the vendors to make a good title? Now the point, so far as I know, is new, and I think the purchaser is right: that is to say, that according to our law it is not competent for a trustee to execute or to rely on a partial disclaimer of the office either of executor or of trustee or of the property devised to him. Let us consider what his position is in this case. It is remarkable, because he is executor as well as a trustee. What would be the position under this document if he remitted personal estate from America to this country? Would not he be responsible for it? Would this disclaimer by him affect him in any way? I should say obviously not. He would be clearly responsible for it, and the duties of the office, if he accepts the office at all. In other words, from a purchaser's point of view, unless he is proved not to have accepted, he must be deemed to have accepted the office of the trust, and then the ordinary principle applies that it is not competent for a man to do that partially; he must either do it altogether or not at all. Now, the cases which have been referred to by Mr. Farwell bear that out, and so far as property within the jurisdiction is concerned I think the point would hardly be arguable. But it has been argued that, if a trustee disclaims his trusteeship of all the property in this country, that disclaimer will be operative, although he may still retain the administration of other property out of the country and be responsible here for the rents of that property if he comes here. I do not think that can be so when the trusts of the real estate are so mixed up with the trusts of the personal estate as they are in this particular case. I do not see how it is possible to give effect to that argument, when, as it seems to me, it is absolutely clear that according to our laws this disclaimer would not shield this gentleman from an action here to make him liable as executor. But, even if there was no mixing up of the personal estate and the real estate, I do not think that Mr. Warmington's answer is sufficient. I do not think that anybody could say that a trustee, even of land in this country, could get rid of his duty as regards other property vested in the trustee if he remained a trustee at all. A testator intends, when he makes such a will as this, that his *cestuis que trust* shall have the joint judgment of all the trustees upon all the property subject to the trusts of the will, whether it is in this country or whether it is abroad, and I do not think it is competent for any trustee to say "I will attend to some of the trusts and I will not attend to others." It is competent for him to say that he will have nothing to do with it; otherwise a testator would be able to saddle people with duties of an onerous description without their having any opportunity to get rid of them. It is competent for anybody to renounce or disclaim a trust, and to have nothing to do with it; but unless he protects himself to that extent I do not think it is competent for a trustee to accept the office as to some part of the estate and not accept it as to the rest. I think that principle applies here. The will is a will of real estate, and some of the real estate is in this country and some is abroad. It is said that such a decision is rather hard and inconsistent, and leads to complication, and so it does; but the answer to that is, that a testator who has property in the Colonies or abroad, and property here, if he is a wise man, will have two sets of trustees, and devise his colonial property to persons in the Colonies who can look after it, and devise his English property to persons in this country. But if he does say, as this gentleman did, "I intend to have five trustees, and I intend that they shall protect my *cestuis que trust*," I do not think it is competent for one of those trustees to say, "I will accept the office as to colonial property and will not have anything to do with it as regards English property." I do not think it would be competent for a person in England to say, "I will accept the office as regards property here, and not have anything to do with it as regards American property." It appears to me, therefore, that the appeal must be allowed, that the purchaser's objection is a good one, and that the proper order to be made is an order in the form of the order in *Re Hargreaves and Thompson's Contract* (55 L. T. Rep. 239; 32 Ch. Div. 454); that is to say, the purchaser is to receive back his deposit with interest, and the vendors must pay the costs of investigating the title.

SMITH, L.J.—I am of the same opinion. In this case a gentleman made his will in Sept. 1888, and he died in May 1889. He left a large amount of property, personalty and realty, some in this country and some in America. He left five trustees of that property to carry out the trusts both of the English property and of the American property, both of the real estate and of the personal estate in England and the real estate and the personal estate in America. Now, in these circumstances, in the year 1895 the trustees were desirous of selling and did enter into a contract of sale with the appellant for the sale of a portion of this property. The contract for purchase having been made, on the 26th March 1895 the abstract was delivered, from which it appeared that only three out of the five trustees were proposed to be made parties as vendors. Thereupon the objection was taken that five trustees were appointed by the will and must be parties. Whereupon it was shown, and truly shown, that, as regards one of the trustees, he had renounced *in toto*, so that he was out of the question. But there was still the question about the other trustee, namely, Mr. Samuel Lord the younger. The vendor then produced to the purchaser this renunciation or disclaimer under the hand and seal of Mr. Samuel Lord. Then the question arises, whether it is such a disclaimer as should be given and would render Mr. Samuel Lord an unnecessary party altogether. A great deal has been said about the construction of this disclaimer, but I have not the slightest doubt that the true construction of this document is, to put it as shortly as I can, that Mr. Samuel Lord under his hand and seal says, "With regard to the real estate and personal estate in England I disclaim, but I do nothing

of the sort as regards the real and personal estate in America." That is the true reading of that document, and that therefore shows that it was his intention, if he had not done so already, as trustee, to intermeddle with the American property, but that it was not his intention to intermeddle with the property in England. Now can a trustee do that? The authorities which have been cited are all on one side. A trustee cannot accept a portion of the trust and disclaim the other portion. He must disclaim *in toto*, or he remains trustee as to all. The authorities are clear upon that. Putting this construction on the disclaimer of Mr. Lord the younger, which I have no doubt is the right one, I think that he did not disclaim the whole of the trust which was left to him in conjunction with the four other trustees. Therefore the purchaser is right in saying that a good title has not been shown, because it is not shown that Mr. Samuel Lord the younger is not a trustee, and therefore he ought to be a party to the conveyance. Mr. Warmington said that this was a most important point to the public and to gentlemen living in Lancashire, many of whom have estates in Lancashire and also estates in America. I wish to point out that I do not think there is much in that observation, for the simple reason that a testator in the happy position of having an estate both personalty and realty both in Lancashire and in America, if he were so minded, could obviate the difficulty which has arisen in this case by creating two sets of trustees, English trustees and American trustees, and this difficulty would never hereafter arise if that were done. Therefore I think that the appeal must be allowed.

RIGBY, L.J.—I entirely agree with the reasons already given, and I will say nothing about that part of the case which appears to be settled by authority, which is, that you cannot disclaim in part. But it is said that there is a special circumstance here which comes within no decisions that have yet been arrived at by the court, and that is, that there is a disclaimer of everything within the jurisdiction of this court; in fact, of everything that is outside the bounds of the United States of America, and it is said that that makes a broad distinction. I cannot see it. It is perfectly true no doubt that we have no jurisdiction over land in America in the sense that we cannot make orders which of their own force will affect that land; but we have jurisdiction over the trustees in this country, and by service out of the jurisdiction we should be able to reach a trustee out of the jurisdiction in respect of that land. Similarly neither this court nor the Court of Probate can of its own authority enable the executors who get probate here to get in the assets in America. But there is jurisdiction over the person of the executors, and the trustees and executors in this double capacity are responsible here equally in relation to the real estate and to the personal estate in America, as in relation to the real estate and personal estate within our own jurisdiction. As to the argument of inconvenience, really it comes to nothing. I have known of many cases where that has been easily met — cases for instance where a testator is domiciled in France and has property in England. He may easily, if he chooses to do it, have one will with regard to the French property and one will with regard to the English property; or even, without having two wills, he might have one set of trustees as regards one property and a separate set of trustees as regards the other. Then the difficulty which is supposed to exist is at once got over. I see no hardship, and I see no real difference between the case of trying to disclaim a part only of a trust where all the property is within the jurisdiction of the court, and trying to disclaim a part only of the trust on the ground that the disclaimer extends to everything within the jurisdiction of the court.

Solicitors for the purchaser, *Ford* and *Ford*, agents for *Richard Higham*, Manchester.

Solicitors for the vendors, *Field, Roscoe*, and *Co.*, agents for *Yates, Johnson*, and *Leach*, Liverpool.

Jan. 20 *and* 21.

(Before LINDLEY and KAY, L.JJ.)

Re NEWTON (Infants). (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Infants—Wards of court—Religious education—Misconduct of father—Parental authority.

The right of a father to have the custody of his infant children may be lost by misconduct on his part.

And the right of a father to have his infant children educated in his own religious faith may be lost even in the father's lifetime if he allows the children to be brought up in another religion for such a time that it would, in the opinion of the court, be contrary to the children's interests to alter their religious education.

Decision of Kekewich, J. affirmed.

THIS was a summons taken out by John Newton, the father of two girls, aged respectively about fifteen and eleven, his only surviving children, that they might be transferred from a Protestant school at which they were being educated to some suitable Roman Catholic school, he being himself a Roman Catholic.

The mother, who was a member of the Church of England, died in Jan. 1888. At the time of the marriage of the father and mother it was agreed that the children of the marriage should be brought up as Roman Catholics, but this stipulation had apparently not been insisted upon by the father after the marriage.

The children had been made wards of court, an aunt of their mother, who died in Oct. 1890, having by her will provided for each of them a small income.

There was evidence to the effect that, so long as the mother was alive, the father had allowed her to bring up their children in her faith; that the children had been sent to Protestant schools, and had attended the Church of England Sunday-school with his knowledge and, to some extent, co-operation; that, though previously a teetotaller, he had, after his wife's death, fallen into a state of dissoluteness; that he had been convicted, fined, and imprisoned for being drunk or drunk and disorderly on several occasions; that he had shamefully neglected his two surviving children, and dissipated money allowed him for their maintenance; that the children had been found by their half-brother in a state of destitution and

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

neglect, and removed by him; and that they were placed, under the order of the court, without opposition from the father, at the Protestant school where they now are.

The father relied on evidence to the effect that, since the last time he was convicted of being drunk and disorderly, he had become a reformed man; that, though previously he might have been irreligious, and even a scoffer, he now was a religious man and attached to the Roman Catholic faith, in which he was educated; and desired to have his children brought up in his own religious faith.

The summons was heard before Kekewich, J. sitting at chambers, and his Lordship, after consideration of the matter, stated his decision in writing, as follows:

KEKEWICH, J.—On this occasion the only question is whether the infants shall be brought up as Roman Catholics or as members of the Church of England. Other matters have been and will hereafter be discussed, but they do not arise now. The father does not ask for the custody of the children, and, provided reasonable opportunities for seeing them (about which there is no difficulty) are given, he is content that the present arrangements shall be continued. But he asks that they may be educated as Roman Catholics, and bases his request on parental authority. I must take it to be proved that the father is and always has been a Roman Catholic. That until recently he was lax in religious observance is admitted, but as far as he is personally concerned that is all that can be said. He swears that on his marriage he stipulated that the children should be brought up as Roman Catholics, and that uncontradicted statement must be admitted for what it is worth. The stipulation never had practical effect. Not only were the children baptized as members of the Church of England, but so long as their mother lived they were brought up in that communion. I conclude that the mother was a religious woman, distinctly a member of the Church of England, and anxious that her children should also be members thereof; and whether by reason of love for her, or because he was careless in the matter, the father seems to have entirely given way to her in this particular. But the girls were taken by the mother regularly to church and attended the Sunday-school. The elder girl has never yet attended a Roman Catholic church or school, and the younger girl has only done so since the mother's death. The elder girl told me that her father had expressed unwillingness to go against the mother's wishes in this matter. The elder girl is now fifteen, the younger only eleven. It is difficult to compare two girls of such different ages—four years at that time of life, representing, of course, large opportunities for development of character. But it seemed to me that the elder girl was far the stronger of the two, and is likely hereafter to influence as apparently she now influences her younger sister. They are evidently devoted to one another as sisters should be. I did not think it right to question the elder girl respecting the differences in doctrine or otherwise between the Churches, but she expressed an anxious desire to remain in the Church of England and a strong objection to being henceforth educated as a Roman Catholic. This arises partly from habit, partly from the teaching of those with whom she had been associated, but still more from affectionate memory for her mother's wishes with which she appears to be well acquainted. She gave me her views on this point simply and tenderly without any pressure on my part, in such manner as convinces me that the feeling was genuine and deep. I did not think it right to ask the younger girl, whom I saw separately, any questions respecting the Churches. She seemed to me too young and her character too unformed to allow this to be done with advantage. I was confirmed in this by finding that she did not at all remember her mother, and therefore could not be guided by personal recollection of her wishes. It would be too much to say that as regards the elder girl change of religious education would certainly unsettle her faith, but it undoubtedly would be a shock to her, and it is difficult to forecast the results. It will be concluded from what is above stated that there is no such difficulty as regards the younger girl, but she would deeply feel separation from her sister, and I should expect it to do mischief. I have considered long and anxiously what ought to be done. Not only have I read the numerous affidavits again and again, but I have given my best attention to a full argument from counsel not the less able because it was temperate, and I have considered with some others the authorities cited, which include, I think, all the modern cases on the subject. I entertain no doubt that it is for the benefit of the girls that they should continue to be educated as they hitherto have been as members of the Church of England, and the only question is, whether the conduct of the father justifies the court in acting in this matter for his children's benefit against his wishes. My conclusion is, that I am free to act on my own judgment. There is no difficulty in finding many passages in many of the cases which read by themselves contradict this, and there is so far as I am aware nowhere laid down any rule by which one can determine what amounts to an abnegation by a living father of his parental authority. These infants' father must, in my opinion, be taken to have deliberately allowed his children to be brought up as members of the Church of England until it is too late for him to insist on the desired change. I therefore intend to direct that the girls shall be educated in future as hitherto as members of the Church of England. The case came before me in chambers, and after having been discussed more briefly several times I appointed an afternoon for having a full argument on the part of the father in my private room. Therefore no judgment will be delivered in open court, and if the usual course were followed my decision would be communicated to the chief clerk verbally or in a short note. Having regard to the importance of the case, and to the possibility of its being taken to the Court of Appeal, I have considered it fair to state my views in writing to be communicated to the parties, and to be read, if need be, to the Court of Appeal. I desire to add that, as at present advised, and not, of course, having given the same consideration to the question as I should have done if I had arrived at a different conclusion on the other, the importance of bringing up the two girls together is so great that, if perchance the

parental authority is held to be in full force as regards the younger only, I should wish both to be educated as Roman Catholics. What has induced me to say this will be apparent from what is above written.

From that decision the father now appealed.

Costelloe for the appellant.—I submit that the appellant is entitled to have his infant children educated in the Roman Catholic faith, and for that purpose to have them removed to a suitable Roman Catholic school. Before the jurisdiction of the court to deprive a father of the guardianship of his children can be called into action the court must be satisfied that he has so conducted himself, or placed himself in such a position, as to render it not merely better for the children but essential to their safety or welfare in some very serious and important respect that the father's acknowledged rights should be interfered with. Mere habits of intemperance will not of themselves justify the interference of the court:

Re Goldsworthy, 2 Q. B. Div. 75.

[LINDLEY, L.J. — Intemperance may not be enough to justify the alteration of the guardianship of infants, but here there has been more than intemperance. There has been neglect as well. KAY, L.J.—The infants here are wards of court, and the court must act as guardian.] The appellant objects to the school at which his children are being educated because of its locality as well as on account of the religion which is taught there. [KAY, L.J. referred to *Reg.* v. *Gyngall* (69 L. T. Rep. 481; (1893) 2 Q. B. 232).] The court cannot interfere with a father unless he abuses his parental authority. If there is no father alive, then the court has jurisdiction to interfere. But the case where the father is living is stronger than that where he is dead. [KAY, L.J. referred to *De Mandeville* v. *De Mandeville* (10 Ves. 52).] The court will not allow infants to be educated in a religious faith different from that of their father:

D'Alton v. *D'Alton*, 4 Prob. Div. 87.

[KAY, L.J.—That was not a case where what the father proposed to do was contrary to the children's interest. Here it is almost obviously against the interest of the children.] A similar case was

Re Meades, 5 Ir. Rep. Eq. 98.

To separate the children from the father is worse than to separate two sisters. The father has a jurisdiction which is above the court's jurisdiction, and prevails unless there has been an abuse. It must prevail in the case of the younger daughter, and, as there is no danger in the case of the elder, she should follow. The jurisdiction of the court was discussed by the House of Lords in

Barnardo v. *McHugh*, 65 L. T. Rep. 423; (1891) A. C. 388.

If the father is moral and does not abuse his parental authority his authority is paramount:

Re Scanlan, 59 L. T. Rep. 599; 40 Ch. Div. 200.

[LINDLEY, L.J.—In *Re Agar-Ellis*; *Agar-Ellis* v. *Lascelles* (39 L. T. Rep. 380; 50 Ib. 161; 10 Ch. Div. 49; 24 Ib. 317) the father had not assented to the religious education which the infants were being taught. If the two children in the present case are to be together the religion of the elder ought to be preferred, because in changing hers you might shake her belief, whereas you might not shake that of the younger.] A father may educate his children in any religion that he chooses, even where there is some religious impression already made on the child. He referred also to

Davis v. *Davis*, 10 W. R. 245.

Hopkinson, Q.C. and *Ryland* for the respondents. — The paramount consideration is the benefit of the infants, and the court will interfere with the authority of a father when it is for the children's benefit. The father's wishes will prevail, but he may have forfeited or abdicated his authority. *Barnardo* v. *McHugh* (*ubi sup.*) was a case where it was not detrimental to the child to comply with the mother's wish. They referred also to the following cases as additional authorities on the question of the religious education of infants:

Re Nevin, 64 L. T. Rep. 107; (1891) 2 Ch. 299;
Hill v. *Hill*, 6 L. T. Rep. 99; 8 Jur. N. S. 609;
Lyons v. *Blenkin*, Jac. 265;
Re McGrath, 67 L. T. Rep. 636; (1893) 1 Ch. 143;
Stourton v. *Stourton*, 8 De G. M. &. G. 760.

Costelloe replied.

LINDLEY, L.J.—In this case we shall not gain much by looking further into the authorities. We have availed ourselves of the opportunity since yesterday to fully consider them, and also the facts of the case which are not materially in dispute. The case is a curious one and not altogether free from difficulty, the father of the infants being now living. [His Lordship stated the facts and continued:] The controversy is in what religion the children should be brought up. The court must consider something more than the mere fact that the father has recently become a religious man—for which I give him credit—and now wishes to have his children removed from a Protestant school and placed at a Roman Catholic one. What is the position of the case as regards the law? I think that it is not necessary to go beyond the two cases of *Re Agar-Ellis* (39 L. T. Rep. 380; 50 Ib. 161; 10 Ch. Div. 49; 24 Ib. 317) and *Re McGrath* (67 L. T. Rep. 636; (1893) 1 Ch. 143), where it was laid down that it is the duty of the court to bring up children in the religious faith of their father, unless there are some serious and unusual circumstances to the contrary. But the court has jurisdiction to disregard in certain cases the religion and wishes of the father. I do not think that James, L.J. went too far in *Re Agar-Ellis* (*ubi sup.*) when he said that the law might take away from a father his sacred right of controlling the education of his children, or might interfere with his exercise of it, just as it might take away his life or his property, or interfere with his liberty; but it must be for some sufficient cause known to the law. In no case, however, has the court interfered with the father's legal right where, as in the present case, the father was living, except in the event of misconduct. It is therefore not immaterial to consider what sort of a man the father in this case was up to a very recent time. Having regard to the decisions in *Re Agar-Ellis* (*ubi sup.*) and *Re McGrath* (*ubi sup.*) we have to see what is best to be done. Kekewich, J. has taken the view that it is too late for the father to insist on a change in the religious education of his children; and that in future they must be educated as hitherto as members of the Church of England. On the whole I think that the view taken by the learned judge

was right. Considering all the circumstances of the case, I have come to the conclusion that there is enough to justify me in saying that the order made by Kekewich, J. was a proper one, and that consequently the appeal must be dismissed with costs.

Kay, L.J.—I am of the same opinion. In this case the peculiar feature is, that the father is still living and now desires to alter the religious faith in which his children have been brought up. [His Lordship discussed the facts of the case and continued:] What is the law applicable to the case? I take it from the judgment of James, L.J. in *Re Agar-Ellis* (*ubi sup.*)—a judge who placed the rights of a father in relation to his children on the highest footing. His Lordship said, at p. 71 of 10 Ch. Div.): "It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property, or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach or intended breach of that day must be proved by legal evidence before that right can be rightfully interfered with." If in this case the father had not been alive it is quite impossible, having regard to the welfare of the infants, to conceive that the court would interfere with them and alter the course of their religious education. I think that the case comes within the words which I have read from the judgment of James, L.J. The conduct of the father has been such that the court ought to consider that he has forfeited or abdicated his paternal right. His conduct has been such as "would make a resumption of his authority capricious and cruel towards his children." It comes entirely within the doctrine laid down by James, L.J. In deciding what religion the children ought to be brought up in the court has to consider what is for the benefit of the children. Kekewich, J. has seen the elder child, who is now fifteen, and she desires to be brought up in the Protestant faith, partly because she has learnt something of it, but apparently chiefly because it was the religion of her deceased mother, to whom she was much attached. I have more difficulty about the younger child. The father has never himself suggested that he wishes any difference to be made between the two. The sisters are, as sisters should be, much attached to each other. The younger one seems to be greatly under the influence of the elder; and it is, in my opinion, desirable that, in the interest of the younger child, the two should be kept together and brought up in the same religious faith. I treat the case as coming within one of the exceptions referred to by James, L.J. in *Re Agar-Ellis* (*ubi sup.*). I think that Kekewich, J. was quite right in his decision; and that the appeal must be dismissed, with costs.

Appeal dismissed.

Solicitor for the appellant, *Charles Steele.*

Solicitors for the respondents, *Woodcock, Ryland,* and *Parker,* agents for *Greenhalgh* and *Cannon,* Bolton.

Friday, Dec. 13, 1895.

(Before Lord Esher, M.R., Lord Herschell, and Kay, L.J.)

Dunn v. The Queen.(a)

APPLICATION FOR A NEW TRIAL.

Crown—Servants of the Crown—Public service—Civil servants—Tenure of office—Right to dismiss at pleasure.

All persons employed in the public service of the Crown, whether in a military or civil capacity, hold their appointments during the will of the Crown, unless there is some statutory provision to the contrary.

This was an application for judgment or for a new trial, by the petitioner, on appeal from the verdict and judgment at the trial of a petition of right before Day, J. and a jury.

The petition of right, so far as is material, stated the following facts:—

1. On the 29th Jan. 1892 your petitioner entered the service of your Majesty's Niger Coast Protectorate (at that time commonly called the Oil Rivers Protectorate) under a contract made with him by Major Macdonald, now Sir Claude Macdonald, your Majesty's Commissioner and Consul-General for such protectorate, who was then and there duly authorised to enter into contracts in that behalf. The terms of such contract were as follows, viz.: your petitioner was to serve for a term of three years, and was engaged for a term of three years certain; the salary to be paid to him was 200*l.* for the first year, increasing 50*l.* a year to 350*l.*; six months' leave after eighteen months' residential service; board and lodging found, or 100*l.* a year in lieu thereof; 25*l.* paid down on arrival in the protectorate; passage paid going from and returning to England, both for the engagement and on absence on leave.

2. The circumstances under which the said contract was entered into were as set out in this and the succeeding paragraph, viz.: Sir Claude Macdonald was desirous of finding men who were ready and willing to enter the service of the Protectorate, and, being then in Africa, requested certain persons in this country to communicate with such men as they thought fit and suitable for the service, and to engage such men provisionally and subject to a power of him the said Sir Claude Macdonald to reject such men as were physically unsuitable on their arrival at the Protectorate. Amongst the persons whom the said Sir Claude Macdonald requested so to act as aforesaid was Major V., who on his part, amongst others, mentioned the matter to C. The said Sir Claude Macdonald gave to the said Major V. particulars in writing of the terms on which such men (if approved by him on arrival) would be engaged, and desired him to communicate such terms to any men he considered suitable. The full text of such terms was as follows: "The salary is 200*l.* a year to start with, increasing 50*l.* a year to 350*l.*; engagement for three years certain; six months' leave after eighteen months' residential service; board and lodging found, or 100*l.* a

(a) Reported by J. H. Williams, Esq., Barrister-at-Law.

year in lieu thereof; 25*l.* down on arrival in protectorate; passages; also passages paid going and returning from leave. If they are the sort of men I want their engagement on future posts in the colony is a certainty. From the ranks of these the deputy-commissioners at 600*l.* rising to 800*l.* There will also be future billets in other departments, army, navy, customs, public works."

3. The said Major V., through the said C., amongst others, communicated on and about the 30th Dec. 1891 with your petitioner, and read over and gave to your petitioner a copy of the said terms, and engaged your petitioner on behalf of the said Sir C. Macdonald to enter the service of the Protectorate upon the said terms.

4. Your petitioner agreed to accept the said engagement on the said terms, and on the 6th Jan. 1892 left England for the Protectorate, where he arrived on the 29th Jan. 1892. Your petitioner at once reported himself to your Majesty's Commissioner, the said Sir Claude Macdonald, who confirmed the said engagement on the said terms, and your petitioner at once entered the service of the Protectorate.

5. From the 29th Jan. 1892 until your petitioner's arrival in England, on leave of absence duly given, in June 1893, your petitioner diligently and faithfully, according to the best of his skill and ability, performed all the duties required from him in the service of the said Protectorate, and was duly paid all the salary and sums of money which according to the said terms of his engagement were due to him.

6. On the 9th Oct. 1893 your petitioner received a notice purporting to determine his said contract and engagement. Such notice was in the words following: "Sir,—I am directed by Sir Claude Macdonald, H.B.M. Commissioner and Consul-General for this Protectorate, to inform you that your services are no longer required. You will receive pay up to and for the 16th Dec., the date your leave terminates, on forwarding the usual life certificate to . . . the agents, who have been instructed accordingly." Your petitioner was not willing to accept the said notice and to terminate his said contract and engagement, and the said notice was wrong and given in breach and violation of the terms of your petitioner's contract and engagement, and your petitioner has refused to accept the said notice, and to terminate his said engagement, and is now and always has been ready and willing to continue to do and perform all his duties and obligations in the service of the Protectorate until the termination of the said engagement, which will expire on the 29th Jan. 1895.

7. Your petitioner has not received payment of any salary under his said contract and engagement for the period which has elapsed from the 17th Dec. 1893 to the date hereof.

8. Your petitioner and suppliant claims to be entitled to have payment made to him according to the said contract and agreement of the sums following, viz.: forty-three days' salary, at the rate of 250*l.* per annum, from the 17th Dec. 1893 to the 29th Jan. 1894, 29*l.* 8*s.* 6*d.*; salary from the 29th Jan. 1894 to the date hereof, at the rate of 300*l.* per annum, 186*l.* 0*s.* 6*d.*; and a further sum of 141*l.* 7*s.* 4*d.* salary from the date hereof until the termination of the agreement which takes place on the 29th Jan. 1895; and 64*l.* 12*s.* 6*d.*, allowances in lieu of board and lodgings from 17th Dec. 1893 to the date hereof at the rate of 100*l.* per annum; and 47*l.* 2*s.* 5*d.*, a further allowance in lieu of board from the date hereof until the 29th Jan. 1895, when such agreement would determine as aforesaid. Alternatively, your petitioner and suppliant claims to be entitled to payment of the sum of 500*l.* as the damages which he has sustained by reason of the said breach and non-performance of the said contract and agreement.

At the trial the petitioner gave evidence in support of the statements made in the petition. The learned judge held that the petitioner, being engaged in the public service of the Crown, could be dismissed at the will of the Crown, and he directed the jury to find a verdict for the Crown.

The petitioner appealed.

W. H. Stevenson for the appellant.—The appellant was engaged for a term of three years, and, therefore, could not be dismissed at the will of the Crown before the expiration of that term. There is a remedy by petition of right in cases of breach of contract:

Thomas v. *The Queen*, 31 L. T. Rep. 439; L. Rep. 10 Q. B. 31.

Before the recent case of *Shenton* v. *Smith* (72 L. T. Rep. 130; (1895) A. C. 229) it was only in cases of persons in the naval or military service of the Crown that it was held that they could be dismissed at any time at the will of the Crown. In *Shenton* v. *Smith* it is said, in the judgment, that the right to dismiss at will exists, "unless in special cases where it is otherwise provided." That does not mean solely where it is otherwise provided by Act of Parliament, but where it is otherwise provided by the terms of the appointment. [Lord HERSCHELL referred to Chitty on the Prerogative of the Crown.] There were also special circumstances in this case owing to the exceptional character of the territory which had to be administered, and the difficulty of obtaining competent persons unless engaged for a definite term. All the reported cases, before *Shenton* v. *Smith* (*ubi sup.*), were cases of military officers, and were decided upon grounds not applicable to the civil service of the Crown:

Re Tufnell, 34 L. T. Rep. 838; 3 Ch. Div. 164;
Grant v. *The Secretary of State for India*, 37 L. T. Rep. 188; 2 C. P. Div. 445;
Mitchell v. *The Queen*, 6 Times L. Rep. 181, 332.

The only reported case relating to a civil servant of the Crown is *Cooper* v. *The Queen* (42 L. T. Rep. 617; 14 Ch. Div. 311), but that was a claim for a superannuation allowance, and not for wrongful dismissal.

Sir *R. B. Finlay* (S.-G.), and *E. Sutton* for the Crown.—The general rule is, that all public servants of the Crown, whether military, naval, or civil, hold their office at the pleasure of the Crown, unless provision has been made to the contrary by statute. No contract for service for a term certain can be made which will bind the Crown and take away the power of dismissal at pleasure. The rule is founded upon public policy, and is equally applicable to all persons engaged in the public service. In the case of *De Dohsé* v. *The Queen*, which has not been reported, which came before the Court of Appeal in June 1885, the Master of the Rolls said: "Admitted, therefore, that no person, whether called a government or anything else, could make a contract for seven years for military service. Now, whether that doctrine with regard to the Crown is confined to military service or not, need not be decided to-day. I take leave to say that I do not accept at all that the doctrine is confined to military servants under the Crown. All service under the Crown is public service, and, to my mind, it is most likely that the doctrine, which is said to be confined to military service, applies to all public service under the Crown, because all public service under the Crown is for the public benefit. Therefore, it may be that the Crown has despotic authority to get rid of all servants who are employed for public purposes, and for the benefit

and advantage of the public." That case went to the House of Lords in Nov. 1886, where the Lord Chancellor and Lord Watson expressed their opinion that the Crown could not by any express stipulation be deprived of the power of dismissing public servants at pleasure, for that would be a violation of public policy.

Stevenson replied.

Lord Esher, M.R.—The question which has been suggested as to an order given for the supply of goods for the public service we will reserve for consideration when the question arises for decision. In this case a relationship was instituted between the petitioner and the Crown in respect of the public service, and that relationship was that the petitioner should become a servant of the Crown and be paid a salary. He became a servant of the Crown in the public service. There is nothing expressed in the appointment as to the length of time the service is to continue. That is immaterial, in my opinion. In this case that has happened which I thought would one day have to be decided upon by the courts. These are the words which I used in *De Dohsé* v. *The Queen* (*ubi sup.*): "It is said that it was lawful to make an engagement with him (the suppliant) for seven years, because the engagement offered and proposed was not an engagement of military service, it being admitted in argument that, if the engagement was for military service as a soldier, whether as officer or private, it is contrary to public policy that any such contract should be made. Admitted, therefore, that no person, whether called a government or anything else, could make a contract for seven years for military service. Now, whether that doctrine with regard to the Crown is confined to military service or not need not be decided to-day, in my opinion. I take leave to say that I do not accept at all that the doctrine is confined to military service under the Crown; all service under the Crown itself is public service, and to my mind it is most likely that the doctrine which is said to be confined to military service applies to all public service under the Crown, because all public service under the Crown is for the public benefit, and therefore it may be that the Crown has despotic authority to get rid of those servants who are employed for public purposes and for the benefit and advantage of the public. But be that as it may, I say it is not necessary to decide it on this occasion, because, in my opinion, it is absolutely clear on this petition of right that what was proposed to the suppliant, if anything was proposed, was military service and nothing else." That is what I said would probably be the decision of the court. Now it is only necessary to say positively that that is the doctrine of law. That proposition was before the House of Lords, on the appeal in that case, and Lord Watson seems to have said that it was the correct opinion, and that it must be so decided. Lord Watson said: "In the first place, it appears to me that no concluded contract is disclosed in the statements contained in this petition of right; and in the second place, I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further, I am of opinion that, if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country, and could not derogate from the power of the Crown." That is conclusive, and I take that to be the rule laid down by the House of Lords, in consonance with the opinion expressed by myself. I think also that the case of *Shenton* v. *Smith* (*ubi sup.*), in the Privy Council, is equally decisive, though the rule is not so clearly laid down as by Lord Watson in *De Dohse* v. *The Queen* (*ubi sup.*). I think, however, that the Privy Council meant to express the same doctrine as Lord Watson. Both authority and principle support the doctrine laid down by Lord Watson. This appeal, therefore, fails and must be dismissed.

Lord Herschell.—I am of the same opinion. The petitioner was appointed by Sir Claude Macdonald as a vice-consular officer in the Niger Protectorate, and as such to be a servant of the Crown. The question is, whether he can maintain a petition of right because his appointment was determined. It is said that he was engaged for three years certain, and that there was no right to determine his services before the expiration of three years. Persons employed in the public service of the Crown are, unless there is some statutory provision for a higher tenure, ordinarily engaged to hold office during the pleasure of the Crown. When, therefore, the petitioner was appointed by Sir Claude Macdonald, even if he was expressly appointed for three years, yet there was the implied right of the Crown, as in all cases, to end the appointment at pleasure. Here there is no evidence that Sir Claude Macdonald had any authority to employ the petitioner on any other than the usual terms, even if that question were material. Considerations of public interest led to such being the terms of employment in the public service. It has been pointed out in the cases that the appointments are made for the public good, and that it is essential for the public good to be able to determine the appointments at pleasure, except in cases where, for the public good, it has been determined that some other tenure is better. This appeal must be dismissed.

Kay, L.J.—The petitioner asserts that he was engaged for three years. The question is, whether that prevents the Crown from exercising its ordinary right to dismiss at pleasure. The appointment of Sir Claude Macdonald was to hold at the pleasure of the Crown, and it would be strange if he had power to bind the Crown by an appointment for three years. The general principle is satisfactorily established by the cases. Some of the cases relate to military service, and it has been argued that different considerations apply in such cases, it being in such cases for the advantage of the Crown to have such power, but that such considerations do not apply in the case of a civil servant. I do not agree with that argument. It might be even more detrimental to the interests of the country if the Crown had not that power in the case of a civil servant. The same reasons are quite as strong in the one case as in the other. The authorities are clear upon the question. Besides there is the case of *De Dohsé* v. *The Queen* (*ubi sup.*), in the House of Lords, where the rule was not confined to the military service. There is also the case of *Shenton* v. *Smith* (*ubi sup.*), in

the Privy Council, which was the case of a civil servant, and it was held that his appointment was at the pleasure of the Crown, and that he was subject to dismissal at the will of the Crown. In my opinion, no person in the position of Sir Claude Macdonald can have power to bind the Crown by engaging any person in the public service for a fixed period.

Appeal dismissed.

Solicitors for the appellant, *Dunn* and *Hilliard.*

Solicitor for the Crown, *Solicitor to the Treasury.*

Nov. 21, 22, 25, 26, 27, *and Dec.* 17, 1895.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

THE WHITTON. (*a*)

ON APPEAL FROM THE DIVISIONAL COURT OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Salvage—Subject-matter—Jurisdiction—"Ship"—Admiralty Court Act 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6—*Wreck and Salvage Act* 1846 (9 *&* 10 *Vict. c.* 99), *ss.* 19, 40—*Admiralty Court Act* 1854 (17 *&* 18 *Vict. c.* 78), *s.* 13—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 2, 458, 459, 476, 497.

By the common or original law of the High Court of Admiralty the only subjects in respect of the saving of which salvage reward could be entertained in the Admiralty Court were ship, her apparel and cargo, including flotsam, jetsam, and lagan, the wreck of these and freight; the only subject added by statute is life. The County Courts have no larger jurisdiction.

Services were rendered to a gas-float which had broken adrift from her moorings in the Humber, where it had been placed to serve as a beacon. By reason of its structure it was incapable of being navigated. The respondents claimed salvage reward.

Held, that the gas-float was not a ship and was not a subject-matter of salvage within either the original or common law jurisdiction, or the statutory jurisdiction of the High Court of Admiralty, or by the general law maritime; and it was consequently not a subject-matter of salvage within the jurisdiction of the County Court.

Quære, *whether salvage would be granted for saving a lightship.*

THIS was an appeal by the defendants, the Corporation of the Trinity House of Hull, against a decision of the Divisional Court of the Probate, Divorce, and Admiralty Division, dismissing an appeal by the defendants from a decision of the judge of the Hull County Court by which salvage was awarded to the plaintiffs for services rendered by them to a gas-float, the property of the defendants.

The case below is reported in 73 L. T. Rep. 319.

The facts of the case, and the arguments of counsel fully appear in the judgment.

Sir *Walter Phillimore* and *F. Laing*, for the appellants, cited, in addition to the authorities in the judgment:

The Willem III., 25 L. T. Rep. 386; 1 Asp. Mar. Law Cas. 129; L. Rep. 3 A. & E. 487;
Godolphin, View of the Admiral Jurisdiction, 2nd edit., pp. 43, 50.

Pyke, Q.C. and *A. Pritchard* (with them *Butler Aspinall*), for the respondents, referred to the following authorities in addition to those cited in the judgment:

The Aquila, 1 C. Rob. 37;
The Boiler ex Elephant, 64 L. T. Rep. 543;
Everard v. *Kendall*, 22 L. T. Rep. 408; 3 Mar. Law Cas. (O. S.) 391; L. Rep. 5 C. P. 428;
The Zeta, 33 L. T. Rep. 477; 3 Asp. Mar. Law Cas. 73; L. Rep. 4 A. & E. 460;
Five Steel Barges, 63 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 580; 15 P. Div. 142;
Rex v. *Property Derelict*, 1 Hagg. 383;
The Calypso, 2 Hagg. 209;
Bass v. *Five Negroes and a Canoe*, Bee, 201;
Jerby v. 194 *Slaves*, Bee, 226;
Mason v. *Ship Blaireau*, 2 Cranch, 239;
The Schooner Emulous, 1 Sum. 207;
The Inquisition of Queenborow, Black Book of the Admiralty (Twiss), 151, 171;
Coke's Institutes, pt. 4, c. 22;
Sir Sherston Baker: The Office of Vice-Admiral of the Coast, p. 12; Duck de auctor, juris civil., lib. 2, c. 25;
Pardessus: Collection de Lois Maritimes, vol. 1, c. 6, p. 259, De Lege Rhodia.

Cur. adv. vult.

Dec. 17.—Lord ESHER, M.R. delivered the following written judgment:—This was an appeal from a divisional court of the Admiralty Division sitting as a Court of Appeal from the County Court of Hull having Admiralty jurisdiction. The cause was a salvage cause. The alleged salvage was the saving from danger of a "gas-float." The nature of the float and the circumstances of the alleged salvage were ascertained by the County Court judge. They were that the float *Whitton No.* 2 was made of iron, that the lower part bore the resemblance of a ship or boat; that part, called by the County Court judge the hull, had two ends shaped like the bows of a vessel; it was fifty feet long and twenty feet broad; it had no mast, stern-post, fore-post, or rudder; its interior was wholly occupied by a cylinder into which gas was pumped so as to fill it, and so that the gas went up to a light elevated on a pyramid of pieces of wood fifty feet high. The float could not by reason of its structure be used for any purpose of its being navigated. It could not be navigated. It could not carry any man or any goods from place to place. It could not hold any man on it, except that he could by means of a man-hole and ladder ascend to the light at the top to clean or arrange it. The float was fixed by an anchor or anchors and otherwise at a particular spot in the river Humber, so as to remain always fixed at that spot. It, however, broke away, and was carried down the Humber, and was in danger in the Humber, and was saved in the Humber by the exertions of the plaintiffs. The question in dispute was whether the County Court had jurisdiction to hear and determine upon the claim of salvage reward. It was argued on behalf of the appellants before us that the gas-float was not the subject-matter of a salvage claim in the High Court of Admiralty

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

within either its common law or any statutable jurisdiction; and that, if it was not so, neither was it within the statutable jurisdiction of the County Court. It was urged that the original, *i.e.*, the common law jurisdiction of the Court of Admiralty in respect of salvage was limited to claims in respect of alleged services to a ship and her apparel, or to the cargo of a ship, including cargo which had become flotsam, jetsam, or lagan, and to freight alleged to be saved by the saving of ship or cargo, and to the wreck of ship or cargo; and that the alleged services were rendered on the high sea. It was true that the jurisdiction was extended by statute to the saving of life; but, it was urged, only to the saving of the life of a person whose life was in danger from his being or having been on board a ship and in danger on the high sea. When in some cases the jurisdiction of the Admiralty Court was extended further than the limits of the high sea, it was so only in respect of the same objects or subjects as were within the jurisdiction of the Admiralty on the high sea. It was then argued that, upon the true construction of the statutes giving Admiralty jurisdiction to the County Courts, they only conferred on those courts, in respect of salvage services occurring within counties, the same jurisdiction as to the same subjects or objects as were within the jurisdiction of the High Court of Admiralty when the services were rendered within its jurisdiction. It was then argued that the float in question was not in any sense a ship, was not a subject or object in respect of the saving of which the High Court of Admiralty could have exercised or could exercise salvage jurisdiction, and, therefore, was not a subject or object for the similar jurisdiction in the County Court. It was argued for the respondents that the High Court of Admiralty had jurisdiction in respect of salvage services claimed to have been rendered at sea far beyond services to ship, cargo, and apparel and freight; that such jurisdiction extended to the saving of any article in danger on the sea, or, if not to all articles, yet to all which could be brought under the denomination of "maritime property;" and that maritime property included every floating object which is constructed for the purposes of navigation—meaning thereby, having some reference to the business of navigation—although it itself was not intended ever to be, and could never be, navigated. It was urged that, even if such things were not the subject or object of salvage within the original jurisdiction of the Admiralty, they were rendered so by statute. And it was further argued that, though not now within the jurisdiction of the High Court of Admiralty either by common law or statute, they were by statute within the jurisdiction of the County Court. The first point raised is whence is the original, or common law, jurisdiction of the High Court of Admiralty of England to be ascertained? The answer is: from the continuous practice and the judgments of the great judges who have presided in the Admiralty Court, and from judgments of the High Courts at Westminster. This proposition was so stated in the case of *The Gaetano and Maria* (46 L. T. Rep. 835; 4 Asp. Mar. Law Cas. 535; 7 P. Div. 137): "It is not the ordinary municipal law of the country, it is the law which the English Court of Admiralty either by Act of Parliament, or by reiterated decisions and principles has adopted as the English maritime law." Neither the laws of the Rhodians, nor of Oleron, nor of Wisby, nor of the Hansa towns, are of themselves any part of the Admiralty law of England. It was attempted by one of the counsel to say that the Laws of Oleron were to be considered as part of the law of England. To anyone who reads some of their strange enactments —as, for instance, in the Laws of Oleron, art. 23: "If the pilot through ignorance causes the ship to miscarry he shall make full satisfaction or lose his head;" art. 24: "If the master or one of the mariners or any one of the merchants cut off his head they shall not be bound to answer for it;" and art. 26: "If the Lord of any place be so barbarous as to maintain wreckers . . . he shall be fastened to a post or stake in the midst of his own mansion-house, which, being fired at the four corners thereof, all shall be burned together," &c., it must be ridiculous to suggest that they are part of the English law. But they contain many valuable principles and statements of marine practice which, together with principles found in the Digest, and in French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their court. All these sources of legal principles were used by Lord Tenterden in his great work; but he says in the last of his prefaces, the preface to the 5th edition: "It should be observed, however, not only of all these treatises, but also of the civil law, and the ordinances, without excepting even the ordinance of Oleron (which being considered as the edict of an English Prince, has been received with peculiar attention in the Court of Admiralty), that they have not the binding force or authority of law in this country, and that they are here quoted, sometimes to illustrate principles generally admitted and received, &c." It should be remarked that, as the law of the Admiralty is to be ascertained from the practice and judgment of its judges, it must be found or deduced from affirmative practice or judgments; that neither principle nor proposition can be deduced from mere negative, *i.e.*, by saying the point has never been treated in the Courts of Admiralty. If you find that the Court of Admiralty has affirmatively stated that it has jurisdiction in certain cases, you cannot affirm that it has jurisdiction in other cases merely on the ground that the Court of Admiralty has not expressly excluded them by negative words. You must bring the proposed case within some affirmative principle, or some affirmative judgment or practice. The second point, therefore, is, What is the jurisdiction of the High Court of Admiralty as to salvage, ascertained from its practice and judgments, and from statutes? As to its practice and judgments irrespective of statutes, it seems to be one uniform, continuous statement by judges and writers of authority that the jurisdiction as to salvage is exercised in respect of a ship, her apparel and her cargo; of freight in danger, and saved by reason of the saving of the ship or cargo; and of flotsam, jetsam, or lagan, being each of them part of the cargo of a ship. Lord Tenterden thus expresses it: "It is the compensation that is to be made to persons by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of salvage." In Park on Insurance, c. 8, Of

salvage: "Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fires, pirates, or enemies." In Kent's Commentaries, vol. 3, p. 245, Of salvage: "Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or recapture. The equitable doctrine came from the Roman law, and it was adopted by the Admiralty jurisdictions in the different countries of Europe." In Parsons, c. 7, Of salvage: "In Admiralty, and generally in the law merchant, it means the compensation which is earned by persons who voluntarily assist in saving a ship or her cargo from peril." In Williams and Bruce, Admiralty, c. 6, On salvage: "Salvage is the reward payable for services rendered in saving property lost at sea, or in saving any wreck, or in rescuing a ship or boat, or her cargo or apparel, or the lives of the persons belonging to her from loss or danger." In Mr. Carver's book, which will be the Abbott on Shipping of the future, c. 11, On Salvage and Wreck, s. 322: "By the common law one who saves, or helps in saving, a vessel to which he is a stranger, from danger at sea, is entitled to a reward for his services. So also with regard to cargo or other property belonging to a vessel at sea, which is rescued from danger, whether while in the vessel, or after having been thrown or washed out of her: those who rescue such property are entitled to reward, and to a lien upon the property for that reward. The reward thus payable to these salvors is called salvage." There is no word used by any of these writers which mentions any subject or object as the subject or object of salvage under the common law jurisdiction as to salvage of the High Court of Admiralty other than the ship, her apparel or cargo, or the wreck of them. If in Williams and Bruce more was meant by the phrase "property lost at sea," the statement is in the notes made to depend on the authority of American cases which will be discussed hereafter. In the last treatise on the subject of salvage, Kennedy on Salvage, the case is thus stated: "A salvage service in the view of the Court of Admiralty, may be described sufficiently for practical purposes as a service which saves or helps to save, maritime property—a vessel, its apparel, cargo, or wreck—or lives of persons belonging to any vessel, when in danger, &c." The learned author then quotes the American cases as to rafts of timber, but observes: "There does not appear, however, to be any reported case in which the English Admiralty Court has awarded salvage for the preservation of any but such maritime property as is included in the suggested description." So far, therefore, as the text writers are to be considered, if the extended meaning of the subject-matter of salvage in the High Court of Admiralty in its original or common law jurisdiction is that which is asserted on behalf of the plaintiffs in this case, all the writers but two have overlooked it, and, of the two, one founds it solely on the American cases, and the other cites those cases, but questions them. If we go further and examine the sources of the English law, as, for instance, the laws of Oleron, of Wisby, and others, every Article in them treats of ships and what concerns them, and of nothing else. As, for instance, Art. XVIII. of the Laws of Oleron: "In all other things found by the sea side, which have formerly been in the possession of some or other, as wines, oil, and other merchandise, although they have been cast overboard, and left by the merchants, &c." And so in the most valuable and remarkable code, known as the Ordinance of Louis XIV. of Aug. 1681, the whole of more than 100 sections deals with ships and the affairs of ships only, and with the wreck of ships or effects called shipwrecked effects. See sect. 45, Of Wrecks and Ships run aground. For these see the Treatise on Sea Laws. In the Black Book of the Admiralty there is no passage to indicate anything but ships and the conduct of them. The Laws of Wisby—Black Book of the Admiralty, p. 405, c. 13, of things found on the sea: "Should a man find goods driving on the sea where he can see no land, should he bring those things to land, he shall have half for his labour; if he could see the land he shall have a third part. I. Should a man find goods on the ground where he has to use oars and hooks, he shall have the third part. II. Should a man find a ship driving on the sea and no people are in it, and he brings it to land, of that which results from it, whether from the ship or from the goods, he shall have half, and it shall remain outside the city's bounds. III. Should a man find goods driving to land to which he can wade, he shall have of them the eighth penny; so likewise should a man find goods driven on to the shore, he shall have the eighth penny therefrom. If anyone denies that he has found such goods, and is afterwards convicted of it, that is a theft." Reading the word "goods" here subject to the context of all the other clauses it must, I think, mean goods which have been in a ship. The truth is that no merchant or legislator ever imagined goods at sea which had got there without having been in a ship. Then, turning to what is after all the chief source from which the jurisdiction of the Admiralty Court is to be ascertained, namely, the decisions of the English courts, we begin with *Sir Henry Constable's* case (5 Coke's Rep.), which defines what is wreck of the sea, and that "flotsam is when a ship is sunk, or otherwise perished, and the goods float on the sea; jetsam is when theship is in danger of being sunk, and to lighten the ship the goods are cast into the sea and afterwards, notwithstanding, the ship perish; lagan is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy, or cork, or such other thing that will not sink, so that they may find them again; and none of these goods which are called jestam, flotsam, or lagan, are called wreck, so long as they remain in or upon the sea;" and the Court of Admiralty shall have cognisance of them whilst they are in or on the sea. In *Hartford* v. *Jones* (1 Ld. Raym. 393) Lord Holt held in favour of a lien as against an action of trover, the lien being claimed for salvage services; *i.e.*, being an Admiralty lien. But those services were alleged to be for saving the goods from a ship which took fire, and that they hazarded their lives to save them. In *Nicholson* v. *Chapman* (2 H. Bl. 254) an action of trover was brought in respect of a quantity of timber placed in a dock on the banks of the Thames, but, the ropes accidentally getting loose, it floated, and was carried

by the tide. It was saved, and the defendant refused to deliver it until salvage was paid. Eyre, C.J. and the Court held that the saving of it was not such salvage as the law recognised (*i.e.*, in the Admiralty or the common law courts). "The question is" said the Lord Chief Justice, "whether this transaction can be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river may, in a vulgar sense, be said to be salvage; but it has none of the qualities of salvage in respect of which the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved." He then goes on to say that goods carried by sea are exposed to danger, &c., and that the recompense is dictated by principles of public policy recognised in civilised and commercial countries. "Such are the grounds upon which salvage stands; they are recognised by Holt, L.C.J., in *Hartford* v. *Jones*. But see how very unlike this salvage (*i.e.*, in *Hartford* v. *Jones*) is to the case now under consideration." The difference thus alluded to evidently is that in the earlier case the goods were saved from a ship on the sea, in the later case the goods were never on the sea at all. In the case of *A Raft of Timber* (2 W. Rob. 251), Dr. Lushington refused to issue a monition, *i.e.*, a summons, calling upon the owner of the raft to show cause why salvage should not be awarded. It is said that the question was only as to the locality in which the services were rendered. But Dr. Lushington also relied upon the nature of the object. "This," he said, "is neither a ship or a seagoing vessel; it is simply a raft of timber." There is no case in any English court in which the question of salvage reward has ever been entertained unless the subject of the salvage service was a ship, her apparel, or cargo, or freight which is peculiar to ships, a wreck of a ship or her cargo, or, by statute, the life of a person in danger, because the person has been on board ship. It follows that no jurisdiction of the Admiralty in England can be carried, by reason of the practice or judgments of the Admiralty, or any other court, beyond a claim for salvage in respect of the subjects and objects above named. As to the alleged extension of the jurisdiction of the High Court of Admiralty by statute, the question is whether it has been extended by statute in cases of salvage claims to any subjects or objects which were not subjects or objects of salvage claims before the statutes. The first statute really relied on was 3 & 4 Vict. c. 65. s. 6, A.D. 1840. It is an Act to extend the jurisdiction of the Court of Admiralty. It does extend the jurisdiction to subjects in respect of which the court had no jurisdiction before. As to salvage there is only sect. 6 which is relied on. Sect. 6 is: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to any ship or sea-going vessel, whether such ship or vessel may have been within the body of a county, or upon the high seas at the time when the services were rendered." This is to be construed according to ordinary rules of construction. Having regard to the then existing state of the law, it is impossible to say that the statute goes further than to extend the area of locality. It abolishes the distinction between the same services in respect of the same subject or object according as they were rendered within the body of a county or on the high seas, but does not alter the nature of salvage, which is a reward for services to ship, &c. The statute 17 & 18 Vict c 78, sect. 13, was relied on. The words are: "In all cases in which a party has a cause or right of action in the High Court of Admiralty of England against any ship or freight, goods or other effects whatsoever, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition." The whole statute is as to the regulation in the Admiralty Court of the procedure in cases in the court. The statute is not applicable until the case is in the court. It does not affect the question of what case is or is not within the jurisdiction of the court, that is, what case is or is not capable of being brought into the court. The statute 9 & 10 Vict. c. 99, was brought to our attention, and was minutely dissected at immense length. It is repealed; but, nevertheless, it was said it could be used to show what were the subjects or objects of salvage. I think that after its repeal it cannot be used at all. But, if it could, it does not seem upon a true construction of it to support the assertions for which it was cited. The section mainly relied on was sect. 40: "The High Court of Admiralty shall have jurisdiction to decide upon all claims and demands whatsoever in the nature of salvage for services performed, except in cases of goods hereinbefore directed to be sold as droits of Admiralty, whether in the case of ships or vessels, or of any goods or articles found either at sea or cast upon the shore, and whether such service shall have been performed upon the high seas or within the body of any county, anything in any Act contained to the contrary notwithstanding." But that section ascertains only the forum of trial. Sect. 19 enacts what can be saved so as to give a right to salvage, and the persons entitled to salvage reward for such saving. "Every person (except receivers under this Act) who shall act, or be employed in any way whatsoever in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof or of the life of any person on board the same, or of any wreck of the sea, or of any goods jetsam, flotsam, lagan, or derelict, or of anchors, cables, tackle, stores, or materials, which may have belonged to any ship or vessel, whether the said ship or vessel shall have been in distress or otherwise, shall be paid a reasonable reward or compensation by way of salvage, &c." It seems that, construing these two sections as parts of one statute, sect. 40 determines the forum in which the claims of persons who claim to have performed the services to the subjects or objects named in sect. 19 is to be referred. We are then brought to the main statute applicable to the case before us, the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). It was passed to amend and consolidate the Acts relating to merchant shipping, not specifically to alter anything with regard to salvage. It does not in its title or preamble state an intention to alter the common law applicable to merchant shipping, but only the Acts relating to merchant shipping. The first section relied on is sect. 2, the interpretation section. Such a section in modern drafting of statutes does not of itself

affect the nature of anything spoken of, or dealt with in the statute. It only avers that, instead of repeating every one of several things dealt with in other sections, they are to be taken as repeated whenever the one word or phrase is used. Thus, wherever the word "ship" is used in any section of the Act, it is as if in that section the words were "a ship and every description of vessel used in navigation not propelled by oars." The statute deals with a variety of matters relating to merchant shipping, and with a great number of modes of dealing with such matters within and without different courts. One part of the statute deals with salvage. The sections relating to it are under the heading, "Salvage in the United Kingdom." It deals, therefore, only with salvage on the high seas within the three miles limit, and with salvage within counties. Sect. 458 is: "Whenever any ship" (*i.e.*, when any "ship or any description of vessel used in navigation not propelled by oars") "or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom (*i.e.*, of Great Britain and Ireland), and services are rendered (1) in assisting such ship (&c.) or boat; (2) in saving the lives of the persons belonging to such ship (&c) or boat; (3) in saving the cargo or apparel of such ship (&c.) or boat, or any portion thereof; and whenever any wreck (*i.e.*, wreck or jetsam, flotsam, lagan, and derelict, found in or on the shores of the sea or any tidal water) is saved by any person other than a receiver within the United Kingdom, there shall be payable," &c., "a reasonable amount of salvage." Sect. 459 is "salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship (&c.) or boat as aforesaid, &c." The section does not deal with salvage beyond the three miles limit. It is obvious that within the limit it specifically deals with subjects or objects which, as has been stated at the commencement of this judgment, were the subjects and objects alone dealt with in the High Court of Admiralty before any statutes as regards salvage. This section does not add, either within or without the realm, to the subjects or objects of salvage. Sect. 476 is also under the heading "Salvage in the United Kingdom." It is: "Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas, or within the body of any county, &c." In this section the subjects or objects of salvage are not mentioned. It deals with salvage. With what salvage? Obviously with that which is in law salvage, *i.e.*, with the saving of the objects and subjects which in law—*i.e.*, the common law, the statute law, and the maritime law—are recognised as the subjects and objects of salvage reward. Sect. 497 is no larger. The statutes do not enlarge the subjects or objects, but, by dealing only with the subjects and objects mentioned, strongly corroborate the view herein expressed as to the original jurisdiction of the High Court of Admiralty. Part 6, headed "Lighthouses" and "Management of Lighthouses," by the interpretation clause includes, in addition to the ordinary meaning of the word, floating and other lights exhibited for the guidance of ships, and "buoys and beacons" includes all other marks and signs of the sea. They are in this Act, all of them, distinguishable from ships. The statutes have added one subject, *i.e.*, life, as liable to salvage to be awarded by the High Court of Admiralty, but have added no other. The question argued that a larger jurisdiction as to the subjects or objects of salvage is given to the County Courts than to the High Court of Admiralty is too preposterous to be worthy of further notice. It was argued that the gas-float was a ship within the ordinary meaning of the word "ship"; or within the meaning of what was said to be the definition of the word "ship" in some judgments of the court. It is said that the judgment of Lord Blackburn, in *Ex parte Ferguson* (24 L. T. Rep. 96; 1 Asp. Mar. Law Cas. 8; L. Rep. 6 Q. B. 280), is inconsistent with the view that "ship" is to be used only in its ordinary meaning amonst people conversant with shipping business. But the description given of that which in the case was called a "coble" makes it clear that that coble was a vessel in its ordinary sense, though all cobles are not ships or vessels, but some are only boats. The case of *The Mac* (46 L. T. Rep. 907; 4 Asp. Mar. Law Cas. 555; 7 P. Div. 126) was much relied on. It is the case of the hopper barge. I agree that expressions used by me were not happy. I think the first phraseology is well enough. "The word includes anything floating in or upon the water built in a particular form and used for a particular purpose." But I think the subsequent phrase "used for the purposes of navigation" was unhappy. It should have been "was being navigated." In the case of *The Cleopatra* (3 P. Div. 145) the thing saved was held to be sufficiently like a ship to be not unfairly treated as a ship. The case of *The Caisson* (Pritchard's Digest, 3rd edit., vol. 2, p. 2078; Shipping Gazette, May 10, 1876), before Sir R. Phillimore, is relied on. It looks as if the judge of the Admiralty Court was asked by both sides to name the amount and the distribution of a fair reward. If so, he acted as an arbitrator. If he acted as judge, the case is contrary to all others and is wrong. It seems impossible to say that, within the ordinary English meaning among merchants or sailors or persons dealing with maritime affairs, this thing could be called a ship, a vessel, or a boat. But now we have to deal with the argument that the general law maritime acknowledged in the High Court of Admiralty included and includes subjects or objects as the subjects or objects of salvage which are beyond ship, material, and cargo, including flotsam, jetsam, and lagan, and wreck of ship or cargo. It was argued that everything found floating on the water, although it itself could not possibly be a navigable thing, might be the subject or object of salvage. And it was said that there are American judgments which justify such a statement. If there are, I, for one, should hesitate long before I differed from them. I have the greatest respect and admiration for American decisions. It is because of the reference to the American judgments that I have used immense labour in writing this judgment. I hope it will be some day considered in American courts. But, before examing the American judgments, I will refer to the statement of the law by Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Company* (56 L. T. Rep. 220; 34 Ch. Div. 234): "The general principle is beyond all question, that work or labour

done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in maritime law. With regard to salvage, &c., the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea." The judgment of Martin, B., in *Palmer* v. *Rouse* (3 H. & N. 505), seems to be to the same effect: "The case depends upon the construction of the Merchant Shipping Act 1854. That Act was passed with reference to shipping, and must, therefore be taken to apply to matters connected with shipping. The Act gives a jurisdiction unknown at common law, and subjects the owners of goods to the payment of charges to which at common law they were not liable. It must, therefore, be construed strictly. Now, according to the well-known definition of flotsam, it refers to goods having been at sea in a ship, and separated from it by some peril." The case principally relied on in the American Reports is that called *A Raft of Spars* (1 Abbott Adm. 291) in May 1848. It was tried before Betts, J., in a district court having Admiralty jurisdiction. The raft, which consisted of sixteen spars, was observed to be adrift below the Narrows and floating out to sea. The libellant stopped the raft and towed it to Staten Island shore. The owner instituted a replevin action in the Supreme Court of the State of New York. The alleged salvor instituted the salvage suit in the District Court. The owner of the raft intervened in the Admiralty suit and moved that the action there should be set aside, or that all proceedings in it should be stayed until the replevin suit in the State Court should be determined. It was on this motion that Betts, J. gave judgment. "The single point which arises for decision on the motion," says Betts. J., "is whether this court will, either as matter of right to the claimant, or by comity towards the municipal courts, cause the prosecution of this action to surcease until the action at law in the State Court is determined." It may be that the learned judge might have based his decision on the view that the Admiralty Court had no jurisdiction to entertain the question of salvage. But that point does not seem to have been argued at that time. The judgment seems to be that, assuming for the purposes of the motion before it that both courts had jurisdiction, there was no legal reason for postponing the hearing of the one suit to the hearing of the other. What might be decided in either court on the hearing was left for the future. Betts, J. did afterwards (1 Abb. Adm. 485) entertain the case in Admiralty, and did decree salvage.

The next case in order of date is *Tome* v. *Four Cribs of Timber*, reported in several reports and in Campbell's (American) Reports, p. 534, in Nov. 1853. It was heard in the Circuit Court, on appeal from the District Court in Admiralty. Rafts, or a raft, of timber were being floated down the Susquehanna river. The raft was anchored in the stream. By reason of a sudden rise in the river, accompanied by a high wind and heavy sea, the rafts went adrift and were carried down the river with the current. They were stopped by one Davis, who claimed salvage. The District Court entertained and allowed salvage reward. In the Circuit Court the judgment was reversed by Paney, C.J., on the ground that the District Court had no jurisdiction. The Chief Justice relied much on the case of *Nicholson* v. *Chapman* (*ubi sup.*). He says: "These rafts, anchored in the stream, although it be a public navigable river, are not the subject-matter of Admiralty jurisdiction in cases where the right of property or possession is alone concerned. They are not vehicles intended for the navigation of the sea or the arms of the sea; they are not recognised as instruments of commerce or navigation by any Act of Congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive them and transport them to their destined port. And any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a salvage service in the sense in which that word is used in courts of Admiralty. The District Court, therefore, had not jurisdiction to issue the process, &c." This judgment seems to me to adopt the reason of the judgment in *Nicholson* v. *Chapman* (*ubi sup.*) contained in the words, "The service had none of the qualities or character of the services for which the maritime law of all commercial nations allows salvage where the property is in danger of perishing from the perils of the sea." There are parts of the judgment of the Chief Justice which seems to show that he thought the raft in question was not in danger. But that is a point which would be an answer to the claim in the trial, and which would have to be tried by the court if it assumed or could assume jurisdiction. It is not a point of jurisdiction. The case of *Fifty Thousand Feet of Timber* (2 Lowell, 64), in the District Court in 1871, is with respect to two rafts of timber found floating in the harbour of Boston. Lowell, J. decreed a salvage reward. "A salvage service is performed when goods are saved from peril at sea or on other navigable waters, or cast upon the shores thereof. There are two judgments that a raft of timber is an exception to the general rule —*Nicholson* v. *Chapman* (2 Hy. Bl.) and *Four Cribs of Lumber* (Paney, 533)." This seems to be hardly an accurate description. The cases did not state that there was an exception; they stated a rule, and decided that rafts of timber were not within it. The judgment, with deference, is more sarcastic than well considered. The learned judge asserts that Paney, C.J. was mistaken and Dr. Lushington wrong. He construes the English statute 9 & 10 Vict. c. 99, s. 40, with deference, again I say wrongly. He says that the only difficulty in the case before Dr. Lushington was as to locality. And he says "that it was so held by Betts, J. in a well considered judgment." Lowell, J. says: "A suit for salvage is

neither contract nor tort. It resembles the latter in being a proceeding for unliquidated damages and in depending on locality." Is that a correct description either of a salvage suit or even of the action to which the learned judge assimilates such suit? "If the services are rendered, it is of no consequence whether the goods are a ship or part of a ship, or were ever on board a ship. A great many of the cases are of mere derelict goods picked up at sea; and no one ever heard that it would be a defence to a proceeding for salvage that the goods had been washed out to sea from the shore by a gale or flood, or had been dropped from a balloon. I have had a case of the former kind; though, to be sure, the subject-matter was an unmanned vessel. If it had been a barrel of oil, the principle would have been the same." I cannot accept this judgment as a careful discussion and decision on American law. *Bywater and A Raft of Piles* (D. C. D. Wash. 42 Fed. Rep. 917), in June 1890, is decided on the authorities of Betts, J. and Lowell, J., and on an endeavour to distinguish the case before Paney, C.J. Whilst writing this judgment, and, indeed, at a very late period of it, the counsel on both sides, with the loyalty always shown by counsel to the court, sent to me the case of *Cope* v. *Vallette Dry Dock Company* (12 Davis' Rep. 625), decided in Jan. 1887 in the Supreme Court of the United States. It was an appeal from the Circuit Court of Louisiana, which had dismissed a libel for salvage brought in the District Court, on the ground that the District Court sitting in Admiralty had no jurisdiction to entertain in the particular case a claim for salvage. The salvage claimed was in respect of saving from total loss a "dry-dock." It was a structure contrived for the purpose of taking ships out of the water in order to repair them, and for no other purpose. It consisted of a large oblong box with a flat bottom and perpendicular sides; in the year 1866 it had been put in position by being permanently moored by means of large chains to the bank of the Mississippi river, and was sparred off the bank by means of spars to keep it afloat. When it was desired to dock a vessel, the dry-dock was sunk by letting in water until the vessel to be docked could be floated into it. It was then raised by pumping water out, leaving the docked vessel in a position to be inspected and repaired. It was furnished with engines, but they could only be used for pumping, and the dry-dock had no means of propulsion, either by wind, steam, or otherwise: it was not designed for navigation and could not be practically used therefor. As a conclusion of law the Circuit Court found that the services of the libellants were not salvage services, and that neither that court nor the District Court had jurisdiction of the case: "We have no hesitation in saying that the decree of the Circuit Court was right. A fixed structure such as this dry-dock is, not used for the purpose of navigation, is not a subject of salvage service any more than is a wharf or a warehouse when projecting into or upon the water. A ship or vessel used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service." The judgment then cites the passage from Abbott, and cites other English authorities, and then says: "If we search through all the books from the Rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued." The judgment then discusses the case of the hopper barge, and then, referring to the American cases, says: "There has been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea, and found floating on the surface or cast upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo, they clearly come under the head of wreck, flotsam, jetsam, lagan, or derelict, and salvage may be claimed upon these. But, when they have no connection with a ship or vessel, some authorities are against the claim and others are in favour of it." The only authority in America for the use of the large terms insisted upon by the arguments before us is the case before Lowell, J. I think that case cannot be supported in America or acted on here. As to the American law, I think the case in the Supreme Court is decisive. I come, therefore, to the conclusion that by the common or original law of the High Court of Admiralty the only subjects in respect of the saving of which salvage reward could be entertained in the Admiralty Court were ship, her apparel and cargo, including flotsam, jetsam, and lagan, and freight, and the wreck of these; that the only subject added by statute is life salvage; and that the County Court has no right to exercise jurisdiction with regard to any other subject-matter than that which might be entertained by the High Court of Admiralty. Whether salvage could be granted for the saving of what is called a lightship may be doubtful. I incline to think not. If it is, it is only because the lightship would be held to be a ship. As to some instances which were proposed, viz., the *Victory* in Portsmouth Harbour, I have no doubt that she is a ship. So was the *Dreadnought*, used for years as a hospital. So is a ship used as a coal-hulk. But the thing in question is not a ship in any sense. The appeal must be allowed.

Kay, L.J.—I concur.

Lord Esher, M.R.—I am authorised by Lopes, L.J. to say that he entirely agrees with the judgment, and with the conclusions contained in it.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *Wilson* and *Sons*, Hull.

Solicitors for the respondents, *Pritchard* and *Sons*, for *Hearfields* and *Lambert*, Hull.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, Dec. 14, 1895.

(Before NORTH, J.)

JENKINS *v.* HOPE. (*a*)

Practice—Injunction—Infringement of patent—Undertaking—Right to proceed for injunction after offer of undertaking.

On the 30th Sept. 1895 *the plaintiffs issued a writ against A. and the C. company to restrain them from infringing the plaintiffs' patent for improvements in a cap for bicyclists. On the 24th Oct. the C. company's solicitors wrote to the plaintiffs, offering to account for all profits made by the sale of the caps complained of, to destroy all such caps in their possession, and to undertake not to infringe the plaintiffs' patent. Notwithstanding this letter, the plaintiffs delivered a statement of claim on the 9th Nov., and on the 27th Nov. the C. company delivered a statement of defence, setting out the letter, and stating that they adhered to the offer made therein, and asked that the plaintiffs might be ordered to pay the costs subsequent to the date of the offer. The plaintiffs now moved for an injunction against the C. company.*

Held, that the plaintiffs ought to have accepted the C. company's offer; that the court has a discretion as to an injunction, and will not grant it where, as in this case, it appears to be asked for other purpose than protection against the defendant. On the C. company undertaking in terms of their offer, the injunction was refused, and the plaintiffs ordered to pay all costs subsequent to the offer, except the costs of appearance in court, the defendants to pay all costs up to the date of the letter, and the costs of appearance in court, the plaintiffs being entitled to the protection of an undertaking given in court.

THIS was an action brought by Messrs. Jenkins and Co. against two defendants, of whom Wilson and Stafford Limited were one, to restrain the manufacture and sale of certain caps for cyclists alleged to be infringements of the plaintiffs' patent. The writ was issued on the 30th Sept.

Immediately after service of the writ the solicitors of Wilson and Stafford wrote to the plaintiffs' solicitors that their clients would not sell any more of the caps complained of, which they had bought in good faith in the usual course of business, and on the 24th Oct. they wrote the following letter:

Our clients purchased the goods of which complaint is made in the ordinary course of business, and in entire ignorance of the plaintiffs' patent. The matter is of no interest to our clients, as the goods they have sold amount in the whole to 9*l.* 9*s.* 5½*d.* Our clients are prepared to account to the plaintiffs for the profits they have made on the sale of these goods, and will also deliver up to the plaintiffs or destroy all caps in their possession which are alleged to be an infringement of the plaintiffs' patent, and will pay your costs of the action. Our clients will also give their undertaking that they, their servants, &c., will not infringe the plaintiffs' patent. Of course after this letter it will be quite unnecessary to take any further proceedings as against our clients, but should the plaintiffs see fit to do so we shall bring this letter to the notice of the court with a view of obtaining such relief as our clients are entitled to.

Notwithstanding this letter the plaintiffs on the 27th Nov. delivered a statement of claim and particulars of breaches. Wilson and Stafford Limited then delivered a statement of defence in which they repeated the offer contained in the letter, and asked that the plaintiffs should pay all costs since the date of such letter.

The plaintiffs now moved that the statement of defence of Wilson and Stafford Limited might be struck out, or that the plaintiffs might be at liberty to enter judgment against them in the terms of the statement of claim, and for a perpetual injunction against the other defendant.

The other defendant did not appear, but it was stated that he was willing to submit to an injunction.

The parties present agreed to treat the hearing of the motion as the trial of the action.

A. J. Walter for the motion.—The plaintiffs are entitled to be protected by an injunction. They are not bound to accept an undertaking. An injunction will give them much more protection than an undertaking. It would give notice to the world that their patent must not be infringed.

A. H. Jessel for the defendant company.—The plaintiffs ought to have been content with the undertaking, and should be ordered to pay all the costs since the date of the latter, including the costs of the pleadings.

NORTH, J.—I think the plaintiffs ought to have accepted the offer of these defendants. The case comes before me in rather an irregular manner, but both parties have agreed that I should deal with the whole question between them on the materials before me. I think the plaintiffs were entitled to have their patent protected, but the undertaking offered by this defendant was sufficient. It is not a matter of course to grant an injunction. The court always has a discretion, and I do not think in this case it ought to exercise that discretion by granting it. I can understand the plaintiffs' reason for preferring an injunction, but I do not see why they should be allowed to advertise the defendant's name as having been restrained. The plaintiffs, however, had, I think, a right to have the protection of having the undertaking given in court. The defendant company must pay the costs up to the date of their solicitors' letter, and the costs of the plaintiffs' appearance here to-day. The plaintiffs must pay all the rest of the costs. The order will be, upon the plaintiffs' undertaking in the terms of their letter, stay proceedings, and order the costs to be paid as I have said. I cannot make any order against the other defendant.

Solicitors: *J. T. Lewis*, agent for *Aeron Thomas* and *Co.*, Swansea; *Emanuel* and *Simmonds; Rowcliffes, Rawle*, and *Co.*

(*a*) Reported by J. H. BROOKE, Esq., Barrister-at-Law.

Dec. 12 *and* 21, 1895.

(Before STIRLING, J.)

Re POCOCK AND PRANKERD AND THE GOVERNORS OF WISBECH GRAMMAR SCHOOL. (*a*)

Settled Land Acts—Exercise of power of appointment—Whether a settlement under the Acts—Settled Land Act 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-sect.* (1); *sect.* 58, *sub-sect.* (1), *ix.* (2).

C. B. by will, dated the 19*th Jan.* 1865, *gave real property to trustees upon trust to pay the rents thereof to his daughter M. C. for life for her separate use without power of anticipation, and after her decease to the use of her children or issue as she should by deed or will appoint, and in default of and subject to such appointment to the uses therein mentioned. The testator died in Dec.* 1865. *By her will of the* 1*st June* 1881 *M. C. appointed one moiety of the property to her daughter M. P. for life for her separate use without power of anticipation, and after her decease to such uses as she should by will appoint, and in default of and subject to such appointment for M. P., her heirs and assigns for ever, and the testatrix appointed the other moiety with similar limitations to her daughter E. P. After the death of M. C., M. P. and E. P., as tenants for life under the Settled Land Acts, contracted to sell the property, but an objection was taken to the title on the ground that it was doubtful whether the appointment by M. C. constituted a settlement within the meaning of those Acts.*

Held, by Stirling, J., that the married women could make a good title as tenants for life under sect. 58, *sub-sect.* (1) *ix. and* (2) *of the Settled Land Act* 1882.

VENDOR AND PURCHASER SUMMONS.

By will, dated the 19th Jan. 1865, Charles Boucher, of Wisbech, in the county of Cambridge, appointed William Bonner Hopkins and George Duppa Collins trustees and executors thereof, and made the following devise:

I give and devise all that my messuage in Wisbech aforesaid wherein I now reside, with the stables, granaries, garden, and paddock, and the cottage late in the occupation of Charles Wesney, and the site thereof respectively, and other the appurtenances belonging thereto [and other real estate] to the uses following (that is to say) to the use of my said trustees, their heirs and assigns, during the life of my said daughter, Mary Anne Collins, in trust to pay the yearly rents, issues, and profits of the said estates respectively to my said daughter, Mary Anne Collins, for her separate use and benefit, independently of her present or any future husband [without power of anticipation], and from and after the decease of the said Mary Anne Collins to the use of all or any one or more of the children or remoter issue of my same daughter (such remoter issue being born in her lifetime) in such proportions, for such interests, and generally in such manner as she, whether covert or sole, shall by any deed, with or without power of revocation and new appointment, or by will duly executed and attested, appoint.

Then followed a hotchpot clause. And the testatrix, in default of appointment and subject to any partial appointment, gave the property to the uses in her will specified.

The testator died on the 25th Dec. 1865 leaving his daughter Mary Anne Collins surviving, and his will was proved on the 16th Feb. 1866 by the two executors therein named.

The testator was at the date of his will and of his death the absolute owner of and in occupation of the messuage in the parish of Wisbech, and the land held therewith.

Mary Anne Collins was married in the lifetime of the testator to George Duppa Collins. There was issue of the marriage two children, the applicants Mary Pocock, the wife of Samuel John Pocock, and Elizabeth Boucher Prankerd, the wife of Archibald Arthur Prankerd. Both daughters were married during the lifetime of Mary Anne Collins.

By her will, dated the 1st June 1881, Mary Anne Collins exercised the power of appointment given her by the will of Charles Boucher as to one moiety of the premises in favour of Mary Pocock for her life for her separate use without power of anticipation, and after her decease to such uses as she should by will appoint, and in default of appointment, and subject to any partial appointment, to the use of Mary Pocock, her heirs and assigns for ever, and as to the other moiety in favour of Elizabeth Boucher Prankerd for her life for her separate use without power of anticipation, and after her decease to such uses as she should by will appoint, and in default of appointment and subject to any partial appointment to the use of Elizabeth Boucher Prankerd, her heirs and assigns for ever. And the testatrix appointed her husband George Duppa Collins sole executor of her will.

Mary Anne Collins died on the 8th Jan. 1894; and letters of administration to her estate, with the will annexed, were granted to the applicant Mary Pocock, George Duppa Collins having renounced probate.

William Bonner Hopkins died on the 24th March 1890. George Duppa Collins died on the 1st June 1894, his personal representatives being Archibald Arthur Prankerd and Philip George Collins.

By a contract, dated the 17th Oct. 1894, and made between the applicants, Mary Pocock and Elizabeth Boucher Prankerd, of the one part, and the Governers of Wisbech Grammar School by Edward Hugh Jackson, their clerk and agent, of the other part, it was agreed (conditionally upon the approval of the Charity Commissioners being obtained thereto) (1) that the applicants as tenants for life respectively would sell, and the respondents would purchase at the price of 2500*l.* the fee simple in possession free from incumbrances of the messuage in the parish of Wisbech, with the appurtenances; (2) that the title should commence with an indenture of release and covenant, dated the 11th March 1836, being a conveyance by way of grant and a covenant to surrender the premises to the testator, Charles Boucher; (4) that the applicants would at their own expense apply forthwith to the Chancery Division of the High Court of Justice for the appointment of trustees for the purposes of the Settled Land Act 1882 of the settlement under which they were tenants for life as aforesaid.

By an order, dated the 25th Jan. 1895, North, J. appointed Thomas Boucher and Scott Boucher trustees of the settlement made by the said wills

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

for the purposes of the Settled Land Acts 1882-1890.

An abstract of title to the messuage and premises was delivered to the respondents' solicitor, and on the 22nd March 1895 the respondents' solicitor delivered the following objections and requisitions: (1) "The title is objected to on the ground that it is doubtful whether the vendors have any power to sell under the Settled Land Act 1882. That question depends on whether or not the appointment by Mrs. Collins constituted a settlement as defined by that Act (sect. 2), viz., a limitation to persons by way of succession. In form there is a limitation to the testamentary appointees of the vendors, but in substance the appointment amounts to an absolute gift of the property to them; and, in fact, Mrs. Collins had no power to create a settlement, therefore it is considered doubtful whether the Settled Land Act applies to the case." The vendors replied that there was no force in the objections, and ultimately took out the present summons.

Ingle Joyce for the vendors.—The objection taken is that this is not a settled estate within the meaning of the Settled Land Acts. Unless the vendors can sell under the Settled Land Acts there can be no sale at all. North, J. has appointed trustees under the Settled Land Acts. Here the legal fee in remainder is in the husband and wife. Burton, in his Law of Real Property, 7th edit., par. 757, p. 248, says: "In strict legal language where the wife has an estate, it is said that the husband and wife (and not the husband only) are seised in right of the wife":

Smith's Compendium, 6th edit., vol. 2, p. 1274;
Polyblank v. *Hawkins*, 1 Dougl. 328, 329;
Note 1 to *Took* v. *Glasscock*, 1 Williams' edition of Saunders, 343.

[STIRLING, J.—The remainder is to herself. She is the successor of herself.] This land is settled land limited to persons by way of succession. The only persons who can dispose of the remainder in fee are the husband and wife. Take the case of the old uses to bar dower. That would be a separate estate. Why should "limited to or in trust for any persons by way of succession" mean limited to or in trust for different persons? It is impossible to say whether there will be appointees or not. [STIRLING, J.—The estate to the wife is a vested remainder liable to be defeated by the appointment.] Where it is limited to the same person and to different persons it is within the mischief of the Settled Land Acts, and no harm can be done by holding it within the Acts:

Slark v. *Dakyns*, 31 L. T. Rep. 712; 10 Ch. App. 35; 44 L. J. 205, Ch.

The interference of the power of appointment creates a succession. As Preston says, "It breaks up the freehold": (Watkins on Conveyancing by Preston, 7th edit., p. 47.)

Edward M. Jackson for the purchasers.—The wife is entitled to equitable estates for life and in fee simply, and they merge. The legal estate in the trustees seems to he immaterial in considering the matter. The limitations are all to the same person. The premises are not limited to persons, but to one person. There are no successive limitations. It is said that the restraint on anticipation brings the case within the mischief that the Acts were passed to deal with, but that it does not is shown by

Bates v. *Kesterton*, 73 L. T. Rep. 656; 44 W. R. 150.

The only distinction between that case and the present one is that the appointment here is by will only. That can make no difference. It was argued in *Bates* v. *Kesterton* that the possible estate by the curtesy brought the case within the Settled Land Acts, but the argument was overruled. The fact that the estate here happens to be in the husband and wife is, I submit, immaterial. [*Joyce*.—The husband is alive.] The Settled Land Acts do not apply.

Joyce in reply.—*Bates* v. *Kesterton* has nothing to do with the present case. The lady there was entitled to the equitable fee of a share of realty for her separate use without power of anticipation. There was no limitation of successive estates. There was an estate by the curtesy in *Bates* v. *Kesterton*. That is clear from *Morgan* v. *Morgan* (5 Madd. 408). Probably there is no estate by the curtesy here. Merger is provided against by the Judicature Act 1873, sect. 25, sub-sect. 4.

Dec. 19.—STIRLING, J.—I wish to mention this case. I have considered it, but I have not been able to satisfy myself that the will constitutes a settlement within the meaning of sect. 2, sub-sect. 1 of the Settled Land Act 1882, and I wish to call the attention of the parties to a later clause, namely, sect. 58, which runs thus: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act as if each of them were a tenant for life as defined in this Act. The 9th clause is: "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land or until forfeiture of his interest therein or bankruptcy or other event." Sub-sect. 2 is: "In every such case the provisions of this Act referring to a tenant for life either as conferring powers on him or otherwise, and to a settlement and to settled land shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised." It seems to me the present case falls literally within that, and I should like to hear what is to be said on that point. If that has not been considered, I am quite willing it should stand over until Saturday. It will be in the paper on Saturday in order that you may have an opportunity of considering it.

Dec. 21.—*E. M. Jackson* for the purchasers.—For the purposes of sect. 58 of the Act of 1882 there must be a settlement within the meaning of sect. 2, sub-sect. 1, of that Act. Sub-sect. 2 of sect. 58 means no more than this, that the preceding provisions of the Act as to a settlement and settled land must be complied with. In all the cases enumerated in sect. 58, excepting sub-sect. 1, cl. ix., there clearly is a settlement within the meaning of sect. 2, sub-sect. 1. The case of a tenant by the curtesy mentioned in sub-sect. 1, cl. viii. of sect. 58 is no exception to the rule, having regard to sect. 8 of the Settled Land Act 1884, which says: "For the purposes of the Act of 1882 the estate of a tenant by the curtesy is

not to be deemed an estate arising under a settlement made by his wife." Clause ix. was intended only to give the powers of the Act to a person not entitled to actual possession—a point which apart from this was doubtful:

Taylor v. *Taylor*, 33 L. T. Rep. 89; 35 L. T. Rep. 450; 20 Eq. 297; 3 Ch. Div. 145.

This clause was probably inserted in consequence of the observations of Sir Geo. Jessel, M.R. in *Taylor* v. *Taylor*, a case under sect. 32 of the Leases and Settled Estates Act 1856 (33 L. T. Rep. at pp. 90-91; L. Rep. 20 Eq. at p. 304). See Hood and Challis' Conveyancing and Settled Land Acts (4th edit.), pp. 281-282. [STIRLING, J.—But regard must be had to the actual words of the section and not merely to the motive the draftsman had in view.] In the second place, supposing that a settlement within sect. 2, sub-sect. 1, is not necessary, still the heading of sect. 58, "Enumeration of other limited owners to have powers of tenant for life," shows that this section is confined to cases of limited ownership, and that it does not extend to such a case as that of a man entitled for life with a remainder to him in fee simple. The powers of the Act are unnecessary in that case. The restraint on anticipation cannot of itself bring the case within the Settled Land Acts.

Ingle Joyce, for the vendors, was not called upon.

STIRLING, J.—I am much obliged to Mr. Jackson for his able argument on this point, but I confess that I do not see any reason why this case does not fall within sect. 58 of the Act of 1882. The short facts of the case are these: Under a will, made in exercise of limited powers of appointment, real estate now stands limited to trustees upon trust for a married lady for her life without power of anticipation, with remainder to the use of all or any one or more of her children or remoter issue as she should by deed or will appoint, with remainder in default of appointment to the use of herself in fee. The legal estate, therefore, is in the trustees or trustee, and the equitable interest is in the married woman during her life fettered by the restraint on anticipation, and then she takes the fee, liable to be divested by the exercise of the power of appointment given to her by her father's will. It is said that this is a settlement within sect 2 (1) of the Settled Land Act 1882, being an instrument under or by virtue of which any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession. I have great difficulty in adopting that view. It seems to me hardly to fall within the words of the sub-section. There is no doubt an instrument under which land stands limited to one and the same person for various interests by way of succession. But the intention and language of the Act must be considered. It says "limited to or in trust for any persons by way of succession," meaning more than one person by way of succession. Sect. 58 provides this: "Each person as follows shall, when the interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined by this Act," namely, sub-sect. ix., "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life whether subject to expenses of management or not, or until sale of the land or until forfeiture of his interest therein on bankruptcy or other event." Therefore a person entitled to the income of land under a trust for payment to her during her life is plainly within that clause. Here the trust is to pay the rents and profits to the lady for life, and she is exactly such a person as is there designated. Then one has to consider whether there is a settlement within the meaning of that section. Sub-sect. 2 exactly deals with the question. It says, "In every such case the provisions of this Act referring to a tenant for life, either as conferring powers upon him or otherwise, and to a settlement and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised." It seems to me plain that that was meant to extend the definition of a settlement to instruments not included under sect. 2 of the Act. That is well illustrated by the instance immediately preceding it of a tenant by the curtesy. If by conveyance or otherwise a married woman was entitled absolutely in fee to land, upon her death leaving a husband surviving her, it was the obvious intention of the Legislature that the husband taking by the curtesy should be treated as tenant for life. Unfortunately the words of sub-sect. 2 were not apt to that case, because his right was not derived from that instrument but under the common law. The words of sub-sect. 2 were not wide enough to include that case, and as his interest did not arise under an instrument there was a difficulty in applying sect. 2 to that case. That was set right by the Settled Land Act of 1884, which said (sect. 8): "For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife." But that seems to me to prove—if there was any doubt on the matter before—that the meaning of the Act of 1882 was to embrace under sub-sect. 2 of sect. 58 instruments which did not fall within the definition of a settlement in the earlier part of the Act. There is nothing said as to the person to whom the remainder is to go in clause 9 of sect. 58, and as the present case seems to me to fall within the exact language of clause 9 and this is an Act which ought not to receive a narrow construction, I think a title can be made by the married women as tenants for life under that clause. No order as to costs.

Solicitors for the vendors, *Peake, Bird, Collins*, and *Peake*.

Solicitors for the purchasers, *Wing* and *Ducane*, for *F.* and *E. H. Jackson*, Wisbech.

Dec. 19, 1895, *and Jan.* 14, 1896.

(Before STIRLING, J.)

LOCK *v.* THE QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY. (*a*)

Company—Prepayment of calls—Payment of interest on such advances out of capital.

The directors of a company which had made no net profit for the year paid interest out of capital to

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

shareholders on the amount advanced by them in prepayment of calls. The memorandum of association did not deal with payments in advance of calls. The articles of association gave the directors power to receive such payments, and provided that no dividend should be paid except out of the net profits of the company, but the directors might, if they thought fit, pay out of capital interest on sums paid in advance of calls.

Held, that the interest was a debt payable out of the general assets of the company, and not merely out of profits.

Dale *v.* Martin (9 *Ir. L. Rep.* 498, *Ch.*; 11 *Ir. L. Rep.* 371, *Ch.*) *followed.*

MOTION by the plaintiff, on behalf of himself and other shareholders and debenture-holders in the Queensland Investment and Land Mortgage Company, for an injunction against the payment of interest on the amount paid up on shares in advance of calls except out of the net profits of the company.

The company was registered in the year 1878. Its present capital consisted of 164,992 preferred shares of 1*l.* 10*s.* each, and 164,992 ordinary shares of 7*l.* each. The whole sum of 1*l.* 10*s.* per share had been called up upon the preferred shares, but upon the ordinary shares only 1*l.* per share had been called up; the directors had, however, received from the holders of 20,000 of such ordinary shares the remaining 6*l.* per share uncalled thereon as a payment in advance of calls. In the year 1895 the company had earned no profit, but, on the other hand, had worked at a loss. Notwithstanding this the directors had paid interest at the rate of 6 per cent. to the holders of the 20,000 ordinary shares upon the amounts paid by them in advance of calls. The memorandum of association of the company contained no provisions bearing upon the question of payments in advance of calls. Art. 40 of the articles of association provided that the directors should be at liberty from time to time, as they thought fit, to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him upon such terms in all respects as the board might determine.

Art. 150 provided as follows:

All dividends on shares shall be declared by general meetings. No dividend shall be paid except out of the net profits of the company, either for the year, or remaining over from previous years in some reserve fund or otherwise; but the directors may, if they see fit to do so, pay out of the capital of the company interest on sums paid up on shares in advance of calls.

Art. 154. If a larger amount be paid up on some shares than on others of the same class, the dividend on the shares of that class shall be paid in proportion to the amount paid upon each share, except in so far as all or some part of the excess shall have been received by the board on the terms of paying interest thereon, in which case the part bearing interest shall not be reckoned for the purposes of dividend.

Art. 156. The directors shall deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.

Art. 158. Unpaid dividends and interest on shares shall never bear interest as against the company.

Millar, Q.C. and *E. Brodie Cooper* for the plaintiff.—The company has no power to apply its capital in any other way than to purposes for which capital is properly applicable. There is no power in the articles to return capital. The case comes within the judgment of Jessel, M.R. in

Re National Funds Assurance Company, 39 L. T. Rep. at pp. 420, 421; 10 Ch. Div. at p. 125.

The payment of interest here must be a repayment of capital. In *Guinness* v. *Land Corporation of Ireland* (47 L. T. Rep. at p. 520; 22 Ch. Div. at p. 358) Chitty, J. said that it would be a remarkable thing if the Act of Parliament, which allows members to limit their liability by paying a sum of money to form the capital, should allow these same persons the next day to receive back their capital in any shape. The second question that arises is, whether it is competent to a company to return capital to the shareholders even where power is expressly given for that purpose by the articles of association. The important thing here is the memorandum. In *Ashbury Railway Carriage and Iron Company* v. *Riche* (33 L. T. Rep. at pp. 451, 452; 7 E. & Ir. App. at p. 670) Lord Cairns, L.C. said that the covenant mentioned in sect. 11 of the Companies Act 1862 is not merely a covenant that every member will observe the conditions upon which the company is established, but that no change shall be made in these conditions, and he went on to observe that art. 4, which provided that an extension of the company's business beyond or for other than the objects and purposes in the memorandum should take place only in pursuance of a special resolution, was an attempt to do what the Act prohibited, to arrogate a power, under the guise of internal management, to go beyond the objects or purposes in the memorandum. By the memorandum of association a limited company declares that its capital is to be applied for the purposes of the business. It cannot reduce its capital except in the manner and with the safeguards provided by statute, and it is clearly against the intention of the Legislature that any portion of the capital should be returned to the shareholders without the statutory conditions being complied with:

Re Exchange Banking Company; Flitcroft's case, 48 L. T. Rep. at p. 88; 21 Ch. Div. at p. 533;

Guinness v. *Land Corporation of Ireland*, 47 L. T. Rep. at pp. 524, 525, 527, 528; 22 Ch. Div. at pp. 373, 375, 380.

Trevor v. *Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409; 57 L. J. 28, Ch.) is to the same effect. This was a case where the articles of association authorised the company to purchase its own shares. In *Re Sharpe; Masonic and General Life Assurance Company* v. *Sharpe* (65 L. T. Rep. 76, 806; (1892) 1 Ch. 154), payment of interest out of capital when there were no profits was held to be *ultra vires*, notwithstanding the clause in the articles of association. Payment of capital is not one of the objects contemplated by the memorandum. The object of this arrangement is to raise the price of the shares on the Stock Exchange. From the shareholders' point of view the question is entirely untouched by the fact that there is an article. How can the fact that this is money paid by shareholders affect the point that the company cannot pay dividends out of capital? The test is this, whether the course taken by the directors is an infringement of a statutory obligation. If it is, it is clearly *ultra vires*. What are the directors doing here? They offer interest to

these shareholders and forbear all calls. Now they propose to pay back to the shareholder part of the money which he has contracted to pay in full—a right good as to shareholders, but not as against creditors:

Trevor v. *Whitworth (ubi sup.)*;
The Ooregum Gold Mining Company of India v. *Roper*, 66 L. T. Rep. 427; (1892) A. C. 125, 133;
Re Almada and Tirito Company, 59 L. T. Rep. 159; 38 Ch. Div. 415.

Lopes, L.J. said in the course of his judgment (59 L. T. Rep. at p. 163): "I can see no practical distinction between issuing shares at a discount and returning to the member a portion of the capital to which the creditors have a right to look as that out of which they are to be paid."

Graham Hastings, Q.C. and *C. E. E. Jenkins* for the defendant company.—It is important that the court should be satisfied that this is a *bonâ fide* exercise of discretion. Was this a debt of the company? This is a contract that a shareholder shall advance a sum of money on interest at 5 per cent., and he agrees to advance the sum due on his shares not yet paid up. Does that create an enforceable contract? It is an advance that cannot be got back. [STIRLING, J.—I doubt whether that is a loan.] It is a loan as much as debenture stock is. Sect 14 of the Act of 1862 says that the articles may adopt all or any of the provisions of Table A., and art. 7 of Table A. provides that the directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon. [STIRLING, J.—The Legislature enacted it as a matter within the powers of the company; to what extent is another matter.] The character of a member does not render it impossible for a debt to exist between him and the company. The fact that the Legislature has provided for a different state of things in liquidation shows that it did not exist before. Here, if they had not paid one of these shareholders, what possible defence would the company have had? There is nothing to prevent the company contracting with a shareholder for money which he is not bound to advance. The exact point has been decided by the Court of Appeal in Ireland in

Dale v. *Martin*, 11 L. Rep. Ir. 371, Ch.

This decision was earlier in date than *Trevor* v. *Whitworth* and *Ooregum Gold Mining Company of India* v. *Roper*. *Dale* v. *Martin* was cited before Kay, J. in

Re Exchange Drapery Company, 58 L. T. Rep. 544; 38 Ch. Div. 171

There there was a clause in the articles providing that the holders of vendors' shares should be entitled to dividends upon so much thereof as should be equal to the amount for the time being paid up on the ordinary shares, and also to interest at 5 per cent. per annum upon such amount of the nominal value of the vendors' shares as should be equal to the amount for the time being not called up on the ordinary shares, and Kay, J. treated it as a binding clause. He agreed that no shareholder could come into competition with outside creditors. The observations of Lord Selborne in *Oakbank Oil Company* v. *Crum* (48 L. T. Rep. 538, 539; 8 App. Cas. at pp. 72, 73) are in point, but the question there was different. [STIRLING, J.—In Ireland *Dale* v. *Martin* has been cited and approved of, but it is not binding on me.] Not one of the cases cited for the plaintiffs is against us. In the *National Funds* case there was clearly no payment in advance. It was decided solely on the ground that it did not authorise payment out of capital at all. Neither this case, nor *Trevor* v. *Whitworth*, nor *Re Sharpe; Masonic and General Life Assurance Company* v *Sharpe*, deal with a shareholder who has paid up in advance. If in one of these cases a dividend had not been paid, and an action had been brought by a shareholder, there would have been no answer to it. We say they are under a legal obligation to pay interest. The material clauses of Table A. are 7, 72, and 73. The directors must be taken to have recognised the popular distinction between interest and dividend. Interest, it is commonly known, is payable out of capital or profits. Sect. 27 of the Companies Act 1867 illustrates the point. The well-known distinction between dividends and interest was evidently present to the mind of the framer of the Act. Sect. 38, sub-sect. 7, of the Act of 1862 is not inconsistent with this. See

Re Leicester Club and County Racecourse Company, 53 L. T. Rep. 340; 30 Ch. Div. 629;
Re The Exchange Drapery Company (ubi sup.).

The case is very analogous to that of a partnership. We do not suggest that the shareholder could get the capital back. There is nothing in this inconsistent with *Trevor* v. *Whitworth*. The point here is, whether the law does not allow the company to obtain a loan for the purpose of accommodation.

Millar in reply.—Under Table A., clause 7, interest is payable only out of moneys lawfully to be devoted to such purposes. [STIRLING, J.—If the Irish courts are right in saying that this interest is a debt, that takes one behind all the cases.] *Dale* v. *Martin* was a case of an actual debt. The shareholders in the present case are not creditors, and *Dale* v. *Martin* is not applicable here. *Guinness* v. *The National Land Corporation of Ireland* was cited in *Dale* v. *Martin*, but that case was anterior to *Trevor* v. *Whitworth* and *Ooregum Gold Mining Company*. The question is, whether it is within the power of the directors to make an arrangement of this kind.

Cur. adv. vult.

Jan. 14.—STIRLING, J. delivered a written judgment, and after stating the facts of the case as above set out, proceeded:—It has not been contended before me that the arrangements entered into between the Queensland Investment and Land Mortgage Company and the shareholders who have prepaid their shares were made otherwise than in good faith; but it was argued that it was beyond the power of the company, and consequently illegal, to pay the stipulated interest out of capital, and the question which I now have to decide is, whether such payment of interest is within the powers of the company. That question has been answered in the affirmative by the courts of Ireland so far back as the year 1883, in the

case of *Dale* v. *Martin* (9 Ir. L. Rep. Ch. 498; 11 Ir. L. Rep. Ch. 371,) Fitzgibbon, L.J., in his judgment in that case in the Court of Appeal, said (11 Ir. L. Rep. Ch. at p. 375): "Therefore, however dangerous the wholesale exercise in the case of a single preponderating shareholder, of the power of taking money in advance of calls may be, the broad question must be decided by us, whether, in the case of a company whose nominal capital is fixed, interest on money paid in advance of calls can be constituted a lawful debt, and made chargeable upon the assets of the company as a debtor. In the absence of some coercive authority, it would appear to me to be enough to prove the legality of such an agreement to read sect. 14 of the Companies Act 1862, which provides that a company limited by shares may adopt all or any of the provisions contained in Table A. in the first schedule thereto, and to point out that Table A, clause 7, is identical with art. 22 of the defendant company. The Companies Clauses Consolidation Act 1845, sect. 24, and the standing orders of Parliament to which we have been referred, also clearly sanction similar engagements. A contract for payment of money if lawful must constitute a debt, and "interest at such rate as the member paying in advance and the directors agree upon" cannot, as it seems to us, be practically made descriptive of dividends in any legal sense. I cannot, upon this the conclusive point of the whole case, do better than quote and adopt the judgment of the learned Vice-Chancellor, at p. 507. "But then it is said the payment of the interest out of capital reduces the capital below the nominal amount fixed by the memorandum. This it must be conceded the board could not do; but the answer to the objection is, that this is not a reduction of capital in any sense except that of a spending of the capital in payment of a lawful debt, which occurs in every case in which money has to be paid out of capital in discharge of the liabilities of a company. If the contraction of the debt itself were unlawful, of course it could not be paid, or if Parliament had provided that interest on moneys paid in advance of calls should be met only out of profits, such an enactment should be obeyed; but the moment we conclude that such an agreement may be lawfully made, it must, in the absence of express or implied prohibition, bind the property of the company to the same extent as any other lawful contract, and payments out of capital in discharge of lawful obligations do not 'reduce' the capital which is best defined as 'the property available for the creditors of the company,' except by applying part of it to its legitimate use, viz., the discharge of creditors' demands." Two points were there decided: first, that the word "interest" in clause 7 of Table A. of the Companies Act 1862 did not mean "dividend"; and secondly, that interest on money paid in advance of calls constituted a legal debt payable out of any assets of the company, including capital. The defendant company in the present case is not governed by Table A, but in the clauses of the articles to which I have referred the word "interest" does not, in my opinion, mean the same thing as "dividend," with which, in articles 150 and 154, it is contrasted. There is no English decision in direct conflict with *Dale* v. *Martin*. The nearest cases on the point are *Re Sharpe*; *Masonic and General Life Assurance Company* v. *Sharpe* (65 L. T. Rep. 76, 806; (1892) 1 Ch. 154); and *Re Exchange Drapery Company* (58 L. T. Rep. 544; 38 Ch. Div. 171). In *Re Sharpe* interest was by the articles not merely made payable on money paid in advance of calls, but on all money paid on shares, which is a totally different thing. In *Re Exchange Drapery Company* (decided in 1880) it was held that a stipulation for payment of interest on what was equivalent to money paid in advance of calls was valid as between the shareholders of the company, and must be given effect to in a winding-up, after outside creditors had been paid in full. Kay, L.J. said in his judgment in that case: "I think that for the purpose of the present application I must treat the 11th clause of the agreement as being a binding clause, and the question is what is the meaning of it? It is a provision that certain persons who have paid up the full 10*l.* a share, the ordinary shares not having been paid up in full, shall receive in respect of the amount which they have paid beyond the ordinary shareholders' interest, and the interest is given in these terms: [His Lordship then read the 11th clause and proceeded:] *Primâ facie* that means that the amount paid on the vendors' shares beyond the amount paid on the ordinary shares shall be treated as an advance to the company carrying interest at 5 per cent. What has happened is, that the company has been wound-up, and all the ordinary creditors have been paid. I quite agree that no shareholder can come and say, 'I will prove for interest in competition with and as against ordinary outside creditors.' The law of partnership, which has been adopted in the winding-up of companies, is against that; but then the creditors having been paid, the duty of the court is to adjust the rights of the various contributories among themselves." The learned judge there expressed a doubt whether such interest could be proved for in competition with, and as against ordinary creditors. It was argued in the present case by counsel for the plaintiffs that the payment of interest in fact amounted to a return of capital to the shareholders, and was contrary to the principles laid down by the English Court of Appeal and the House of Lords in *Re Almada and Tirito Company* (59 L. T. Rep. 159; 38 Ch. Div. 415), *Trevor* v. *Whitworth* (57 L. T. Rep. 457; L. Rep. 12 App. Cas. 409), and *Ooregum Gold Mining Company of India* v. *Roper* (66 L. T. Rep. 427; (1892) A. C. 125); but this argument must fail if the decision of the Irish courts in *Dale* v. *Martin*, that the interest constitutes a valid debt of the company, is well founded. The plaintiffs consequently can succeed only by establishing that the interest does not create such a debt. It is unnecessary for me to say what my opinion on this point would have been had the matter been *res integra*, for I have arrived at the conclusion that, as a judge of first instance, I ought to follow the decision of the Court of Appeal in Ireland. It is a decision pronounced in the year 1883, and though it is not binding on me, it is nevertheless a weighty authority in favour of the defendant company. It is twice referred to, and the effect of it stated in the last edition of Lindley, L.J.'s book on the Law of Partnership, published in 1889; and it has therefore become known in this country, and I cannot doubt that it has been acted upon here. Lastly, I must refer to the

language of Lord Macnaghten in the recent case of *Newton* v. *The Debenture-holders and Liquidators of the Anglo-Australian Investment, Finance, and Land Company Limited* (72 L. T. Rep. 305, 307; (1895) A. C. 244), before the Privy Council, where he alludes to the importance and desirability of maintaining uniformity of practice in the administration of company law. The decision in *Dale* v. *Martin* has fixed the practice in the sister country, and I think, therefore, that I ought not to depart from it. The motion will, therefore, be refused.

Solicitors: *Ashurst, Morris, Crisp,* and *Co.*; *Trinders* and *Capron.*

Dec. 6 *and* 7, 1895.

(Before KEKEWICH, J.)

GRAHAM *v.* O'CONNOR. (*a*)

Specific performance—Company—Shares—Assignment—Volunteer—Injunction.

The doctrine that a volunteer cannot hold property, which has been conveyed by way of gift, as against the prior equity of a purchaser for value from the person by whom the conveyance was made, applies to a contract for the sale of shares of a company.

THIS was an action brought by Thomas Graham, a newspaper proprietor, of Wolverhampton, against Thomas Power O'Connor, M.P., Francis Howard O'Connor, his stepson, and the Tudor Publishing Company Limited, carrying on business at Sun-buildings, Tudor-street, Temple, for specific performance of an agreement to transfer 2000 fully paid-up deferred shares in the company to the plaintiff. The defendant company were the proprietors of two newspapers called the *Sun* and the *Weekly Sun*, and the defendant T. P. O'Connor was the manager, and the defendant F. H. O'Connor was the secretary of the company.

In 1893 the company was in difficulties, its expenses being heavy, and its publications not paying their way. T. P. O'Connor then wrote to the plaintiff asking his assistance in working the company. To this the plaintiff agreed, and early in 1894 he proceeded to take part in the business management of the company, which he did to the satisfaction of T. P. O'Connor and the other persons interested in the company. From that time the company began to pay its way.

In consideration of the plaintiff's services, and as an inducement for him to continue them, T. P. O'Connor in March 1894 wrote him the following letter:

The Tudor Publishing Company, Sun-buildings, Tudor-street, London, E.C., 16th March 1894.—My dear Graham.—It is with pleasure that I offer you an honorarium of 500*l.*, payable at about 100*l.* a month, for advice and assistance in connection for six months with the commercial department of the Tudor Publishing Company, and to give such personal attendance at the company's offices as you are able to render. When you come to town, your railway fares and hotel expenses to be paid. Also I shall assign to you at once 2000 deferred shares of the Tudor Publishing Company, and I hope that you will be able on or before the expiry of the six months, to see your way to come on the board.—Yours very sincerely, T. P. O'CONNOR.

The fee of 500*l.* was duly paid, but the 2000 deferred shares were never transferred to the plaintiff.

All the deferred shares to the number of 25,000 were issued, and stood in the name of the defendant T. P. O'Connor.

In consequence of the non-transfer of the shares to Graham, he brought this action claiming specific performance of the agreement contained in the letter of the 16th March 1894, and an injunction to restrain the defendants from disposing of or dealing with the 25,000 shares without leaving a sufficient number to answer the plaintiff's claim. It appeared that after the commencement of the action the defendant T. P. O'Connor transferred 24,998 of the deferred shares held by him into the name of his stepson, the defendant F. H. O'Connor.

Warrington, Q.C. and *Eustace Smith* for the plaintiffs.—We are entitled to specific performance notwithstanding that the property the subject of the agreement has been assigned to a third person: (Fry on Specific Performance, 3rd edit., pl. 241, p. 105.)

Swinfen Eady, Q.C. and *George Lawrence* for T. P. O'Connor.—That doctrine has never been extended to a contract to sell shares. The shares are not numbered or distinguished in any way. There is no authority extending the rule in the case of an assignment of land to a third person to a contract to sell shares. There was an absolute transfer of the shares to F. H. O'Connor as beneficial owner.

Edward Ford, for F. H. O'Connor, referred to *New Brunswick and Canada Railway Company* v. *Muggeridge*, 4 Drew. 616.

KEKEWICH, J.—This action arises out of a contract contained in a letter dated the 16th March 1894, addressed by the defendant T. P. O'Connor to the plaintiff Thomas Graham, and a reply by Graham accepting the terms, thereby completing the contract. No question is raised respecting the contract; it must be treated as a contract for value on both sides; the value was services rendered by Graham, at T. P. O'Connor's request, to the Tudor Publishing Company, in which T. P. O'Connor was largely interested. So far as I can see there is no question at all about the contract, except a certain amount of vagueness with regard to the shares; they are not numbered, and no reference is made to the shares being registered in the defendant's name. One cannot say that these particular shares are the subject of the contract. But I am entitled to look at the facts, and I know that the whole of the deferred shares were registered in the name of and belonged to the defendant T. P. O'Connor, and no other deferred shares were in any other name. The result is I construe, the letter as meaning "I shall assign to you 2000 out of the whole issue, which whole issue stands in my name." Immediately afterwards T. P. O'Connor assigned nearly all the deferred shares to his stepson, the defendant F. H. O'Connor, and the shares were registered in his name. It is admitted that the transfer was not for value, but a gift by T. P. O'Connor to his stepson. Upon the facts before me I think the inference is irresistible that T. P. O'Connor having agreed to assign 2000 shares in the Tudor Publishing Company to the plaintiff, made a gift of the shares to his stepson F. H. O'Connor, in order to put it out of his

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

power to comply with the particular terms of the contract which he had entered into, and because he did not desire that the plaintiff should become a member of the company, over which it was clear upon the evidence that he (T. P. O'Conner) had the main control. In so acting there is no necessity to attribute to him any moral impropriety: he was entitled to act as he did, at the risk of being found liable in damages and costs for his breach of contract. It is now admitted for the purposes of this action that F. H. O'Connor received the shares as a gift, and not upon any trust to deal with them as T. P. O'Connor should direct. But the gift to F. H. O'Connor was subsequent to the contract by T. P. O'Connor, and Mr. Warrington puts the case on a different ground: he says F. H. O'Connor is only a volunteer. Though as between T. P. O'Connor and F. H. O'Connor there is no trusteeship, yet as regards the plaintiff, whose contract was prior, F. H. O'Connor must do what T. P. O'Connor is bound to tell him, namely, to fulfil the obligation which is now sought to be enforced by the court. It is admitted that, if the subject-matter of the contract was land, F. H. O'Connor, being a mere volunteer, could not hold the land which he received by way of gift as against the prior equity of the plaintiff under his contract. Why should not that doctrine apply equally to a contract for the sale of shares? In principle I see no reason why it should not. The ingenuity of counsel has not produced any authority upon the subject, and I therefore feel justified in believing that no authority can be cited, and I must deal with the matter as *res integra*, and upon principle. The principle applicable to the case is thus laid down by Sir Edward Fry, in his work on Specific Performance, 3rd edit., p. 105: "Where a contract has been entered into for the sale or demise or other dealing with property, and that property is afterwards transferred to a third person, such third person is liable to perform the contract at the suit of the purchaser or intended lessee in either of the events: (1) When the transferee takes as a volunteer. (2) When the transferee takes with notice of the prior contract. (3) When the transferee has acquired only an equitable title, and has no better equity than the purchaser or intended lessee." But it is objected that the numbers of the shares are not given, and that therefore the subject-matter of the contract is too vague to admit of the application of the doctrine. It is said that T. P. O'Connor might have given the shares to twenty or more of his friends in separate batches, and that then such an action as this would be practically impossible. It is contended that this shows that the extension of the principle to a case such as the present is unsound. I think that all that has been shown is that a practical inconvenience may arise which will be dealt with when it does arise. It does not arise here, because it is admitted that shares were registered in F. H. O'Connor's name, more than sufficient in number to answer the plaintiff's claim. There must be a judgment for the plaintiff for specific performance, with a direction that F. H. O'Connor shall transfer, and T. P. O'Connor concur with him, if necessary, in transferring, 2000 deferred shares to the plaintiff; also an injunction to restrain the company from allowing a transfer of, or permitting to be transferred, any deferred shares now registered in the name of F. H. O'Connor, without leaving in his name sufficient shares to answer the claim of the plaintiff. The defendant T. P. O'Connor to pay the costs.

Solicitors: *Thomas Herbert Edward Foord; Slaughter* and *May; McKenna* and *Co.*

House of Lords.

Nov. 18, 19, *and Dec.* 16, 1895.

(Before the LORD CHANCELLOR (Halsbury) Lords WATSON and SHAND.)

BURGESS *v.* MORTON. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Practice—Appeal—Special case raising questions of fact—Decision extra cursum curiæ.

Where the court gives a decision in any matter extra cursum curiæ *it must be taken to be of the nature of an award by arbitrators, and no appeal will lie except by consent of all parties.*

A special case was stated which did not raise, and was not intended to raise, any question of law, but questions of fact only. A divisional court, at the request of the parties, gave judgment upon it.

Held, that such judgment was substantially a consent order, and that no appeal would lie.

Judgment of the Court of Appeal reversed.

Bickett *v.* Morris (*L. Rep.* 1 *H. of L. Sc.* 47) *distinguished.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Davey, L.JJ.), who had reversed a judgment of the Divisional Court (Wills and Wright, JJ.) on a special case.

The circumstances which gave rise to the action were as follows:

On the 30th Sept. 1891, the firm of Bean and Gough, consisting of two partners, was dissolved by mutual consent upon the terms that Gough should continue the business, and should, in consideration of his being permitted to take over the bulk of its assets, relieve the retiring partner of the whole liabilities of the firm. Some time before the date of the dissolution the respondent had a meeting with the two partners, at which he consented, in the event of its taking place, to assist Gough towards carrying on the business. He accordingly continued to deal with Gough, who traded under the name of C. H. Gough and Co., until the concern became bankrupt in July 1892. At the time of its dissolution the old firm owed a considerable sum to the respondent. The appellant, who was trustee in the bankruptcy of C. H. Gough and Co., in Dec. 1892, brought this action against the respondent for recovery of 1067*l.* 10*s.* 10*d.* as the balance due on his transactions with the bankrupt. The respondent resisted the claim, mainly on the ground that he was entitled to set off against that balance the sum due to him by the old firm. The cause was set down for trial at York before the late Lord Coleridge, C.J., when, there being no likelihood of its being reached, the parties, with the consent of the learned judge, agreed to withdraw it from

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

trial, and to state a special case for the decision of the court. In the special case the only matter which was professedly submitted for adjudication was the respondent's contention to the effect that "he is entitled to set off the moneys owing to him from the said firm of Bean and Gough, at the date of the said dissolution of partnership, against the sum claimed on the writ." The case concluded by stating the agreement of parties that, in the event of the contention being sustained, judgment should be entered for the respondent, with costs, and that it should be declared that he was entitled to prove against the bankrupt estate for 62*l.*; and that, in the event of its being rejected, judgment should be entered for the appellant for the sum of 836*l.* 11*s.*, with costs. The facts and circumstances detailed in the case were not calculated, and were not intended, to raise any question of law. There had really been no dispute between the parties in regard to the law of set-off, and, in the argument in the appeal, neither party attempted to conceal that the only point upon which they desired a decision was whether the statements in the case did or did not warrant the inference that the respondent had, before the bankruptcy of Gough, made an agreement which would entitle him to a set-off. No particular agreement was stated or put in issue. The case was first submitted to a divisional court, composed of Wills and Wright, JJ., who pointed out the incompetency and inexpediency of trying such a question by means of a special case, but expressed their willingness to do the best they could to decide it if the parties desired them to do so. On that footing the learned judges heard the case, and gave judgment for the present appellant upon the ground that the facts and circumstances stated were insufficient to warrant an inference that the respondent had made any agreement which could support his plea of set-off. That decision was brought by the respondent under the review of the Court of Appeal, who reversed it, and gave judgment in his favour.

Against that decision the present appeal was brought.

Forbes, Q.C. and *G. Banks*, appeared for the appellant.

Cohen, Q.C. and *Scott Fox* for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 16.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury). — My Lords: In this case an effort has been made to try in the form of a special case a pure question of fact and to make it subject to the ordinary consequences of being subject to appeal first to the Court of Appeal and then to your Lordships' House. Speaking for myself, I will not be a party to such a course of procedure. It is objectionable in two ways. It is objectionable to ask your Lordships to try a question of fact without the facts themselves being put before you. It is objectionable as a matter of procedure because the Legislature have provided a mode of deciding questions of law when the parties are practically agreed upon the facts. But this is an effort to use that convenient method of trying a question of law and agreeing to what is called a special case, when it by agreement between the parties does not state either the inferences of fact, or even all the facts from which the inferences of fact are to be drawn. It has been candidly admitted by counsel at the bar how this occurred. The parties could not agree upon the facts—in particular as to what had passed at a conversation between the parties, which conversation terminating in an agreement would have been decisive one way or another upon the question which your Lordships are asked to determine now. Because the parties could not agree how the fact was, they agreed upon a special case from which this matter is left out altogether, this intentional omission including the disputed parts of the conversation as to an agreement, and they ask first the court below and now your Lordships to grope in the dark as best you can to find out what was the real effect of the agreement between the parties which the parties themselves have deliberately withheld because they could not agree upon what passed between them. I think that this is a complete perversion of the procedure provided by the statute. When the case came before the Divisional Court it was immediately observed by the learned judges that this was not properly a special case, and both by the counsel and the learned judges it was treated as being left to the judges not as a special case raising a question of law, but upon the invitation of counsel the judges agreed to hear it and to decide it as a question of fact. After the judgment was given both the learned judges, upon an application to stay, interposed with the observation that it having been left to them to decide as a question of fact they could not see how there could be any appeal. Both judges were agreed that there was no point of law, and, indeed, that could not have been disputed before your Lordships. I am therefore of opinion that there is no appeal. The judges were invited to sit practically as arbitrators, and their decision upon the question in dispute, which is one of fact, I regard as final. In saying that, I have not omitted to observe that the special case allows the right to draw inferences of fact—which is a very well-understood provision. Occasionally it will happen that upon the facts as agreed upon some point is left uncovered, and in order to prevent the necessity of going back to the arbitrators or tribunal of fact that provision is inserted to enable the court upon the question of law raised to draw such inferences of fact as may not be specifically found. But the objection here is that no question of law is raised or intended to be raised, but a question of fact only, and the Divisional Court only heard it upon the understanding that they were arbitrators between the parties. It has been held in this House that where, with the acquiescence of both parties, the judge departs from the ordinary course of procedure, and, as in this case, decides upon the question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of procedure, and to treat the matter as if they had been heard in due course. I am satisfied that, if the parties had not agreed to take the decision of the Divisional Court as being one on a question of fact, that court would have refused to hear the case. The parties having done so, I think that they are precluded now from treating the matter as subject to appeal, and I think, therefore, that this appeal must succeed upon the ground that the Court of Appeal had no jurisdiction to entertain the question. For these reasons it becomes

unnecessary to consider what would have been the proper decision, and I accordingly move your Lordships that the judgment of the Court of Appeal be reversed, and that the original judgment of the Divisional Court be restored, the respondents to pay the appellant the costs here and below.

Lord WATSON.—My Lords: Before dealing with the points which require to be considered in this appeal, it is necessary to notice the circumstances giving rise to the action, and also the peculiar course of procedure which has been taken. [His Lordship went through the facts of the case, as set out above, and continued:] The opinions delivered by the learned judges of the Court of Appeal deal exclusively with the question of fact upon which alone their decision was based. But the present appellant objected to their competency to interfere with the judgment of the Divisional Court, which he maintained to be conclusive. The objection was, however, overruled. Lord Esher, M.R., after adverting to the terms of the special case, said: "Whether it is necessary in these circumstances that a question of law should be raised, is a matter which it seems to me it is not necessary to decide in this case, because I cannot have a doubt but that there were some difficult questions of law raised in this case, as well as inferences of fact which were to be drawn, so that it is a special case under the ordinary circumstances of a special case, with power for the court to draw inferences of fact." I am unable to assent to the view thus stated by Lord Esher. It does not appear to me to admit of doubt that the judgment of the Divisional Court was substantially a consent order. I am also satisfied that the whole proceedings in the cause, from and after the time when the parties thought fit to retire from the proper tribunal for its trial, have been *extra cursum curiæ*. The rules which govern procedure on the common law side of the High Court of Justice do not contemplate or permit the use of a special case, except for the purpose of obtaining the decision of questions of law arising upon facts which are admitted; and the consent of a judge to its use for the purpose of trying a question of fact cannot, although the fact when found might give rise to legal questions, make it a regular proceeding in the ordinary course of law. I think the consent of the judge in this case must be presumed to have been given on the assumption that the parties meant to raise directly some question of law, although it now appears that they had no such intention. There are several decisions of this House in cases coming from Scotland which appear to me to affirm that the judgment of a court below, pronounced *extra cursum curiæ*, is in the nature of an arbiter's award, and that, as a general rule at least, no appeal from it will lie. An appeal was held on that ground to be incompetent in *Craig* v. *Duffus* (6 Bell's App. 308), *Dudgeon* v. *Thomson* (1 Macq. 714), and *Magistrates of Renfrew* v. *Hoby* (2 Macq. 472). All these cases had the following features in common: (1) The action had been remitted to the jury court by an interlocutor which was not subject to review; (2) the parties had agreed, either before the trial commenced, or before the jury were asked to consider their verdict, to withdraw the action from trial by jury, and to accept the decision of the court, in one instance upon a proof to be taken by commission, and in the others upon the notes of the presiding judge and the productions made before him; and (3) the court referred to was a division of the Court of Session, so that the appeal was against the first and only decision which had been given upon the evidence. I may add that all of these cases involved questions of law arising upon the facts when these were ascertained. The subsequent decision of the House in *Bickett* v. *Morris* (L. Rep. 1 H. of L. Sc. 47) does not trench upon the authority of these precedents, although it establishes an exception in cases where the party holding the original judgment has stated no objection to an appeal from it to an intermediate court. In that case the action was one of the causes specially appropriated for trial by jury under the provisions of the Scotch Judicature Act of 1825 (6 Geo. 4, c. 120). While it depended before the Lord Ordinary, and before the usual order was made remitting it to the jury court, the parties agreed that it should be disposed of by the court upon a proof by commission. The proof was taken, and was reported to the Lord Ordinary, who, after hearing parties, assoilzied the defender. The pursuers then presented a reclaiming note, to the competency of which no objection was stated; and the Second Division recalled the interlocutor of the Lord Ordinary, and gave judgment for the pursuers. The defender brought an appeal to this House against the decision of the Second Division, and was met by a preliminary plea of incompetency. After hearing a full argument upon the point Lord Chelmsford, L.C., Lord Cranworth and Lord Westbury unanimously repelled the plea, heard the appeal upon its merits, and affirmed the judgment appealed from. The Lord Chancellor said: "By taking the step of appealing to the Inner House, the pursuers, in my opinion, have precluded themselves from objecting that the interlocutor pronounced in their favour is not subject to all the consequences of other interlocutors, and therefore is appealable to this House." Lord Westbury observed, "Upon the question of competency it must be understood that the decision of your Lordships proceeds upon its being personally incompetent to the respondents to raise that objection." In my opinion it necessarily follows from the rule laid down by the House in these cases that the Court of Appeal were incompetent to entertain the respondent's appeal to them, unless the appellant unreservedly submitted the determination of the special case upon its merits to their jurisdiction. So far from acquiescing in, he objected to the jurisdiction of the Court of Appeal, and there can, therefore, be no reason for holding, as in *Bickett* v. *Morris*, that he is personally barred from now pleading the absolute finality of the judgment of the Divisional Court. In my opinion the House has, in these circumstances, no jurisdiction except to reverse as incompetent the judgment of the Court of Appeal. I therefore concur in the judgment which has been moved by the Lord Chancellor.

Lord SHAND.—[After going through the facts of the case and the proceedidgs in the courts below his Lordship continued:] Where a question of law arises on facts agreed on, or on alternative views of facts, the question admits of being distinctly stated, and it is usual and desirable that it should be so stated expressly. In the present case not

only does the special case state no such question, but counsel did not suggest that any such question admitted of being formulated. It is true that the case contains the clause usually inserted where questions of law are presented for decision, viz., "The court is to be at liberty to draw inferences of fact." But, on examination, if it turns out, as here, that the only duty which it is sought to throw on the court is to draw inferences from which certain legal consequences admittedly follow, this only shows that the question for decision is one of fact only. This being so, I am of opinion with your Lordships that the case was one which the Divisional Court was not bound to entertain. As soon as it became apparent to the learned judges of that court—and this seems to have been at an early stage of the argument—that the special case raised only a question of fact for their determination, they would have been warranted in declining to give judgment on it; and with a special case which left so much to conjecture, and where the parol evidence of the parties would have, in many respects, supplied satisfactory grounds for decision one way or the other, in place of mere grounds for speculation as to what the parties meant, and said, and did, it is not unlikely that the ends of justice would have been better served had this course been taken. It is apparent that the learned judges yielded to the entreaties of both parties in entertaining and disposing of the case, and I agree in thinking that the proceeding was *extra cursum curiæ*, and that the decision of the dispute between the parties was of the nature of an award by arbiters, as indeed the learned judges of the Divisional Court seem themselves to have thought. It follows, on the authority of the series of cases cited by Lord Watson, that, as the plaintiff maintained the finality of the decision of the Divisional Court in the Court of Appeal, their Lordships, in place of dealing with the merits of the cause, should have sustained that contention and held that the proceedings and decision having been *extra cursum curiæ*, they could not entertain the appeal. On these grounds I agree in thinking that the judgment of the Court of Appeal should be reversed, and that of the Divisional Court restored.

Judgment of the Court of Appeal reversed, and judgment of the Divisional Court restored; respondent to pay to the appellant the costs in this House and in the court below.

Solicitors for the appellant, *Steavenson* and *Couldwell*, for *T. Piercy*, Leeds.

Solicitors for the respondent, *Vincent* and *Vincent*, for *Peckover* and *Scriven*, Leeds.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Jan. 22.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

FINCH *v.* OAKE. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Trade protection society—Voluntary association—Member—Resignation—Withdrawal of resignation—Acceptance.

Under the rules of a voluntary trade protection society members, on election, were required to pay an annual subscription, in return for which they were entitled to certain benefits, but they incurred no further obligations beyond such payment. The rules contained no provision as to the retirement or expulsion of members.

A member wrote to the committee resigning his membership, but before receiving any reply to his letter he wrote again withdrawing his previous resignation. The committee, however, insisted that he had ceased to be a member.

Held, that the plaintiff, not being subject to any obligation to the society, was at liberty to resign his membership at any time, and that no acceptance of his resignation by the committee was necessary; but that he ceased to be a member from the date when his letter of resignation was received by the secretary; and that he could not become a member again without re-election.

Decision of Kekewich, J. reversed.

A MOTION was made by the plaintiff, Henry Hobson Finch, a licensed victualler, alleging himself to be a member of the Bermondsey and Rotherhithe Licensed Victuallers and Beersellers' Local Protection Society, for an injunction until the trial of the action or further order, restraining the defendants, J. W. Oake and others, the chairman and committee of the society, from excluding the plaintiff from his membership of the society, and from interfering with the exercise of his rights and privileges as a member of such society.

The society was a voluntary association, of which any licensed victualler, or person holding a licence to sell beer to be consumed on or off the premises, was eligible to become a member. The society was regulated by certain printed rules, having no office, but holding its meetings at a public-house.

The society had no property beyond the subscriptions received from its members, and some donations from brewers and others, and there was no trust deed.

The objects of the society were stated to be as follows:

1. The protection of its members against frivolous and vexatious informations.

2. The offering of rewards for the detection of persons robbing its members.

3. The offering of rewards to persons coming to the aid and assistance of its members in cases of assault or outrage.

4. The watching over the interests of the trade in the Legislature, and generally for the furtherance and promotion of its interests.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

5. The offering of rewards for information leading to the conviction of persons illegally selling exciseable liquors.

The subscription, payable in advance, was 10*s.* 6*d.* per annum. There was no entrance fee. Brewers, distillers, wine and spirit merchants, hop merchants, maltsters, mineral-water manufacturers, and other wholesale dealers, directly or indirectly connected with the trade, were eligible to become honorary members of the society on the payment of an annual subscription of not less than half-a-guinea.

On the 30th Oct. 1895 the plaintiff, who was then a member of the society, and had paid his annual subscription, being dissatisfied with part of its policy, and in consequence of a resolution passed by the executive of which he did not approve, wrote to the committee resigning his membership, but no reply was received to his letter.

On the 29th Nov. 1895, before the next committee meeting, which took place on the 9th Dec. 1895, he wrote to the chairman withdrawing his previous resignation.

On the 9th Dec. 1895 the secretary wrote informing the plaintiff that the committee had resolved to accept his resignation.

The plaintiff, however, claimed that he was still a member, and issued the writ in this action, having first tendered his annual subscription in advance, which was, however, refused.

On the 17th Jan. 1896 the motion came on to be heard before Kekewich, J., who decided that the plaintiff was entitled to withdraw his resignation before it had been accepted by the committee; and that, having done so, he still remained a member of the society. The learned judge accordingly granted an injunction until the trial of the action or further order, being of opinion that, although, as a general rule, the court had no jurisdiction to interfere by injunction with a voluntary society at the instance of a member unless the society had property of its own which could be seized by the court, in this case the contributions of the members constituted sufficient property to give the court jurisdiction.

From that decision the defendants now appealed.

H. Terrell for the appellants.—Kekewich, J. granted an injunction to restrain the defendants from improperly excluding the plaintiff from the society, being of opinion that he had jurisdiction to do so. Two questions are therefore raised by this appeal: First, whether the court has jurisdiction to interfere in the case, and to grant such an injunction as has been granted by Kekewich, J. Secondly, whether on the facts the plaintiff did not voluntarily resign his membership prior to his being excluded by the defendants, and thus at the date of that exclusion was not a member of the society. First, I submit that the granting of an injunction was not within the jurisdiction of the court, there being no property belonging to the society. It is necessary that the society should hold property in order to give to the court jurisdiction. Moreover there is no reason why the court should interfere by injunction unless the society are doing something in the nature of a breach of trust. The authorities show that there must be property of the society held in trust for the members, or that the act of the society is contrary to natural justice. The general principle was laid down by Lord Cranworth in

Forbes v. *Eden*, L. Rep. 1 Sco. App. Cas. 568, at p. 581.

The principle was also dealt with and acted on in

Baird v. *Wells*, 63 L. T. Rep. 312; 44 Ch. Div. 661;

Rigby v. *Connol*, 42 L. T. Rep. 139; 14 Ch. Div. 482.

The members' rights specified in the rules are not "property" in the sense referred to in the authorities. It is not even clear that the members have any personal rights, and the plaintiff does not allege that there is any property vested in the society at all. It is true that the rules provide that the committee shall have power to form a benevolent fund. But the formation of such a fund is not imperative, nor is it in evidence whether the committee have formed one or not. The onus is on the plaintiff to show that the society has some property. Here there is no such evidence. All that appears is that the members are possibly entitled to some benefits under the society's rules. As regards the second point, a member of a society of this kind, like a member of an ordinary club or other voluntary association, can at any moment resign *ex mero motu*, and no acceptance of his resignation is necessary:

Re The Gloucester, Aberystwith, and Central Wales Railway Company; Ex parte Maitland, 23 L. J. 140, Ch.; 4 De G. M. &. G. 769.

[SMITH, L.J. referred to *Reg.* v. *The Mayor, &c., of Wigan* (52 L. T. Rep. 435; 14 Q. B. Div. 908).] There is nothing about expulsion or retirement in the rules of the society. The society being a purely voluntary one, the mere fact of the plaintiff sending a letter announcing his withdrawal from the society made him no longer a member. If he desires to join the society again he must be re-elected.

Warrington, Q.C. and *Church* for the respondent.—We submit that this is a case in which the court has jurisdiction to interfere. The rules of the society show that there is property belonging to the society in which the plaintiff as a member has a right to participate, and to a share of which he would be entitled in the event of a winding-up. Putting aside his intended resignation he is still a member of the society, and the committee are endeavouring to exclude him from membership. They are seeking, without any justification under the rules, to deprive the plaintiff of the rights which he is entitled to enjoy. They are breaking the contract into which they and the plaintiff have entered. The rules provide for certain benefits to be acquired by a member of the society on payment of his subscription. Part of the contract into which the plaintiff entered was, that if during the year of membership the officers incurred any liability over and above the amount which the funds would enable them to discharge, he is one of the persons to whom they could look for contribution. [SMITH, L.J.—There is nothing in the rules about that.] That is true; but it is quite conceivable that the legal expenses, for example, of the society might exceed the amount of the funds during the year, and in case of there being such a deficiency in the funds the members would have to make it up. A member could not therefore withdraw within the year for which he had

joined the society without the consent of his fellow-members, because, if there was any liability beyond what the funds would enable the committee to defray, he would by his withdrawal be relieved from sharing in it. As regards the letters written by the plaintiff, the resignation contained in the letter of the 30th Oct. was inoperative until it was communicated to the committee who manage the affairs of the society. It was not, however, communicated to them until at the same time the withdrawal of his resignation contained in the letter of the 29th Nov. was also communicated. *Reg.* v. *The Mayor, &c., of Wigan* (*ubi sup.*) is a case which does not affect the present. It depended on the construction of a particular statute. [LINDLEY, L.J.—The importance of that case is, that the court there decided that no acceptance of a resignation should be necessary.] But the statute provided that no acceptance should be necessary. Here the plaintiff's resignation had no operation in law, because it was not accepted before it was withdrawn by him.

No reply was called for.

LINDLEY, L.J.—It appears to me that this case turns on a very small point, though I do not mean to say that it is entirely free from difficulty. It is this: What is the effect of the plaintiff's letter of the 30th Oct. 1895? In order to determine that we must consider the rules of the society. The rules are not very full; they express only certain points. The rights of the members and their obligations to the society are to some extent expressed. The rules of importance are these:—No. 1 deals with membership. It provides as follows: "That any licensed victualler or person holding a licence to sell beer to be consumed on or off the premises, be eligible to become a member of this society at any regular meeting when proposed and seconded by members, and duly elected by a majority thereof, and shall pay a subscription of 10*s.* 6*d.* per annum; all subscriptions to be paid in advance in January of each year. Any licensed victualler or beer retailer joining this society on or after the ordinary meeting in June, shall be admitted a member on payment of one-half the annual subscription for that year. Any member being three months in arrears with his subscription shall forfeit all claims to the society." It appears, therefore, that a member must be elected in the first instance, and has to pay an annual subscription. If he goes on from year to year paying his subscription he remains a member; he need not be re-elected. He is not bound to go on paying his subscription; but if he does he continues to be a member. The society is managed by certain officers, respecting whom rule 3 provides as follows: "The officers of the society shall consist of chairman, vice-chairman, treasurer, three auditors, and a committee of twenty-five financial members (all to be elected at the annual general meeting in January). Five to form a quorum, all subscribing past chairmen to be *ex officio* members of the committee." As to the officers, the secretary is really the society for the purpose of carrying on its business, but he is subject, I suppose, to the directions of the committee. He is the most important officer, and his duties are as follows (rule 4): "The secretary shall keep all accounts, conduct all correspondence, and do all things appertaining to the office; he shall also collect all moneys due to the society, and pay same into London and Midland Bank every day, submitting the pass-book and counterfoils to the treasurer every Monday. At the end of the financial year he shall prepare a balance-sheet which shall be printed and distributed among the members at their annual meeting." I do attach importance to that rule because Mr. Warrington contends that the plaintiff's letter of the 30th Oct. 1895 ought to have been submitted to the committee, and that it cannot be taken to have reached the society until it had been submitted to the committee; and that, therefore, the letter was not communicated to the committee till after the plaintiff had withdrawn his resignation. But I would point out that, according to the rules of the society, so soon as the letter was addressed to and received by the secretary, it was communicated to the committee. The rules contain further provisions, and then rule 13 empowers the committee to form a benevolent fund in these words: "The committee shall have power to set aside from time to time, towards the formation of a benevolent fund, such donations as may be received for that purpose, and such contributions from the funds of the society as may be agreed upon by a general meeting of the society, such funds to be devoted to the relief of the necessities of aged and decayed members of the society, their widows and children, under such regulations as may from time to time be agreed upon." That is substantially all that I need read. The rules contain nothing about the expulsion of members; nor is there anything about the right of members to retire. All those matters are left to be dealt with according to the ordinary principles of law. Now, what is the position of a member who has paid his subscription of 10*s.* 6*d.* to this society for the current year? Can he withdraw from the society at any moment at his own pleasure, or can he withdraw only with the consent of his fellow-members? In other words, can he withdraw until his notice of resignation is accepted? It appears to me that, so far as he and his fellow-members are concerned, when he has paid his subscriptions for the year, he is under no obligation whatever to his fellow-members, and that he need not wait until his resignation is accepted. Having paid his subscription, he no doubt acquires certain rights and benefits. But what is there to prevent a member who has paid his subscription from retiring from the society at any moment that he wishes to do so? Absolutely nothing. In my opinion no acceptance of his resignation is required, though of course he cannot get back the subscription which he has paid. He may say that he wants to retire. If he does say so, the other members have no power to object that he shall not retire. There is no law which lays down that a resignation which cannot be declined must be accepted before it can take effect. If, therefore, a member of this society chooses, even from mere caprice, to retire from it he can do so at any time. All that he has to do is to say, with or without giving reasons, "I retire." His position then is that he ceases to be a member, and if he desires to become a member again he must be re-elected. I am not aware that there is any principle of law which entitles him to recall his notice to withdraw. On the contrary, the decisions in *Re The Gloucester, Aberystwith, and Central Wales Railway Company; Ex parte Maitland* (23 L. J. 140, Ch.; 4 De G. M. & G. 769) and *Reg.* v. *The Mayor, &c.*,

of Wigan (52 L. T. Rep. 435; 14 Q. B. Div. 908) are against the argument that he could take such a course. Now, what did the plaintiff do? He sent to the committee a letter as follows: "30th Oct. 1895. Gentlemen,—In consequence of the executive of your society having passed a resolution severing their connection with the central board, I desire you to withdraw my name as a member of your society." Of course, if that letter had not reached the secretary it would have been a different matter. It might have been treated as non-existent. It did, however reach the secretary, but the plaintiff allowed the letter to remain for one month without any retractation. What then was his position? It is perfectly clear to me that during that month he had ceased to be a member of the society, and he could not become a member again without being re-elected. Afterwards he writes this letter to the chairman: "29th Nov. 1895. Dear Sir,—Not having received an acknowledgment of my letter to you of the 30th Oct. I shall feel obliged if you will withdraw the same, as I intend to continue a member of the society." The plaintiff had no right whatever to do that. Whether the other members could perhaps have waived the requirements of the rules I do not know. *Reg.* v. *The Mayor, &c., of Wigan* (*ubi sup.*) seems to decide that they could not. But I think that the position taken up by the committee was perfectly right in point of law. That they exceeded their powers I cannot hold. In my opinion the plaintiff had ceased to be a member, and in order to become a member again he must be re-elected. Therefore the appeal must be allowed with costs, and the injunction must be dissolved.

KAY, L.J.—This is a voluntary association of persons who deal in beer, and it appears that according to the rules of the society any licensed victualler or beer retailer may join the society if elected by a majority present at any regular meeting. Thereupon he has to pay a subscription of 10*s.* 6*d.* I have been through the rules more than once with care, but I cannot find that there is anything whatever in them which imposes any obligation on the members who have joined the society except that of paying the subscription of 10*s.* 6*d.* They have no duties to perform; they are merely allowed, on being elected and on paying their subscriptions in advance, to share in the benefits mentioned in the rules. The principal benefit is that relating to the protection of members. They may have the advantage of being defended at the expense of the society in legal proceedings against them, under clause 8 of the rules. It provides as follows: "In cases of assault, robbery, or riotous conduct on the premises of a subscribing member, he shall, without loss of time, if he wishes to avail himself of the assistance of the society, communicate particulars to the secretary or chairman, who will refer such member to the solicitor for his professional assistance, to defend the same at the expense of the society, and the solicitor shall write the result to the secretary, to be by him laid before the next meeting of the committee; and that, to carry this rule into effect, the committee shall arrange with some one or more professional gentlemen; but should it be a case involving a question of general importance to the trade, and requiring to be defended by counsel, it shall be referred to the committee, who shall be called together specially for that purpose. When a person is given into custody over night, and is to come before the magistrate next morning, as there may not be time to procure a letter from the secretary or chairman to the solicitor authorising him to act, the member may apply to the solicitor, who has power to deal with the case at his discretion, without the letter from the secretary or chairman, which in all other cases must be first procured." Then by rule 13 the committee have power to set aside towards the formation of a benevolent fund such donations as may be received for the purpose, and such contributions from the funds of the society as may be agreed upon by a general meeting, for the relief of aged and decayed members, their widows and children. Those are the principal advantages which the members derive from the society. What happened in the present case was this: The plaintiff having joined the society, and having paid his subscription for the current year, before the end of the year sent a letter to the committee in which he intimated in the plainest possible terms his intention to withdraw from the society then and there. It is said that before his resignation was accepted by the society he withdrew it. But why was any consent to his withdrawal from the society required? The plaintiff, as a voluntary member of a voluntary association, gave notice of his intention to resign, saying that he did not wish to continue a member any longer. It is suggested that his resignation was not effective until accepted by the society, because the committee might have incurred obligations beyond the amount of the society's funds, and that the plaintiff might be bound to contribute to the funds in future years in respect of those obligations. I deny that proposition entirely. The society would not be bound to defend the members beyond the amount of the funds in the hands of the committee. If the society began litigation it might stop if there were no more funds. I fail to see the slightest indication in these rules that members can be made liable beyond the amount of their annual subscriptions. If it were otherwise, the result might be that any member might be made liable to any extent for the costs of any amount of litigation which the committee might think fit to enter upon. That is an utterly extravagant notion. But if, as I hold, there is no further liability beyond the payment of his annual subscription, how can it be said that anything more is required of a member wishing to resign than his sending a notice of withdrawal? How can he be entitled to say afterwards to the committee, "As you have not answered my letter, I choose to be a member of the society again without any re-election?" In the present case the plaintiff wrote, saying that, as the committee had not acknowledged his letter, he chose to continue a member of the society. In my opinion, after his letter of resignation, the plaintiff cannot become a member of the society again without being re-elected. I doubt the right of the committee to dispense with the re-election, even if they thought proper to do so.

SMITH, L.J.—[His Lordship stated the facts of the case and continued:] What was the position of the plaintiff the day after he had sent his letter of resignation? He was no longer a member of the society. He had nothing to do with it. They had no power to refuse his resignation. He

had a perfect right to withdraw from the society. Then during a whole month he was not a member. How could he become a member again? In my judgment, only by re-election. Assuming therefore that the court has jurisdiction to interfere, it certainly ought not to interfere in such a case as this. I agree that the appeal should be allowed.

By consent of the parties the hearing of the appeal was treated as the trial of the action, and the action was dismissed with costs, including the costs of the appeal.

Appeal allowed.

Solicitor for the appellants, *Charles Oliver Pook.*

Solicitors for the respondent, *Maitlands, Peckham,* and *Co.*

Wednesday, Jan. 22.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

LOCK *v.* THE QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY LIMITED. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Payments on shares in advance of calls—Interest on—Payment of, out of capital—Validity—Companies Act 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 14, 38, *sub-sect.* 7; *s.* 101; *Table A., clause* 7.

Payment out of the capital of a limited company of interest on sums paid up on shares in advance of calls is not equivalent to a return of capital to the shareholders; and therefore a provision in the articles of association of the company authorising such a payment is not ultra vires, *but the payment can be legally made.*

Dale *v.* Martin (9 *L. Rep. Ir. Ch.* 498; *on appeal,* 11 *Ib.* 371) *approved and followed.*

Trevor *v.* Whitworth (57 *L. T. Rep.* 457; 12 *App. Cas.* 409) *and* The Ooregum Gold Mining Company Limited *v.* Roper (66 *L. T. Rep.* 427; (1892) *A. C.* 125) *distinguished.*

Decision of Stirling, J. (ante, *p.* 708) *affirmed.*

THE capital of a company formed in 1878 now consisted of 164,992 preferred shares of 1*l.* 10*s.* each and the same number of ordinary shares of 7*l.* each. The full sum had been called up on the preference shares, but only 1*l.* on the ordinary shares.

The directors had received from the holders of 20,000 of such ordinary shares the remaining 6*l.* per share uncalled thereon as a payment in advance of calls.

In 1895 the company had earned no profit but, on the contrary, had suffered a loss. The directors nevertheless paid interest at 6 per cent. to the holders of the 20,000 ordinary shares upon the amounts paid by them in advance of calls, and the object of the present action was to restrain the further payment of such interest except out of net profits.

The plaintiffs' contention was, that the payment of interest was, in effect, a return of capital to the shareholders, which, upon the principle of *Trevor* v. *Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409), *The Ooregum Gold Mining Company* v. *Roper* (66 L. T. Rep. 427; (1892) A. C. 125), and cases of that class, was beyond the powers of the company, and illegal.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

The memorandum of association contained no provisions bearing upon the question of payments in advance of calls, but art. 40 of the articles of association gave power to the directors, as they should think fit, to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him upon such terms in all respects as the board might determine.

The following articles were also material:

150. All dividends on shares shall be declared by general meetings. No dividend shall be made except out of the net profits of the company, either for the year or remaining over from previous years in some reserve fund or otherwise; but the directors may, if they see fit to do so, pay out of the capital of the company interest on sums paid up on shares in advance of calls.

154. If a larger amount be paid up on some shares than on others of the same class, the dividend on the shares of that class shall be paid in proportion to the amount paid up on each share, except in so far as all or some part of the excess shall have been received by the board on the terms of paying interest thereon, in which case the part bearing interest shall not be reckoned for the purposes of dividend.

156. The directors shall deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.

158. Unpaid dividends and interest on shares shall never bear interest as against the company.

A motion was made before Stirling, J. in the terms of the writ.

It was decided by Stirling, J. (*ante*, p. 708), on the authority of *Dale* v. *Martin* (9 L. Rep. Ir. Ch. 498; on appeal, 11 Ib. 371), that the stipulated interest could be paid out of capital; and that, therefore, the motion must be refused.

From that decision the plaintiffs now appealed.

Brodie Cooper (*Millar*, Q.C. with him) for the appellants.—The question is, whether the company can pay interest out of its capital to shareholders who have paid sums in advance of their calls. Stirling, J. decided this question in the affirmative on the authority of the decision of the Irish Court of Appeal in

Dale v. *Martin*, 9 L. Rep. Ir. Cas. 498; on appeal, 11 Ib. 371.

Arts. 40 and 150 of the articles of association expressly authorise such a payment. Therefore, unless it is illegal, the directors have power to make the payment under those articles. [KAY, L.J.—The point is, is the payment interest or dividend? If it is interest it may be considered interest on a loan.] That was the point discussed in the case of

Dale v. *Martin* (*ubi sup.*).

But I submit that it is not interest on a loan, for payment in advance of calls is not a loan. Interest paid out of capital on such payments in advance is equivalent to a return of capital to the shareholders. A company can pay interest on its debts out of capital, but not to shareholders in the company. [LINDLEY, L.J.—I can understand that that might be so in the event of a winding-up. I can see that there would be difficulty then.] The directors must contemplate the possibility that a winding-up may supervene at any time, and they cannot disregard the possible rights of outside creditors. [LINDLEY, L.J.—Clause 7 of Table A. in the schedule to the

Companies Act 1862 empowers the directors to pay interest in respect of prepaid calls; and it would be a strong thing to say that articles annexed to the Act of Parliament by the Legislature were *ultra vires*.] That clause must be read as authorising payment of interest out of profits only; and I submit that the Irish Court of Appeal construed it wrongly. The question of payment of interest on dividends out of capital was considered by the Court of Appeal in

Re Sharpe; Re Bennett; The Masonic and General Life Assurance Company v. *Sharpe*, 65 L. T. Rep. 76, 806; (1892) 1 Ch. 154.

The cases most in point since the Irish case are

Trevor v. *Whitworth*, 57 L. T. Rep. 457; 12 App. Cas. 409;

The Ooregum Gold Mining Company Limited v *Roper*, 6 L. T. Rep. 427; (1892) A. C. 125.

[Kay, L.J.—The company may always spend its capital. In the present instance it is merely spending its capital in the ordinary way, as was said by FitzGibbon, L.J. in the Irish case.] Any payment out of capital to shareholders is a return of capital. There is no other fund out of which the interest on prepaid calls can be paid if there are no profits. This transaction is therefore *ultra vires* notwithstanding the articles of association of the company.

Graham Hastings, Q.C. and *C. E. E. Jenkins*, for the respondents, were not called upon to argue.

Lindley, L.J.—I do not feel, I confess, any difficulty about this matter. I think that the answer to Mr. Brodie Cooper's argument, in which he has done full justice to his case, is this: It goes a great deal too far. If he is right, it would follow that no part of the capital of a limited company could be applied in paying a debt to a shareholder of any sort or kind. Now, it is impossible to read *Trevor* v. *Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409) and *The Ooregum Gold Mining Company Limited* v. *Roper* (66 L T. Rep. 427; (1892) A. C. 125), and suppose for a moment that the learned Lords who decided those cases intended to lay down any such proposition as that. It would be entirely contrary to the provisions of the Companies Act 1862. If you look at sect. 38, sub-sect. 7, and sect. 101 of the Companies Act 1862, you will find that shareholders can be creditors of their own companies, and that they can come in and prove in competition with creditors of their own companies, provided only that their claims are not in respect of either shares or dividends or profits. In other words, if I am a shareholder in a limited company, and I lend that company 20,000*l.* on the terms of being repaid the same with interest, I am entitled to be repaid that 20,000*l.* and interest out of the capital of the company in competition with the other creditors of the company, even in the event of a winding-up of the company. I am not entitled to stand as a creditor of the company in competition with other creditors, or with any creditors, in respect of my capital, whether prepaid or not prepaid, or in respect of dividends or profits or anything of that sort. But, in respect of debts contracted with me as an outsider, to use a common expression. I am entitled. Therefore, Mr. Brodie Cooper's argument, I repeat, goes a great deal too far. We have to look to this simple question, whether there is anything *ultra vires* of this company in the stipulation that it shall be lawful for the directors to pay to a shareholder, whilst the company is a going concern, so much money—6 per cent.—upon capital advanced before it has become due in respect of calls. I have already pointed out in the course of the argument how extremely disastrous it would be to companies to deprive them of that power. It is a benefit to the company to be able to raise money upon terms so much more advantageous to itself, than by contracting an ordinary debt, which would compel the company to repay the principal as well as the interest on it. By this machinery the company can raise money by obtaining advances from the shareholders in respect of their calls not yet due, upon the terms of paying, what I may call for convenience, interest upon capital so prepaid. which interest will cease when that capital is really called up. Nobody supposes that the interest will go on after all the capital is called up. It is interest on prepaid capital, and when the prepayment ceases to be a prepayment there is no interest payable. Now, if you look at the material clauses in the articles of association, you will find that they are expressly framed with a view to carry out that kind of business arrangement. Art. 154—which Mr. Brodie Cooper did not read, but which I have looked at because it was referred to by Stirling, J.—does throw light on the true construction of arts. 40 and 150, and it shows that, when the capital is called up, this arrangement about interest will cease and the shareholders will be on a par. They will have to take dividends instead of interest. Now, it is said that clause 7, in Table A, in the first schedule to the Companies Act 1862, which authorises the directors to pay interest in respect of prepaid calls, does not authorise the directors to pay that interest out of capital, and Mr. Brodie Cooper's contention is, that we must read it as authorising only the payment of interest out of profits. Well, I admit that the language is not so explicit as perhaps might be desired. But a construction has been put upon that clause in Ireland in 1883, in the case of *Dale* v. *Martin*, originally by the court of first instance (9 L. Rep. Ir. Ch. 498), and subsequently by the Court of Appeal (11 L. Rep. Ir. Ch. 371), in which that court held that interest could be paid, in respect of prepaid calls, even out of capital. We are asked to say that that is wrong, although it has stood from 1883 downwards and has been acted on, I believe, ever since throughout the whole of England. I cannot help thinking that the judgment of the Irish court was right, and right on principle; and that the principle upon which they have decided the case does not infringe at all the principles laid down and acted on by the House of Lords in *Trevor* v. *Whitworth* (*ubi sup.*) and *The Ooregum Gold Mining Company Limited* v. *Roper* (*ubi sup.*). The purchasing of shares is a totally different transaction, and so is the issuing of shares at a discount. The Act of Parliament says that the shares are to be paid for; that 20*l.* a share means 20*l.* a share; and that the 20*l.* is to be paid. And *The Ooregum* case (*ubi sup.*) means this, that you cannot avoid the liability by the company buying back the shares. That is all, but that has nothing to do with the payment of debts. You must look for the obligation to pay debts, at sect. 38 and sect. 101; and, having regard to those sections, it seems to me that the decision

of the Irish court is quite right; that the decision of Stirling, J. is quite right; and that this appeal must be dismissed.

Kay, L.J.—In this case the articles of association of the company distinctly authorise what has been done. Art. 40 empowers the board from time to time, as they think fit, to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him, upon such terms in all respects as the board may determine. Art. 150 provides that all dividends on shares shall be declared by general meetings; and that no dividend shall be made except out of the net profits of the company, either for the year, or remaining over from previous years in some reserve fund or otherwise; but that the directors may, if they see fit to do so, pay out of the capital of the company interest on sums paid up on shares in advance of calls. Then art. 154 shows that that interest is only payable while the sum is in advance of calls. First of all, is that legal or illegal? If these articles are *ultra vires*, then of course the argument succeeds. Are they *ultra vires*? How can they be *ultra vires* when we find in sect. 14 of the Companies Act 1862, that any company "may adopt all or any of the provisions contained in the table marked A." in the first schedule to the Act. Clause 7 of Table A. is this: "The directors may, if they think fit, receive from any member willing to advance the same, all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon." That is the law. The provision of Table A. is made legal by the Act of Parliament itself. I have referred already to sect. 14 of the Act. Now the provisions in the articles of this company in effect are the same as that provision in Table A. Therefore it is impossible to say that the articles, so far as they authorise the directors to agree to pay interest upon the capital paid by the shareholders on their shares in advance, are *ultra vires*, or beyond the powers of the company whose articles contain that provision. Then the next thing is, what is the meaning of the provision that the company may take from its shareholders in advance—that is, before calls are made—money remaining unpaid on their shares, and may agree to pay interest on such money at such rate as the directors think fit? That agreement to pay interest is a valid agreement, and the fact is this: The company borrows money from its shareholders that it need not pay back, which is a great advantage to the company because, if it borrowed from outsiders, then the money might be recalled, and the company might have to pay back the capital. But, borrowing the money from shareholders, the company has not to pay back the capital. Therefore, when the company borrows it in that way, it gets a great advantage. But the company is at liberty to contract to pay interest, and what is that interest when it is contracted to be paid by the company? Is it anything but a debt? It is a valid contract. It is not dividend on shares. I cannot conceive how in law it can be considered as anything but a debt. A contract to pay interest upon money which the shareholder voluntarily pays in advance on the faith of that contract, must be a debt created by contract, and then, if it is a debt created by contract, and if that contract is a legal and valid contract, why should not the interest be paid out of capital? The company it seems had not, and I assume that it had not, profits out of which to make these payments, and the debenture-holders are now objecting to these payments of interest being made out of capital; but, as I have already said, they are debts. If they are debts, how can the debenture-holders object? It seems to me that such payments are plainly debts which the company is bound to pay by contract with its shareholders, which contract, as I have before remarked, is perfectly legal. Now I quite agree, if I may respectfully say so, with the reasoning of Fitzgibbon, L.J. in the case of *Dale* v. *Martin* (*ubi sup.*), which has been referred to. It is cited by Stirling, J., and I read from his judgment this part of the citation: "But then it is said the payment of the interest out of capital reduces the capital below the nominal amount fixed by the memorandum. This it must be conceded the board could not do; but the answer to the objection is, that this is not a reduction of capital in any sense except that of a spending of the capital in payment of a lawful debt, which occurs in every case in which money has to be paid out of capital in discharge of the liabilities of a company." That is a complete answer to that part of the argument. The company cannot reduce its capital. It cannot do so either by issuing shares at a discount, or by repurchasing its own shares. That, the House of Lords has decided in the two cases which have been cited to us of *The Ooregum Gold Mining Company Limited* v. *Roper* (*ubi sup.*), and *Trevor* v. *Whitworth* (*ubi sup.*). But the payment of interest on calls paid in advance is not a diminution of the nominal capital. It is not a return of capital to the shareholders. As Fitzgibbon, L.J. says, it is a proper spending by the company of its capital in payment of that which was a *bonâ fide* debt of the company. I think that the decision, if I may respectfully say so, of the court in Ireland, was quite right, and that the decision of Stirling, J. following that was also quite right. I observe that, in the case in the House of Lords, which has been referred to, of *Trevor* v. *Whitworth* (*ubi sup.*), Lord Herschell, in his speech, says this (at p. 415 of 12 App. Cas.): "What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorised. Of this all persons trusting the company are aware and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the

shareholders." This being expenditure within what seems to me to be the proper and lawful limits of the expenditure of a company, it comes exactly within those words of Lord Herschell, in the case of *Trevor* v. *Whitworth* (*ubi sup.*).

SMITH, L.J.—I entirely agree.

By consent of the parties the hearing of the appeal was treated as the trial of the action, and was dismissed, but without costs.

Appeal dismissed.

Solicitors for the appellants, *Ashurst, Morris, Crisp,* and *Co.*

Solicitors for the respondents, *Trinder* and *Capron.*

Monday, Feb. 3.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re RAY (a Person of unsound mind).

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunacy—Settled land—Lunatic tenant for life—Sale of lunatic's estate—Conveyance "as beneficial owner"—Covenants on behalf of lunatic—Power of committee—Conveyancing Act 1881 (44 *&* 45 *Vict. c.* 41), *s.* 7 (*A*); *Settled Land Act* 1882 (45 *&* 46 *Vict. c.* 38) *ss.* 3, 4, 20, 55, 62; *Lunacy Act* 1890 (53 *Vict. c.* 5), *ss.* 120, 122, 124.

Under sect. 124 *of the Lunacy Act* 1890 *the judge in lunacy has jurisdiction to authorise the committee of a lunatic, who is selling the lunatic's estate under an order of the judge, not only to execute a conveyance of the estate on behalf of the lunatic, but also to bind the lunatic by entering into all such covenants on his behalf as are usual and proper in such a conveyance, including the ordinary covenants for title.*

Re FOX (55 *L. T. Rep.* 39; 33 *Ch. Div.* 37) *explained and distinguished.*

CAPTAIN H. R. RAY was entitled, as tenant for life in possession, to one undivided moiety of certain estates under the will of a testator (who acquired the property by purchase), the Hon. E. A. Fitzroy being tenant for life in possession of the other moiety of the property.

Captain Ray became a lunatic, and was so found by inquisition, and A. L. Wheeler was appointed the committee of his estate.

By an agreement, dated the 30th Oct. 1895, made between Captain Ray, acting by A. L. Wheeler, and the Hon. E. A. Fitzroy of the one part, and the purchaser of the other part, the parties of the first part agreed to sell and the purchaser agreed to purchase the inheritance in fee simple in possession of the property.

By clause 7 of the agreement it was provided that the vendors would, on payment of the purchase money, execute a proper assurance of the premises to the purchaser or his nominee, the engrossment thereof being made in the office of the Master in Lunacy at the expense of the purchaser.

Clause 8 of the agreement stated that Captain Ray sold as tenant for life under the powers of the Settled Land Acts; and it was stipulated that he should not be required to enter into any covenants for title other than those implied by his conveying "as beneficial owner," subject to a proviso that, so far as regards the remainder expectant on his life estate, and the title to and further assurance of the property after his death, his implied covenants should not extend to the acts or defaults of any person other than himself and his own heirs, and persons claiming or to claim under or in trust for him or them.

The agreement was executed by Captain Ray by A. L. Wheeler, his committee, and it was stated therein that the conveyance of the property would be executed in the same manner.

On the application of the vendors the agreement was confirmed by Kay, L.J. sitting in lunacy, but the case of *Re Fox* (55 L. T. Rep. 39; 33 Ch. Div. 37) having been cited to his Lordship, he expressed a doubt whether the lunatic could be bound by any covenants.

The purchaser having refused to accept any conveyance not containing all the usual and proper covenants for title, the application was renewed in court.

Crackanthorpe, Q.C. and *Borthwick* for the applicants.—The question is whether, on a sale of the lunatic's estate under the Settled Land Act 1882, the committee can enter into the usual covenants for title on behalf of the lunatic, the lunatic being expressed to convey "as beneficial owner": (see sect. 7 (A) of the Conveyancing Act 1881.) The lunatic having derived his estate through a testator, the covenants will relate to the acts of his testator and his own acts. The purchaser refuses to complete without the usual covenants for title. [SMITH, L.J.—It is evident that, if the committee could not enter into covenants, the result might be that he could not sell the estate at all.] The statutory provisions relating to the matter are these: Settled Land Act 1882, sects. 3, 4, 20, 55 (2), 62; Lunacy Act 1890, sects. 116, 117, 120, 122 (1), (2), 124; Lands Clauses Consolidation Act, sect. 7. What the practice of conveyancers has been appears from Davidson's Precedents, edit. 1864, p. 364. Whatever difficulty there is arises from the decision of the Court of Appeal in

Re Fox, 55 L. T. Rep. 39; 33 Ch. Div. 37.

That, however, was a very special case, and the point was not argued out. The present is an entirely different case. Every word of *Re Fox* (*ubi sup.*) can be read without its being treated as saying that the committee of a lunatic cannot enter into covenants for title on the sale of a lunatic's estate. We ask the court to take a broad view of the Settled Land Act 1882, the object of which was not to tie up, but to make the transfer of land simpler than before. We submit, therefore, that a lunatic tenant for life by his committee can enter into all the usual and proper covenants on a sale of his estate.

LINDLEY, L.J.—I do not think that there is much difficulty in this case apart from the decision in *Re Fox* (55 L. T. Rep. 39; 33 Ch. Div. 37). I was a party to the decision in that case, and, although one's memory may be rather treacherous, I cannot believe that we meant to go so far as to say that under no circumstances, having regard to sect. 116 of the then Lunacy Act, was there jurisdiction to authorise a covenant by the committee of a lunatic to repay money. *Re Fox* (*ubi sup.*) was a peculiar case. We were asked to sanction a covenant by the committee of a lunatic to pay

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

money not for debts of his own, but other people's debts, and we doubted whether that could be done, and would not sanction it. Certainly there are passages in the report which look at first as if Cotton, L.J. thought that there was no power to do it. I myself doubt, however, whether we intended to go that length, and if we did, we put an uncommonly narrow construction on sect. 116 of the Lunacy Regulation Act 1853, and one not likely to be abided by. Now, having made those observations, when we look at the present case we find that it is a different one, and turns upon a different Act of Parliament. I think that it would be a very unfortunate decision if we construed the Act so narrowly as to say there was no jurisdiction on the part of the judge in lunacy to sanction such a clause as is proposed in a conveyance like this one. The lunatic has been so found by inquisition, and he is entitled, as tenant for life, to one moiety of an estate. There is an advantageous proposition to sell both moieties of the estate, and the owner of the other moiety agrees. There is no doubt felt by the judge in lunacy, or anybody else, that the proposed sale of the whole estate upon the terms which have been previously approved would be extremely beneficial to the lunatic. Now, how is the lunatic to convey the half of the estate in which he is interested as tenant for life? Of course, apart from the Settled Land Acts, he could only convey his life interest. But under the Settled Land Act of 1882, especially sect. 62, the judge in lunacy has power to authorise the committee of the lunatic to sell the whole estate as if the lunatic were *sui juris*. If one looks at sects. 3, 4, 20, and 55 of the Settled Land Act of 1882 it will be found that a tenant for life, who is not a lunatic, can certainly enter into an arrangement of this kind. And I do not think that there is any real difficulty about an ordinary tenant for life selling and expressing to convey as beneficial owner. What that means is that, if the tenant for life purports to sell under the powers of the Settled Land Act of 1882, and is expressed to convey as beneficial owner, then the covenants referred to in the 7th section of the Conveyancing Act of 1881 will be implied and incorporated. I do not see any difficulty so far. When you turn to sect. 62 of the Settled Land Act of 1882 you find that, where a tenant for life or a person having the powers of a tenant for life under that Act is a lunatic so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted with the care of lunatics, "exercise the powers of a tenant for life under this Act, and the order may be made on the petition of any person interested in the settled land or of the committee of the estate." What does that mean? That means that the committee may sell the fee simple under the powers conferred by sects. 3 and 4 of the Settled Land Act of 1882, and the sale must be for the best price. Then we go a little further, and we come to the Lunacy Act 1890. We find that there is a power to sell, and sect. 124 says this: "The committee of the estate, or such person as the judge approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and thing shall be valid and effectual and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject." That appears to me to authorise the judge in a proper case to sanction an assurance by the committee of a lunatic in the way in which assurances are commonly executed according to the practice of conveyancers in dealing with real property. I do not see how it is possible for the committee of the lunatic in the present case to exercise his powers in the most beneficial way unless he enters into some covenant for title as proposed. The covenants are the common ones and are not onerous ones. First of all, there will be imported the covenants which by the Conveyancing Act of 1881 are implied when a person conveys, and is expressed to convey, as beneficial owner. But those covenants are followed by a proviso that cuts them down immensely, and the whole effect of that proviso on the covenants which we are asked to sanction is to confine the covenants to the life estate of the lunatic. If we did not sanction the covenants we should put a fetter on the committee's power which would be most prejudicial to the interests of the person whom we are bound to protect. I think, however, that the language of the statutes is sufficient for the purpose, and that we ought to approve of this sale.

KAY, L.J.—Under the Settled Land Act of 1882 a tenant for life is authorised to sell and convey the fee simple of the land, but he is not authorised to enter into any covenants at all. It was not the purpose of the Act that he should do so, and it had nothing to do with covenants. The Act gave him a statutory power to convey the fee simple, and, of course, *primâ facie*, it applied to a case where the tenant for life was *sui juris*, and could enter into such covenants as he pleased. But there is nothing in that Act referring to any covenants to be entered into by a tenant for life when he is selling and conveying land. Sect. 62 provides that: "Where a tenant for life, or a person having the powers of a tenant for life, under this Act is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act." As I have pointed out, it is no part of the powers of a tenant for life under the Settled Land Act of 1882 to enter into covenants. Any covenant which he has to enter into is not a statutory covenant under the Settled Land Act of 1882; and therefore the 62nd section does not by itself in any way authorise the committee of a lunatic to enter into any covenant. So far the matter is perfectly clear. Next we come to the Conveyancing and Law of Property Act of 1881, and I confess that there is a little difficulty upon that. That Act provides, by sect. 7 (A), that: "In a conveyance for valuable consideration, other than a mortgage, the following covenants by a person who conveys, and is expressed to convey, as beneficial owner," shall be implied: Then follow the usual covenants for title. That statutory provision, however, only applies to a case where a person conveys, and is expressed to convey, "as beneficial owner." It is rather difficult to say that a tenant for life under the Settled Land Act of 1882 conveys the fee simple as

beneficial owner. That he may be expressed to convey as beneficial owner I can understand. But perhaps it is expedient to give to this clause of the Conveyancing Act of 1881 a wide meaning, its main object being to prevent the necessity of setting out all the usual covenants at length. When a person conveys as beneficial owner, and is expressed to convey as beneficial owner, those covenants are to be implied, and it is a compendious mode of having those covenants in a conveyance when they are not set out at length. Moreover a tenant for life has some beneficial interest, because he has a life interest, and therefore a conveyance which passes the fee simple includes his life interest. I think it is possible to say, without straining the words, that a tenant for life may convey under the Settled Land Act of 1882 expressing himself to be conveying as beneficial owner for the purpose of introducing these covenants, and, when he does so, the covenants which I have referred to in the Conveyancing Act of 1881 may be considered as contained in the conveyance. So far the ground is clear. Then we come to the Lunacy Act of 1890. So far I have found nothing whatever to authorise the committee of a lunatic to enter into covenants for title so as to bind the lunatic. The Conveyancing Act of 1881 does not refer to a committee at all, but to an ordinary person who is *sui juris*, and is conveying as beneficial owner. By the Lunacy Act of 1890, sect. 120, it is, however, enacted that: "The judge may by order authorise and direct the committee of the estate of a lunatic to do all or any of the following things," and the first is "(*a*) sell any property belonging to the lunatic." Then the section contains sub-sections from (*a*) to (*l*), which state the various things that the judge may authorise and order the committee of a lunatic to do. There is not in any one of those sub-sections any power to authorise the committee to bind the lunatic by any covenant. But in sect. 122 we find this: "(1) The power to authorise leases of a lunatic's property under this Act shall extend to property of which the lunatic is tenant in tail . . ." And sub-sect. 2 says: "Leases authorised to be granted and accepted by or on behalf of a lunatic under this Act may be for such number of lives, or such term of years, at such rents and royalties, and subject to such reservations, covenants, and conditions as the judge approves." There you have an express power in the judge to approve of reservations, covenants, and conditions. That provision cannot refer to the lessee. The words "covenants and conditions" are coupled with the word "reservations," and reservations would be favourable to the lessor. No doubt the section includes covenants by the lessor—that is to say, the committee on behalf of the lunatic in such a case as this. Therefore as regards a lease there is an express power for the judge to authorise the committee of a lunatic to enter into covenants. In sect. 124 there is no express power of that kind, nor can I find it in any of the other sections referred to. I believe there is no such express power in the Act. But sect. 124 enacts as follows: "The committee of the estate, or such person as the judge approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the judge directs," and so on. Now, a covenant is not strictly an "assurance." The point has been much contested when considering the meaning of that word in the Bills of Sale Acts. An "assurance" is really something which operates as a transfer of property; and an assurance can hardly be a covenant. But the section says, "All such insurances and things," and the latter word is put in no doubt so as to enlarge the power. I should say that in furtherance of the general intention this section is wide enough to enable the court to authorise the committee of a lunatic to execute a conveyance on behalf of a lunatic with all such covenants as are usual in such a conveyance including the ordinary covenants for title. But when this case came before me in my private room my attention was called to the case of *Re Fox* (*ubi sup.*). *Re Fox* (*ubi sup.*) was not a case under the present Act of Parliament—the Lunacy Act of 1890—but under an Act worded differently, although very nearly in the same terms. In the Lunacy Regulation Act of 1853, by sect. 116, it was provided that the Lord Chancellor and other persons intrusted "may order that any estate or interest of the lunatic in land or stock," and so on, should be sold or mortgaged, and so on. "And the committee of the estate may and shall, in the name and on behalf of the lunatic, execute, make, and do all such conveyances, deeds, transfers, and things relative to any such sale, mortgage, charge, or other disposition as aforesaid, and for effectuating this present provision, as the Lord Chancellor intrusted as aforesaid shall order." Those words, to my mind, are quite as wide as the words in sect. 124 of the Lunacy Act of 1890, and indeed that section contains certain words which sect. 124 does not. Sect. 124 authorises the committee to execute and do all such assurances and things as the judge directs; and sect. 116 of the former Act authorised the committee to execute, make, and do all such conveyances, deeds, transfers, and things. Those words are therefore quite as large as, although perhaps not essentially larger than, those in the Act of 1890. Now, in the case of *Re Fox* (*ubi sup.*) the lunatic was entitled in fee to one moiety of certain real estate as one of two coheiresses of an ancestor who died intestate; and the real estate was liable to pay the debts of that ancestor, whose personal estate was insufficient to pay them. It was desired to raise money for the payment of those debts; and a mortgage of the property, of which one moiety belonged to the lunatic, was sought to be authorised by the court in lunacy. The question arose whether there could be covenants for payment of the mortgage money. The mortgage money was not due from the lunatic, but from the ancestor, and the lunatic was only liable to it so far as she obtained assets from that ancestor, and not further. Therefore a personal covenant to pay the money would be a new obligation. But, according to the report in 33 Ch. Div., Cotton, L.J. said (at p. 38): "I very much doubt whether the court can direct a committee to covenant in the name of a lunatic." Those words are large enough to express a doubt whether any covenant could be entered into by a committee to bind a lunatic. That may or may not have been the meaning. Again Cotton, L.J. says: "I doubt whether we have jurisdiction to do more than give the mortgagee the rights of a mortgagee against the particular estate." There can be no mistake about the meaning of Cotton, L.J. He thought

that there was no jurisdiction to bind the lunatic's estate by a covenant of that kind, and he does not confine it to that particular covenant. Then when he comes to give judgment he says this: "It being clearly for the benefit of the lunatic's estate that this 5000*l.* should be raised, we think we can authorise the committee to concur, in the name and on behalf of the lunatic, in a mortgage of the entirety of a portion of Thomas Fox's estate, and, if necessary, of Richard Fox's estate, for raising it, provided that the mortgage be so framed that the lunatic's moiety of the property cannot be made liable for any default of the other part owner in payment of her moiety of the principal and interest. We do not, however, see our way to authorising the committee to enter into any covenant on behalf of the lunatic." That decision makes it very difficult for this court to say that any covenant can be entered into on a sale by the committee so as to bind the lunatic. However, Lindley, L.J., who was a party to that decision, doubts whether the court intended to go so far as that, and whether the refusal went further than an exercise of the discretion of the court as to that particular covenant, namely, a covenant to bind the lunatic to pay money, which she was not bound to pay, to the extent of the assets received. The difficulty that arises from that case would, therefore, be removed if that is the true construction of it. I agree that it is beneficial for lunatics in general to read sect. 124 of the Lunacy Act of 1890 as authorising the court in a proper case to allow a committee to bind the lunatic by such covenants as are usual on a sale. I will not go further than that. Of course the ordinary covenants for title are usual on a sale; and therefore I think that in this case we may say that the difficulty arising from the decision in *Re Fox* (*ubi sup.*) being removed, the court has jurisdiction to approve of the proposed sale.

SMITH, L.J.—The question in this case is whether or not a committee of a tenant for life who has been found lunatic by inquisition has not only the power of selling the lunatic's estate, but of entering into covenants which are necessary for that purpose. There can be no doubt—in fact it is not disputed—that the covenants in question are necessary covenants in order to carry out the sale if it is to be effected, and the sale has been found beneficial for the lunatic's estate. The question is whether there is the power. That drives one to the statutes to see whether this power is given to a committee under these circumstances or not. Sect. 62 of the Settled Land Act of 1882 enacts as follows: [His Lordship read the section and continued:] That is clear. Then comes this question: What powers has a tenant for life who is not a lunatic so found by inquisition as regards selling the estate? That drives one back to sect. 3 of the Settled Land Act of 1882, which enacts that a tenant for life may sell the settled land. Sect. 4 of the same Act says: "Every sale shall be made at the best price that can be reasonably obtained." Then sect. 55, sub-sect. (2) enacts that, where a power of sale is exercised by a tenant for life, he may "execute, make, and do all deeds, instruments, and things necessary or proper in that behalf." It does seem to me that the conjoint operation of those sections would give a tenant for life power not only to sell, but to enter into covenants necessary for the purpose of effecting that sale. The question does not rest there because the Lunacy Act of 1890 also applies to a case like this. By sect. 120: "The judge may, by order, authorise and direct the committee of the estate of a lunatic to do all or any of the following things"; and the first is "(*a*) sell any property belonging to the lunatic." Reading that in conjunction with the Settled Land Act of 1882, sect. 62, there is power to sell the property of a lunatic when he is tenant for life. Then what happens after that? The committee of the estate, in the name and on behalf of the lunatic, may execute and do all assurances and things for giving effect to an order under this Act that the judge directs. If we were to put the limited construction on this Act which has been suggested, and which might be put upon it, we should be bringing these two Acts of Parliament as regards lunatics so found by inquisition to a dead-lock, because in numberless cases the committee could not effect a sale beneficial to the lunatic's estate without entering into proper covenants with the purchaser, who would not buy unless those covenants were entered into. Taking not what I call a broad view, but a correct view, of these sections together, I think that there is this power given to a committee to enter into proper covenants when he sells the estate of the tenant for life who is a lunatic so found by inquisition. Then we were referred to the case of *Re Fox* (*ubi sup.*). I have nothing to say about that beyond what has been said. I do not read that as a decision that in no case can an order be made for a committee of a lunatic to enter into any covenants at all. The real decision was, that on the facts there the court did not see its way to authorise what was applied for. I think, therefore, that we should confirm the agreement.

Application allowed.

Solicitors for the applicants, *Blunt* and *Co.*

Thursday, Jan. 16.

(Before Lord ESHER, M.R., SMITH and RIGBY, L.JJ.)

ANDREWS v. MOCKFORD AND OTHERS (No. 1). (*a*)

APPLICATION FOR A NEW TRIAL.

Company — Prospectus — Fraud — Purchase of shares in the market—Damages.

The promoters of a company issued prospectuses to the public, and sent a copy to the plaintiff amongst others. The company was a sham and the prospectus fraudulent. The plaintiff read the prospectus, but did not apply for shares. Afterwards the defendants caused to be published in a financial newspaper a telegram concerning the company which to their knowledge was false.

The plaintiff, on reading the telegram, purchased shares in the company in the market, and thereby suffered damage which he sought to recover from the defendants. At the trial the jury found (inter alia) *that one of the objects which the defendants had in view, both when issuing the prospectus and when publishing the telegram, was to induce the plaintiff as one of the public to purchase shares in the company in the market.*

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

Upon an application by the defendants for judgment:

Held, that there was evidence on which the jury might reasonably come to the conclusion that the function of the prospectus was not exhausted upon the allotment of the shares, and that there had been one continuous fraud, commencing with the prospectus and culminating in the publication of the telegram, practised by the defendants upon the plaintiff with the object of inducing him to purchase shares in the company in the market, and that the plaintiff having suffered damage in consequence of having been thereby induced to purchase shares in the company in the market was entitled to judgment.

THIS was an application for judgment or a new trial after the trial of the action before Lord Russell, C.J. with a jury.

The action was brought to recover 411*l.* 15*s.* 6*d.* as damages caused to the plaintiff by the defendants' conspiracy and fraudulent misrepresentation in connection with an African gold-mining company.

In Jan. 1889 the defendants issued the prospectus of a gold-mining company, called the Sutherland Reefs Limited, and sent a copy of the prospectus to the plaintiff as well as to other members of the public. The plaintiff read the prospectus, but did not apply for any shares in the company.

On the 24th Sept. in the same year, the defendant Mockford, sen., received from his son in Africa the following telegram:

Sutherland Reef; main shaft down fifty feet; discovered large body pay ore assay twenty-four ounces to the ton.

The defendant Mockford, sen., did not disclose the telegram to the shareholders of the Sutherland Reefs Limited, and on the 27th Sept. there appeared an article in the *Financial News*, which was practically an expansion of the telegram.

On the 28th Sept. the plaintiff, having read the article, purchased shares in the Sutherland Reefs Limited.

The company never paid any dividend, and was wound-up in 1891.

In consequence of his purchase of the shares the plaintiff suffered a loss of 411*l.* 15*s.* 6*d.*

At the trial of the action before Lord Russell, C.J. with a jury, the jury, in answer to several questions left to them, found that the defendants had conspired to defraud the plaintiff as one of the public by promoting sham companies, namely, the Sutherland Reefs Limited and another company; that the defendants authorised the sending of a prospectus to the plaintiff of the Sutherland Reefs Limited in order to induce the plaintiff to buy shares in the market as well as to make an application for shares; that the defendants conspired to create fictitious prices of the Sutherland Reefs Limited in order to induce the plaintiff as one of the public to buy shares in the company at those fictitious prices; that the telegram was false, to the knowledge of the defendants, and concocted with the view to induce the plaintiff, amongst others, to buy shares in the market, and that the plaintiff bought the shares in consequence of the telegram.

Lord Russell, C.J. accordingly gave judgment for the plaintiff for the amount claimed.

The defendants moved for judgment or for a new trial.

Carson, Q.C. and *F. M. Abrahams* for the defendants.—There was no evidence proper to be left to the jury in support of the plaintiff's case. Assuming that there was a conspiracy by the defendants, it did not damnify the plaintiff. First as to the prospectus of the company. A prospectus is merely an invitation to apply for an allotment of shares. After the shares have been allotted, the functions of a prospectus are exhausted. Therefore the plaintiff, who had only bought shares in the market, cannot rely upon anything with regard to the prospectus of this company:

Peek v. *Gurney*, L. Rep. 6 H. of L. 377, at p. 410.

As to the telegram, there is no evidence to show any connection between the defendants and the article in the *Financial News*, upon the reading of which the plaintiff purchased these shares. But even assuming everything on this matter against the defendants, the plaintiff ought not to recover in this action. The damages claimed are too remote. The price at which the plaintiff bought was the result of purchases by the public. Upon this point they referred to

Rex v. *De Berenger*, 3 M. & S. 67;
Barry v. *Crosskey*, 2 J. & H. 1, at p. 18;
Peek v. *Gurney*, L. Rep. 6 H. of L. 377, at p. 412;
Salaman v. *Warner*, 65 L. T. Rep. 132.

Astbury, Q.C. (*McCall*, Q.C. and *T. M. Whitehouse* with him) for the plaintiff.

Carson, Q.C. replied.

Lord ESHER, M.R.—I am of opinion that this application for a new trial must be dismissed. The grounds of this application are that there was no evidence to go to the jury in support of the plaintiff's case, and misdirection. But as to both of these grounds the contention of the defendants is the same, and the only question therefore for our decision is whether there was evidence which was properly left to the jury in support of the plaintiff's case. Now, there was clear evidence given that the defendants issued to the plaintiff personally a prospectus of the proposed Sutherland Reefs Company. There was also strong evidence that that prospectus was grossly fraudulent in its description of the Sutherland Reefs mine. There was also evidence upon which the jury might well come to the conclusion that the defendants, when they sent out that prospectus, did not issue it merely with the object of inviting people to subscribe to the proposed company, but that they issued it having in their minds the intention of using it afterwards to carry out the fraud, and of supporting the prospectus afterwards by other means. There was also evidence that the defendants did afterwards resort to other means to carry out that original intention. I pass by some small matters that have been referred to, and I will come to the telegram. There was evidence that the defendant Mockford, sen., received a telegram from his son in Africa, and there is evidence upon which the jury might reasonably find that that telegram was suggested by Mockford to his son, and that he arranged that it should contain a statement as to the working of the mine, and as to the findings in it, which he knew was untrue. What was the object of that false telegram? The telegram was to be used to

strengthen the prospectus, and to be a means of carrying out the intention of the defendants which they had in their minds at the time when they issued the prospectus. Now, the telegram sent to Mockford, sen., would not be known to anyone else unless he chose to disclose it. He did not disclose it to the members of the Sutherland Reefs Company. There was therefore evidence upon which the jury might infer that he himself sent to the *Financial News* the article that elaborated the telegram and added it to the prospectus with the object of its being so published, Therefore when he sent that article to the *Financial News* he was joining the telegram to the prospectus for the purpose of carrying out his original intent. I do not think that any reasonable man could come to any other conclusion but that. His object in sending that article to the *Financial News* was that it might be read by the people to whom he had sent the prospectus, and that the prospectus being thus fortified, these people might be induced to buy shares in the company. I think that the jury were entitled to draw the conclusion that the defendants, by means of one continuous fraud, carried out in the manner I have described, induced the plaintiff, to whom they had sent a prospectus, to buy shares in the company. The jury were therefore entitled to find a verdict for the plaintiff. The case comes within the propositions laid down by Lord Cairns in *Peek* v. *Gurney* (L. Rep. 6 H. of L. 377, at p. 413). The defendants made a false representation to the *Financial News*, upon which the plaintiff acted and was damnified, and that false representation was made to the *Financial News* with the intent that it should be acted upon by any person reading it who had previously received a prospectus from the defendants. And, as the jury have found, I think that the damage suffered by the plaintiff was the immediate consequence of what the defendants did.

SMITH, L.J.—I agree with what the Master of the Rolls has said. The plaintiff in this action seeks to recover damages from the defendants for having by fraudulent devices induced him to purchase shares in a sham gold-mining company, for which he paid the sum of 411*l.* 15*s.* 6*d.*, and the jury, in answer to specific questions left to them by the Lord Chief Justice, have found that the plaintiff has established his allegations, and have given a verdict for him for the amount claimed, for which judgment has been entered. Application is now made to this court to enter judgment for the defendants, or for a new trial, upon the ground that there was no evidence to support the plaintiff's case. The case made by the plaintiff is this: that the defendants fraudulently agreed together to publish and to send to the plaintiff, and did in fact send to him, a prospectus of the Sutherland Reefs Company, which they knew, when brought out, to be a sham or fraudulent company, in order to induce the plaintiff to purchase shares therein; that the plaintiff did not then do so; that the prospectus, so issued, having produced but a scanty subscription for shares, the defendants thereupon fraudulently caused to be published in the *Financial News* a telegram which they knew to be false in order to stimulate and bring about that which the prospectus had been intended to effect, but had failed in doing; that the plaintiff believing in the truth of the telegram, confirming as he thought it did the statistics given in the prospectus, was thereby induced to purchase the shares whereby he was damnified. That, as I understand, is the case made by the plaintiff. It appears to me that the answers given by the jury to the questions which were left to them by the Lord Chief Justice establish the plaintiff's case. It is now said that there is no evidence to support some of these findings. No evidence was given at the trial by the defendants, though some of them were in court. The plaintiff gave evidence (1) that he received the prospectus which was sent to him by post, and it is not disputed that it had been issued by the defendants; (2) that having read it he did not then apply for shares, but laid it aside for a time; (3) that he afterwards saw the telegram in the *Financial News*, and, believing that its contents were true, and that it confirmed the statistics given in the prospectus, he thereupon purchased the shares. In other words, he says that he purchased upon the faith of the statements contained in the prospectus supported by the statements in the telegram that a shaft had been driven and that a large body of payable ore had been opened. assaying by Government assay twenty-four ounces to the ton. It was argued on behalf of the defendants that the plaintiff upon this evidence did not purchase the shares by reason of the conjoint operations of the prospectus and telegram, but only upon what he saw in the *Financial News*. As to that, I will refer to a passage in Lord Halsbury's judgment in *Arnison* v. *Smith* (61 L. T. Rep. 63, at p. 67; 41 Ch. Div. 348, at p. 369), which is very pertinent to this point. Lord Halsbury said: "A person reading the prospectus looks at it as a whole, he thinks the undertaking is a fine commercial speculation, he sees good names attached to it, he observes other points which he thinks favourable, and on the whole he forms his conclusion. You cannot weigh the elements by ounces. It was said, and I think justly, by Sir George Jessel in *Smith* v. *Chadwick* (46 L. T. Rep. 702, at p. 708; 20 Ch. Div. 27, at p. 44) that if the court sees on the face of the statement that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shown that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not." The fourth point on which the plaintiff gave evidence was that the telegram was published at the defendants' instance in the *Financial News*. It is said by the defendants that no such evidence was given, but it seems to me that there is abundant evidence from which the jury might infer that the defendants sent the telegram to the *Financial News* that it might be published in that newspaper. There was also evidence to go to the jury that the telegram was false to the knowledge of the defendants. But then it was argued that, assuming that the telegram was published at the instance of the defendants with a fraudulent intent and that its contents were false to their knowledge, and that the plaintiff really did act upon the conjoint representations of the prospectus and the telegram, nevertheless the Lord Chief Justice should have directed judgment for the defendants upon the ground

first, that it has been decided by the House of Lords in *Peek* v. *Gurney* (L. Rep. 6 H. of L. 377), that when shares are purchased upon the market and not taken by allotment from a company, fraudulent misstatements in the prospectus cannot be relied upon by the purchaser, because the functions of the prospectus, which were only to induce persons to obtain shares from the company by allotment, had been performed so that the plaintiff could found no cause of action upon the misstatements in the prospectus; and secondly, that the plaintiff could not rely in this action upon the false statements in the telegram. With regard to the second contention reliance was placed upon the remarks of Wood, V.C. in *Barry* v. *Crosskey* (*ubi sup.*) to the effect that the propagation of false news of peace whereby the price of the funds was sent up would not give rise to an action for damages to those of the public who had been deceived and injured thereby through having purchased stock when unduly inflated by the false news. The judgment of Wood, V.C. in *Barry* v. *Crosskey* (*ubi sup.*) was dealt with by Lord Cairns in *Peek* v. *Gurney* (*ubi sup.*), and the propositions enunciated by the Vice-Chancellor seem to me to cover the present point. I now come to the findings of the jury with respect to the telegram, which seem to me to be the most important. There was evidence in support of these findings, and upon them there is proved against the defendants a continuous fraud on their part, commencing with the issue of the prospectus and culminating in the direct lie told in the telegram, which was intended by the defendants to operate upon the plaintiff's mind, as well as upon others, and which did operate to his prejudice and to the defendant's advantage. It is not a correct view of the case to sever it into parts as the learned counsel for the defendants have endeavoured to do and to argue that neither the prospectus taken by itself, nor the telegram taken by itself, would support a cause of action. The case must be taken as a whole. There was evidence of a continuous systematic fraud practised by the defendants upon the plaintiff to his detriment. For these reasons the plaintiff, in my opinion, is entitled to retain the judgment that has been entered for him.

RIGBY, L.J.—I am of the same opinion. The case has been very ably argued on behalf of the defendants, in the only way in which probably it could be presented to the court, by dividing it up into compartments and treating each one separately. To my mind that is not permissible. The case here made was one of fraud from the very inception of the company. A sham company was created, a fraudulent prospectus issued, not only for the purpose of inducing the public who read it to take shares by allotment, but also for the purpose of inducing persons to take shares subsequently by purchase, and then came a series of frauds, or perhaps one fraud running through a number of stages, ending with the publication of the telegram in the *Financial News*. Now upon this point, as to the prospectus, there is in my judgment nothing in *Peek* v. *Gurney* (*ubi sup.*), or in any other case, which meets the present one. Undoubtedly, if there be a prospectus issued for the sole purpose of obtaining subscriptions for the original capital of the company, or subscriptions for any issue of shares about to take place, and that can be treated as a separate transaction, people who did not respond to that invitation, and did not act upon it in the way in which it was intended to be acted upon, but who passed by the opportunity given to them and afterwards bought shares in the open market, cannot in a simple case of that kind rely upon any statements in the prospectus which they may be able to establish as being fraudulent misrepresentations. But it is a totally different case when the prospectus was not intended solely, or even primarily, for the purpose of getting the public to subscribe for shares. If the object of the prospectus was, in pursuance of a deliberate scheme of fraud, to impress the mind of all persons reading it with the idea that the sham company which was created was not only not a sham company but a real and most prosperous company, if that were a part of the scheme, and if, after the issue of the prospectus, that scheme were continued by other devices in order to produce the same results, it is idle to say that there is any rule of law or any principle which should oblige you to shut your eyes to that portion of the fraud which was contained in the prospectus. It appears to me that, putting aside the findings of the jury as to the prospectus, there is enough in the other findings, if they can be supported, to justify the judgment in favour of the plaintiff. [His Lordship then referred to the evidence as to the telegram, and stated his opinion that there was ample evidence upon which the jury were justified in finding that the statements in it were false to the knowledge of the defendants, and that they caused the article to be published in the *Financial News*.] But then a point of law was raised with regard to the telegram. It was said that, assuming that the statements in it were false, there is nothing on which the plaintiff can found an action for damages. Reference was made to *Rex* v. *De Berenger* (3 M. & S. 67), which was a case of an indictment for a conspiracy by the defendants to circulate a false report which was intended to lead to the conclusion that peace was imminent. But how far could a report like that give rise to an action for damages? It might have been acted upon in numerous ways. A man acting on it might have done many things besides buying funds. He might have bought French funds, or land in France, or incurred expenses in all sorts of ways in preparing to act upon peace being proclaimed. It has been suggested that when a man tells a lie he is responsible for every sort of damage that accrues to any person, wherever he may be, who hears of the lie and takes action upon it whatever the nature of that action may be. It was pointed out by Fry, L.J. in *Salaman* v. *Warner* (65 L. T. Rep. 132), that so extravagant and extensive a rule as that would in all probability lead to fraud to such an extent that no system of law would support it. But what was done in the present case was something totally different. Have not the defendants here pointed out the mode of action which they wished people to take on reading the telegram, have they not invited members of the public, who have money to invest, to buy shares in the Sutherland Reefs Company? The jury have found that that invitation was intended by the defendants to be acted upon, and that it was acted upon. I think that there was ample evidence to justify the verdict of

the jury. *Rex* v. *De Berenger* (*ubi sup.*) has nothing to do with the present case. Nothing that could be said about that case would in my view alter the liability of persons, who being the owners of property procure false statements to be made about that particular property in order to induce members of the public to buy that property from them. I agree that the application should be dismissed.

Application dismissed.

Solicitors for the plaintiff, *Nunn* and *Popham*.
Solicitors for the defendants, *Michael Abrahams, Sons*, and *Co.*

Friday, Jan. 31.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

Andrews *v.* Mockford and others (No. 2.) (*a*)

Practice—Costs—New trial motion—Shorthand notes—Summing up of judge.

Upon a motion for a new trial, an application for the costs of the shorthand writer's notes of the summing up of the judge at the trial, will only be granted in exceptional cases.

In this case the plaintiff had obtained a verdict and judgment at the trial of the action before Lord Russell, C.J. with a jury. The defendants moved for judgment or for a new trial. The court dismissed the application: *ante*.

McCall, Q.C. (*Astbury*, Q.C. and *T. M. Whitehouse* with him), for the plaintiff, asked for the costs of the shorthand-writer's notes of the summing up of the Lord Chief Justice. He cited *Pilling* v. *The Joint Stock Institute*, *ante*, p. 570.

Carson, Q.C. and *F. M. Abrahams* for defendants.

Lord Esher, M.R.—We will consult with the other members of the court, and then let you know our decision.

Jan. 31.—Lord Esher, M.R.—We have spoken to the other members of the court about this matter, and it appears that there is no hard and fast rule that the court cannot, or will never, grant such an application as this for the costs of the shorthand-writer's notes of the judge's summing up at the trial. But persons who make such an application may consider that it will not be granted except in exceptional cases. The present case is not an exceptional one, and the application must therefore be refused.

Lopes and Rigby, L.JJ. concurred.

Application refused.

Solicitors for the plaintiff, *Nunn* and *Popham*.
Solicitors for the defendants, *Michael Abrahams, Sons*, and *Co.*

Monday, Jan. 27.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

The Germanic. (*b*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice—Collision action in rem — *Defence of compulsory pilotage—Joining pilot as a defendant—Jurisdiction—Discretion.*

In a collision action in rem *the defendants pleaded* (inter alia) *compulsory pilotage. The plaintiffs thereupon applied for an order giving leave to have the pilot joined as a defendant to the action. The President made the order.*

Held, on appeal, that the joinder of a pilot as a defendant to an action in rem *would cause inconvenience in procedure, and that therefore the Court, assuming it had jurisdiction to make the order, had wrongly exercised its discretion in granting it, and that the order must be set aside.*

The owners of the steamship *Cumbrae*, the plaintiffs in a collision action brought *in rem* against the owners of the steamship *Germanic*, who had pleaded (*inter alia*) compulsory pilotage, applied to the Registrar of the Liverpool District Registry for leave to add the pilot of the *Germanic* as a defendant. The registrar refused the application. The plaintiffs thereupon appealed to the President of the Probate, Divorce, and Admiralty Division in chambers. The learned judge allowed the appeal, and made an order giving the plaintiffs leave to join the pilot as a defendant to the action.

The defendants now appealed from this order.

Sir *Walter Phillimore* (*Butler Aspinall* with him) for the appellants.—There is no jurisdiction to add a pilot as defendant in an action *in rem*:

Reg. v. *Judge of the City of London Court*, 66 L. T. Rep. 135; 1 Asp. Mar. Law Cas. 140; (1892) 1 Q. B. 273;

The Bowesfield, 51 L. T. Rep. 128; 5 Asp. Mar. Law Cas. 265.

The rules of court do not give the court power to make the order asked for:

Smurthwaite v. *Hannay*, 71 L. T. Rep. 157; (1894) A. C. 494; 7 Asp. Mar. Law Cas. 485;

Peninsular and Oriental Steam Navigation Company v. *Tsune Kijima*, 73 L. T. Rep. 37; (1895) A. C. 661.

If the court has jurisdiction, it ought not in its discretion to exercise it.

Joseph Walton, Q.C. (*Pickford*, Q.C. and *Bateson* with him), for the respondent, *contrà*.—The court has jurisdiction:

The Zeta, 69 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468.

On reference to the Admiralty Registry we are informed that an order similar to that asked for has been made in the following unreported cases: *The Altyre, The Gemma, The Dispatch, The Hollandia.* If the court has the jurisdiction it should be exercised in this case. [Lopes, L.J.—Would not the pilot be entitled to apply for a jury, whereas the action against the ship would be tried by judge and assessors?] Probably he would, but that is merely an objection on the ground of convenience, and does not in any way affect the right we claim:

Child v. *Stenning*, 36 L. T. Rep. 426; 5 Ch. Div. 695.

Sir *Walter Phillimore* in reply.—The writ in this action being a writ *in rem* could not be served on the pilot, because, by Order IX., r. 12, of the Rules of the Supreme Court 1883 a writ *in rem* must be served by being affixed to the mainmast of the ship proceeded against.

Lord Esher, M.R.—In this case, when the parties who applied for this order originally

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.
(*b*) Reported by Butler Aspinall and F. A. Satow, Esqrs., Barristers-at-Law.

instituted their suit, they brought their action only against the ship and the owners of the ship and those interested in it. It is after they have brought that action that they are asking for leave to do something, namely, to add somebody else, that is, the pilot. It is not as if they had, when they began their litigation, begun it jointly against the owner of the ship and against the ship and the pilot. With such a case we have nothing to do at present. Here they began it against the ship and the owners of the ship, and now they come to ask for the assistance of the court to enable them to join the pilot. It is not necessary to determine whether the court has jurisdiction to do or not to do that thing which they ask. As at present inclined, I think myself that there is the jurisdiction, and, therefore, I shall assume that the court has the jurisdiction. Then comes the question, how ought that jurisdiction in such circumstances to be exercised? If this court, upon appeal against the exercise of that discretion by the learned judge in the Admiralty Division, thinks it quite clear that the learned judge has exercised that discretion inadvisedly, there is no doubt that this court has the power and the right and the duty to alter that exercise of his discretion. Now, the case when it came before the learned judge must have presented to him two different views. I have not the least doubt that he ought to take into consideration what would be the consequence of what he is asked to do. If one view of what he is asked to do will almost inevitably, or, at least very probably, lead to very great inconvenience, and the other view that he can take can lead to no real inconvenience at all, it seems to me that the proper exercise of his discretion is not to put the case into the danger, the probable danger, of great inconvenience, but to leave it as it is, where there can be no inconvenience at all. He is asked to join the pilot, and it is an admitted fact that, if he does, the joining of the pilot may cause—and in this case, after the discussion which has taken place, I have no doubt, in all probability, would cause—the greatest inconvenience when the case is dealt with hereafter. The pilot would have the right to ask that his liability might be tried by jury; and, considering what has been said here, can there be any doubt but that the pilot will have advice as to what course he should take? Then he would in all probability ask for a jury, and what then? The case, as between the two ships and the owners of the two ships, would be tried by the judge and the assessors, and the case between the ships to which the pilot did not belong and the pilot would be tried by the same judge and a jury. If they are to be tried at the same time under those circumstances, does it require anybody to consider for more than a minute to see the unseemliness and inconvenience of so trying a case? When the case is tried, it is true, though I do not myself think that I ought to attach much importance to this, there would be a difficulty in drawing up the two judgments, the one as against the ship and the owners, and the other as against the pilot. There are apparently great inconveniences if the judge takes the course of acceding to the request or application which is made to him. On the other side, if the case is left as it is, what can be the inconvenience? It is said by Mr. Walton: "We can, after having tried the case as between the owners of the two ships, sue the pilot, and, if the case is not removed, then the judge of the Admiralty Court may try the case against the pilot with a jury." Of course, that may be, but we are not talking about metaphysical things that may be, but what will be, and what is the business of it. Can anybody who understands business suppose that if they try the case as between the two ships, and either succeed or fail, they would then go against the pilot with a jury? Whatever chance would they have with a jury, and what sum more than half-a-crown would they get from the pilot? No doubt there is a legal right against the pilot, but it is in my mind a right which it is impossible they would ever want to try. Therefore, by adopting one course great inconvenience would arise, and, by adopting the other, no inconvenience at all would occur; but for some shadowy motive, which I cannot appreciate, they want to deal with the pilot, by way of threatening him in some way, so as to affect the evidence which they think it is not improbable he may give. I think that on the one side there is every probability of inconvenience, and, on the other, truly no inconvenience at all, and there is no good ground which can be frankly stated why they should want to sue the pilot in this case. Therefore, I think the proper course is to refuse the application to join him.

LOPES, L.J.—The writ in the first instance was issued against the ship and her owners, and not against the pilot. The joining of the pilot was an afterthought, and it is in respect of that afterthought that this application was made to the President, who granted it, and against his decision the present appeal was lodged. I assume, for the purpose of the very few words I am going to say, that the court had jurisdiction to grant this application if it thought fit. The question which we have to consider is, how far is it expedient so to do? In considering that question we have to look at what I will call the convenience or the inconvenience on one side or the other. It seems to me that to grant the application would be a highly inconvenient course, and would cause embarrassment in the action when it came to be tried. It has been said, and truly said, that the learned judge who had to try it would have to lay down two different rules in regard to the different parties. The damage as against the ship would be calculated on one principle, and the question of whether both were to blame would have to be considered. As regards the pilot, another question would have to be considered, and a different rule as to damages would have to be applied. I do not, however, attach much importance to that, because that could be easily dealt with by the learned judge. But there is another matter. In the ordinary course the case against the ship would be tried by the judge with assessors. The case against the pilot, on the other hand, if the pilot thought fit, would have to be tried by a jury. If the pilot exercised that right, and I do not know that he would not, very serious inconveniences would arise. There would have to be, as it were, two trials going on concurrently, and I cannot see how the matter could be carried out with any amount of propriety. For those grounds I think this appeal ought to be granted. On the one side there seem to me to be serious inconveniences

which may have to be encountered, and, adopting the other view, there is no inconvenience or difficulty at all. What is the alternative? It seems to me that the court has only one course to pursue, and that is the course which is surrounded by no difficulties.

RIGBY, L.J.—I am of the same opinion. I think this is a question of discretion. Assuming the jurisdiction, we must look to see what would be the probable result. If the pilot is made a defendant it seems to me almost hopeless that the matter could be tried as one case, and, therefore, it appears to me most desirable that he should not be joined.

Appeal allowed.

Solicitors for the appellants, *Hill, Dickinson, and Co.*

Solicitors for the respondents, *Batesons, Warr, and Wimshurst.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Jan 15.

(Before NORTH, J.)

Re PIERCY; WHITWHAM *v.* PIERCY. (*a*)

Will — Construction — Charitable gift — Impure personalty — Direction to trustees to submit proposal for distribution among charities of property included in gift.

A testator gave his real and personal estate to trustees upon trust to sell and convert, and to apply one-tenth of his estate over and above 110,000*l. to such charitable institutions and objects as his trustees might determine. He died in* 1888, *leaving realty and impure personalty as well as pure personal estate.*

Held, that the gift to the charities carried realty and impure personalty, and was a gift of one-tenth of the testator's whole distributable estate over and above 110,000*l., not a gift of one-tenth of its value over and above* 110,000*l. at the expiration of a year from the testator's death, and the trustees were directed to submit a proposal showing to what charitable institutions and objects, and in what sums they proposed to apply moneys available for distribution under the gift.*

BENJAMIN PIERCY, by his will dated the 5th Dec. 1883, provided as follows:

I give and bequeath all my real and personal estate whatsoever and wheresoever to which I shall be beneficially entitled at the time of my decease unto [his trustees therein named], upon trust to sell and convert into money my said real and personal estates, or such parts thereof as shall be of a saleable and convertible nature, and to get in the other parts thereof; and I direct my trustees to hold the moneys to arise from such sale, conversion, and getting in upon trust thereout in the first place, to pay the expenses incidental to the execution of the preceding trust and my funeral and testamentary expenses, and to apply one-tenth of my estate over and above 110,000*l.* to such charitable institutions and objects as my trustees may determine, and at such time or times, and in such manner as they may think fit, and to stand possessed of my residuary real and personal estate until conversion, and the surplus of the said moneys and all my estate after conversion thereof, and which is herein referred to as my residuary estate,

upon trusts for the benefit of his wife, children, brother and sister, as therein mentioned.

The testator died on the 24th March 1888, and his will with a codicil thereto not affecting the above-mentioned charitable gift, was proved on the 3rd Sept. 1888. He left considerable property including real estate in England, Wales, and Italy, and impure personalty.

In 1888 the trustees of the testator's will commenced an action for the administration of his estate, and on the 21st Jan. 1889 obtained an order for administration.

The estate had been partly realised, and the trustees had in their hands moneys comprising proceeds of realty and impure personalty which were available for distribution under the charitable gift of one-tenth of the testator's estate over and above 110,000*l.*

The action now came on for further consideration, and the questions for determination were (*inter alia*) (1) whether the gift to the charitable institutions included impure personalty and realty as well as pure personalty; and (2) whether, according to the right construction of the will, the gift was a gift of one-tenth of the value at the date of a year from the testator's death of his estate over and above 110,000*l.*, or was a gift of one-tenth of the testator's whole distributable estate over and above 110,000*l.*

Cozens-Hardy, Q.C. and *Frederick Thompson*, for the plaintiffs, in the action, stated the facts.

Ingle Joyce for the Attorney-General.—The gift to the charity is one-tenth of the testator's estate above 110,000*l.*, and comprises his impure personalty as well as realty and pure personalty. It carries all accretions on the one-tenth since the testator's death. In *Lewis* v. *Allenby* (L. Rep. 10 Eq. 66) it was held that a gift of residue of personal estate, which included impure personalty to trustees upon trust to divide the same amongst any charities in England "as they in their sole and uncontrolled discretion shall think proper," was equivalent, as to the impure personalty, to a gift to charities exempt from the Mortmain Act to be selected by the trustees, and therefore a valid gift; and the court directed the trustees to submit to the judge in chambers the names of the charities proposed by them to be benefited. That case was discussed in the unreported case of *Re Seton Smith*, (*a*) where

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

(*a*) *Saturday, June* 2, 1894.

(Before NORTH, J.)

Re SETON SMITH; BRIGHT SMITH *v.* THE ATTORNEY-GENERAL.

ROSAMUND BRIGHT SETON SMITH, by her will, dated the 30th July 1888, after bequeathing the charitable legacies following, viz.: To the Royal Society for the Prevention of Cruelty to Animals, 1000*l.*; to the Free Cancer Hospital, 1000*l.*; to the Hospital for Consumption, Fulham-road, 1000*l.*; to St. George's Hospital 1000*l.*; and directing that such charitable legacies should be paid exclusively out of such part of the personal estate as might be lawfully appropriated to such purposes, bequeathed all the residue of her personal estate to her executors upon trust to sell, call in, and convert, and after payment of debts and legacies "upon trust to divide the net residue of the proceeds of such sale, calling in, and conversion, among any charities that my said executors may think desirable."

the proceeds of sale of the testator's personal estate, which included impure personalty, were given to "any charities that my said executors may think desirable." Here the gift is to such charitable institutions and objects as the trustees may determine. In *Re Clark; Husband* v. *Martin* (52 L. T. Rep. 406), a gift of residue, which included both pure and impure personalty to trustees "to give it to the poor as they may think fit," was held to fail as to so much of the residue as consisted of impure personalty, on the ground that the charitable objects intended to be benefited were not sufficiently indicated to enable the gift to be read as a gift of impure personalty to charities authorised to hold property of that nature. For the purposes of the present case there is no difference in the law between land and impure personalty.

Swinfen Eady, Q.C. and *Badcock* for some of the residuary legatees.—We admit that we cannot distinguish this case from *Lewis* v. *Allenby* (*ubi sup.*), but without prejudice to getting the decision reversed in the Court of Appeal.

St. John Clarke for the heir-at-law. — The decision in *Lewis* v. *Allenby* (*ubi sup.*) is not applicable to the present case, as there the testator made specific reference to hospitals, which can take gifts of realty and impure personalty, and the trustees proposed to apply that part of the residue which consisted of impure personalty to such charities as were able to receive it. In *Re Clark; Husband* v. *Martin* (*ubi sup.*), Kay, J. expressed himself as against extending the rule of *Lewis* v. *Allenby* (*ubi sup.*).

Mulligan for another residuary legatee.—*Lewis* v. *Allenby* does not apply here, because the trustees in the present case have not exercised their discretion; and until they do it is impossible to say whether any such question arises. [NORTH, J.— That is a reason why I should direct the trustees to give particulars of the manner in which they intend to distribute the money.]

Curtis Price, *James Rolt*, and *E. S. Ford* for other persons interested.

NORTH, J.—I have no choice but to follow the decision in *Lewis* v. *Allenby* (*ubi sup.*), and to hold that the gift to the charities includes impure personalty. I direct the trustees of the testator's will to submit for the approval of the judge in chambers a proposal showing to what charitable institutions and objects, and in what sums respectively they propose to apply such amount as is now available for distribution under the gift of one-tenth of the testator's estate beyond 110,000*l.* to such charitable institutions and objects as the trustees may determine. I do not now control their selection, but I think that the court ought to know what is being done. I am not disposed at present to direct an inquiry for the purpose of ascertaining the relative values of the pure and impure personalty. I think that the gift of one-tenth of the estate beyond 110,000*l.* is a gift of one-tenth of the whole distributable estate as it turns out beyond 110,000*l.*, and not a gift of one-tenth of the value of the estate beyond 110,000*l.* at the period of one year from the testator's death; and I declare that the direction to the trustees as to the application of the one-tenth of the testator's estate beyond 110,000*l.* is not confined to one-tenth of the estate or the proceeds thereof on the 24th March 1889, being the expiration of a year from the testator's death, after deducting 110,000*l.*

Solicitors: *Field, Roscoe*, and *Co.*; *Hare* and *Co.*; *Crowders* and *Vizard*; *Foyer* and *Hordern*; *Godden, Soa*, and *Holme*.

The residue of the testatrix's personal estate included impure personalty.

NORTH, J., in his judgment, said:—I think I am bound to follow *Lewis* v. *Allenby* (*ubi sup.*), which appears to me to be very like this case. Indeed, I cannot draw any distinction between "any charities" here and the words "any hospitals or other charitable institutions" in that case. *Lewis* v. *Allenby* (*ubi sup.*) has never been doubted that I know of, and I know that it has been followed in various cases of which one has practical experience. The only case which has been put forward as inconsistent with it is the case of *Re Clark*; *Husband* v. *Martin* (52 L. T. Rep. 406), before Kay, J. That case is very distinguishable from the present. What Kay, J. does is not to throw any doubt on *Lewis* v. *Allenby* (*ubi sup.*), which he seems to treat as right, but he does not follow it because he had a totally different case in his opinion to deal with.

QUEEN'S BENCH DIVISION.

Jan. 13 *and* 14.

(Before WRIGHT and KENNEDY, JJ.)

THE NORWICH UNION FIRE INSURANCE COMPANY (apps.) *v.* MAGEE (Surveyor of Taxes) (resp.). (*a*)

Inland Revenue — Income tax — Company in England with foreign branches—Interest on investments made abroad as reserve fund—Profits made abroad—Non-remittance of such sums to England—Income Tax Act 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *sched. D., cases* 1, 4, *and* 5.

An insurance company having its head office in England had branch offices in England and in some foreign countries, the business of which was conducted by managers appointed by and acting under the board of directors at the head office. The company sought to have exempted from assessment to income tax (*a*) *a sum of* 5502*l.*, *being dividends upon various foreign securities, representing part of the profits made abroad, which, instead of being specifically remitted to this country, were re-invested in American securities for the purpose of forming a reserve fund for the business of the company there, as required by the law of the United States;* (*b*) *a sum of* 12,841*l.*, *as being profits made at some of the foreign branches, which profits were not specifically brought or remitted to this country, but were retained abroad to effect reserves. The company contended, as to both sums, that, as no part of the same had been actually remitted to or received in this country, they were not liable to assessment.*

Held, that both sums were part of the profits and gains of the business and were liable to assessment as such.

CASE stated by Income Tax Commissioners.

At a meeting of the Income Tax Commissioners for the City of Norwich, on the 10th April 1894, the Norwich Union Fire Insurance Company (the appellants) appealed against an assessment of

(*a*) Reported by W. W. OAR, Esq., Barrister-at-Law.

65,787*l.* made upon them for the year ending the 5th April 1894, under schedule D.

The appellants are an English company registered under a special Act (42 Vict. c. xx.), with their registered head office in Norwich, England, where the directors and shareholders meet, and where the dividends are declared, and all the affairs of the company are directed, managed, and controlled.

The appellants have a number of branch offices in England, America, Australia, New Zealand, and elsewhere, the business details of which are conducted by managers, and in some cases with local directors appointed by and acting under the board of directors in Norwich, the general directions and instructions emanating from the head office in Norwich. The business carried on out of the United Kingdom is conducted by the managers abroad, who are appointed and act under power of attorney signed by nine of the directors of the company in Norwich, and such managers have the power to accept risks and issue policies without reference to the head office; whereas in the case of the agencies in England cover notes only are given, and directors at the head office determine whether to accept or decline risks.

The annual income of the appellants is derived from premiums, interest on investments, fees, and profits on sales earned at the head and branch offices, the whole being brought into one account and a set of books kept and entered up at the head office, and is set forth in the annual balance-sheet issued to the shareholders, and the branch offices do not issue any separate balance-sheet.

The assessment of 65,787*l.* made upon the appellants was based on their own return, which included profits and losses made at all the branches. This sum included an item of 17,157*l.* for untaxed interest and an item of 12,841*l.* for profits made at the New York and New Zealand branches. The appellants sought to have the assessment amended by having (*a*) 5502*l.* deducted from the item of untaxed interest as being dividends upon various foreign securities (as per schedule) payable out of and not specifically remitted to or received by the appellants in the United Kingdom; (*b*) 12,841*l.* deducted as being the profits made at some of the foreign branches as set out in the schedule, and not specifically remitted to or received by the appellants in the United Kingdom.

The 5502*l.* represents part of the profits made abroad, and instead of being specifically remitted to this country is, together with other funds belonging to the appellants, reinvested in American securities, but the amount is accounted for at the head office here and included in the general accounts and balance-sheet, and could if required be specifically remitted to this country.

The 12,841*l.* comprises: 7086*l.*, the profits made by the New York branch, and 5755*l.* made by the New Zealand branches. These profits are not specifically brought to or remitted to this country, being retained abroad to effect reserves or for other purposes of the appellants, but they are accounted for to the head office and included in the general balance-sheet. All the branches are controlled from the head office, and from time to time the balances are adjusted between the head and branch offices. The majority of the shareholders are English subjects, and all dividends are declared, paid, and remitted from this country.

It was contended for the appellants, (*a*) that the dividends upon the foreign securities fell to be assessed under the 4th case of sect. 100 of 5 & 6 Vict. c. 35, and that therefore the assessment should be restricted to the full amount of the sums actually received in Great Britain, and that the sum of 5502*l.* had not been received in this country by the appellants: *Colquhoun* v. *Brooks* (61 L. T. Rep. 518; 14 App. Cas. 493).

For the surveyor of taxes it was contended that, even if the dividends on the foreign securities fell to be assessed under case 4, the dividends, if not specifically received, had been constructively received in this country: *Scottish Mortgage Company of New Mexico* v. *McKelvie* (2 Tax. Cas. 165; 24 Scotch L. Rep. 87), and he contended that *Colquhoun* v. *Brooks* (*ubi sup.*) did not apply.

It was also contended for the appellants (*b*) that as to the 12,841*l.* profits made by the New York and New Zealand branches as foreign profits they fell to be assessed under Case 5 of sect. 100 of 5 & 6 Vict. c. 35, and that as such profits had not been remitted to or received in Great Britain they were not liable to assessment: *Colquhoun* v. *Brooks* (*ubi sup.*), and *Bartholomay Brewing Company* v. *Wyatt* (69 L. T. Rep. 561; (1893) 2 Q. B. 499).

The surveyor contended that as the appellants were an English company with branches in different parts of the world carrying on and controlling the whole of its business and dividing and expending its income from its head office in this country, the whole of its profits wherever made were chargeable under case 1 of schedule D, whether specifically remitted to this country or not: *The London Bank of Mexico* v. *Apthorpe* (65 L. T. Rep. 601; (1891) 2 Q. B. 378); *The Cesena Sulphur Company* v. *Nicholson* (35 L. T. Rep. 275; 1 Ex. Div. 428); *The Calcutta Jute Mills Company* v. *Nicholson* (35 L. T. Rep. 278; 1 Ex. Div. 437). He also contended that *Colquhoun* v. *Brooks* (*ubi sup.*) did not apply, as in that case the appellant carried on two distinct businesses, one of which was carried on wholly and solely abroad; that the case of *Bartholomay Brewing Company* v. *Wyatt* (*ubi sup.*) did not apply, as there the profits were derived from shares in an American company, whose business was wholly carried on by the American company in America.

The Commissioners confirmed the assessment, and the question now was whether the commissioners were right.

Bigham, Q.C. (*Loehnis* with him) for the appellants. — Two points arise in this case, and with regard to one it may be said against me that it is covered by the decision of the House of Lords in the case of *The San Paulo* (*Brazilian*) *Railway Company* v. *Carter* (73 L. T. Rep. 538); but the second point is untouched by the decision in that case. The first point is as to the 12,841*l.* profits made by foreign branches abroad, and with regard to this point no doubt the *San Paulo* case (*ubi sup.*) is very similar in its facts to the present, and it may be very difficult to distinguish the one case from the other. The only distinction I can make is, that the branch offices in this case are more like separate and independent businesses carried on abroad, and they are managed by people who have themselves to exercise control, and who are

appointed abroad to carry on the businesses there. The real question in the case is as to the assessment to income tax of the 5502*l.*, being the dividends upon certain foreign securities not remitted to or received in this country, and the decision in the *San Paulo* case does not touch this question. In order to comply with United States law in reference to the carrying on of insurance businesses there, we are compelled as a sort of guarantee to purchase and keep in America certain securities, and the sum in question relates to the dividends which we receive, and which are paid to us in America, in respect of the securities which we hold there. No part of these dividends is remitted to this country, but they are invested in similar securities in America. They therefore are dividends in respect of foreign securities, and as such they fall within case 4, and as by that case the duty is to be assessed on the amount of the interest which has been, or will be, received in Great Britain, and as the case finds that no part of such interest has been so received, none is assessable. The dividends which are distributable amongst the shareholders are computed with reference to that item as well as other items of profit and loss, and hence the Crown contend that case 1, and not case 4, is applicable. [*The Attorney-General.*—Our contention is, that there is an absolute finding of fact that there were profits from the business part of which is carried on in England, and upon conclusive authority we say that brings the case within case 1 and not within case 4; but if it does not come within case 1, and if it is to be considered as a case of remittance or non-remittance within case 4, then we say that there was a constructive remittance of these dividends to this country; and the case of *The Scottish Mortgage Company of New Mexico* v. *McKelvie* (2 Tax Cases, 165) shows that, if there be two bases of taxation, the Crown can adopt either.] Our contention is, that we come under case 4 and not under case 1, and that there has been no remittance to this country of these dividends, and that they are not assessable. The case of the *Scottish Mortgage Company of New Mexico* v. *McKelvie* (*ubi sup.*) is entirely different, as that was not the case of a company trading in this country with English money and using the money for trading purposes by having investments in different parts of the world. The distinction is as to the actual receipt of the money in this country. If it were not the case of an insurance company at all, but the case of a merchant carrying on business in London, who invests some of his profits in American securities and leaves them there, how is the income tax paid in respect of these American securities? The dividends are collected in this country by coupons being paid into a bank, and the banker now deducts the tax before he credits his customer with the amount; but when the dividends are not collected or received in this country, but are paid abroad and remain abroad, there is no machinery under the Act for collecting the tax, and we submit that there is no obligation to make any return in respect of such receipts abroad. He referred to the case of *Forbes* v. *The Scottish Widows Fund and Life Assurance Society* (an unreported decision of the Court of Session given on the 17th Dec. 1895).

Sir *Richard E. Webster* (A.-G.) and *Danckwerts*, for the respondent, were not called upon.

WRIGHT, J.—It is not necessary to express any opinion as to the case of interest arising on foreign investments where those investments are made for the sake of investment. Supposing a firm of traders, trading abroad, instead of dividing their profits there—say profits made in an American trade—choose to invest those profits in American securities, the interest arising on that investment would seem to me to come within case 4 and not within case 1. That, however, is not the point we have to decide here. The real point in the case may be put in one sentence. If there is a trade which cannot be carried on without making investments abroad, the interest arising on the investments necessarily made for the purposes of the trade is, as it seems to me, part of the gains of that trade. Constantly it occurs that companies carrying on operations abroad have balances which they leave at interest on foreign securities for a time, or they even provide a reserve fund in foreign securities. In practice the interest on securities of either kind is always brought into account as part of the profit and gains of the business. In the present case I think it clearly appears that the company could not carry on, or could not so profitably carry on, its business in America unless, as the business increased, they provided continually augmenting reserves in these American securities. They do not invest in those investments for the sake of investment, or for the sake of making profit by those investments, but for the sake of having a fund invested in America to answer the requirements of the American law. In effect it seems to me, that the 5502*l.* is received in this country, because owing to the exigencies of the American law, this money would have to be sent out from here if it were not otherwise provided; and if it can be otherwise provided, and so relieve the funds of the company in this country from being despatched from this country, it is a mere matter of convenience which does not appear to me in any way to alter the nature or character of the moneys for the purpose of investment. The Scotch case of *The Scottish Mortgage Company of New Mexico* v. *McKelvie* (*ubi sup.*) has been referred to as an authority for saying that the Crown may elect under which case it will tax the subject. I doubt if it is an authority for that proposition to its full extent. It is no doubt an authority for the proposition that if a particular company is clearly within case 4, the Crown may tax it under case 4, even though it may also be under case 1; but I doubt whether it is an authority for the converse proposition. I doubt whether the Crown could always elect to tax under case 1 if the company were clearly under case 4. I do not say whether it is so or not. I only say it seems to me doubtful whether the Scotch case decides the proposition which the Attorney-General has stated in its full entirety.

KENNEDY, J.—I agree.

The *Attorney-General* added that he did not contend that in all cases the Crown could elect, and that he did not think the Scotch case decided more than Wright, J. had said.

Judgment for the Crown.

Solicitors for the appellants, *Nye* and *Moreton*.
Solicitor for the respondent, *The Solicitor of Inland Revenue.*

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Tuesday, Dec. 3, 1895.

(Before WILLIAMS, J.)

Re JOHN BASSETT; *Ex parte* LEWIS. (*a*)

Bankruptcy—Costs of appeal in bankruptcy—Costs of appeal in Chancery—Same parties—No power to set off.

The costs incurred in bankruptcy proceedings are to be kept quite distinct from those incurred in other proceedings in the High Court, and therefore the costs of an appeal to the High Court from the County Court in Bankruptcy cannot be set off against the costs of an appeal to the High Court from the County Court on the Chancery side, even though the parties to the two appeals are the same.

THIS was an application by Joseph Lewis, the liquidator of the Bassett Plaster Company Limited, that a sum of 30*l.* deposited by him at the time of entering an appeal in bankruptcy as security for the costs of the appeal might be paid out to him.

On the 7th Feb. 1894 Lewis applied by motion to the Warwickshire County Court for an order against John Bassett, the managing director of the Bassett Plaster Company Limited, to pay over to Lewis as liquidator of the company a sum of 189*l.* 13*s.* 11*d.* received by Bassett on behalf of the company and retained by him on account of an alleged claim against the company. In that motion Bassett was ordered to pay over the sum claimed forthwith with costs and on appeal by Bassett to the High Court, his appeal was dismissed, and Bassett was ordered to pay the costs. On the 31st Aug. 1894 Lewis presented a petition against Bassett in the Warwickshire County Court; this petition was dismissed with costs, and on appeal to the Divisional Court sitting in Bankruptcy, the appeal was dismissed, with costs, against Lewis. The costs in the two proceedings were taxed by the master, and he ordered that the costs due from Lewis to Bassett in the bankruptcy appeal in which Bassett was successful should be set off against the costs due to Lewis from Bassett in the other appeal in which Bassett had failed. Lewis now applied that the 20*l.* deposited as security for his appeal in bankruptcy might (in consequence of the master's order setting off the costs) be paid out to him.

Muir Mackenzie for the applicant.—The master made an order setting off the costs of the appeal in which Lewis was unsuccessful against the costs of that in which Lewis was successful. He had a right to make such an order if the costs in each case were incurred between the same parties, and in each case in High Court proceedings. It is true that, in *Re Adams; Ex parte Griffin* (14 Ch. Div. 37; 42 L. T. Rep. 704), it was decided that the Court of Appeal would not allow costs incurred in any division of the High Court to be set off against costs in bankruptcy, although such costs were incurred in proceedings between substantially the same parties as were litigating in bankruptcy. That case, however, was decided before the Bankruptcy Act 1883 was passed, and is of doubtful authority on this point, as bankruptcy matters are now assigned to the Queen's Bench Division (see Williams on Bankruptcy, 8th edit. p. 128), and by the Rules of the Supreme Court a set-off for costs may be allowed between parties. He referred to

Barker v. *Hemming*, 43 L. T. Rep. 678; 5 Q. B. Div. 609;

Pelton v. *Harrison*; 65 L. T. Rep. 845; (1892) 1 Q. B. 118.

He also referred to Bankruptcy Rules 1886, r. 353: "When no other provision is made by the Act or these rules, the present law, procedure and practice in bankruptcy matters shall, in so far as applicable, remain in force. And, save as provided by these rules or rules amending them, the Rules of the Supreme Court shall not apply to any proceeding in bankruptcy." [WILLIAMS, J. referred to *Blakey* v. *Latram* (60 L. T. Rep. 624; 41 Ch. Div. 518), and *Edward* v. *Hope* (53 L. T. Rep. 69; 14 Q. B. Div. 922.)]

F. C. Willis, for the respondent, was not called upon.

WILLIAMS, J.—I am of opinion that this set-off ought not to be allowed. It would be a most just thing to allow it here, but I cannot do so. Up to the passing of the Judicature Acts the point would not have been arguable that the costs of an appeal like this on the Chancery side of the County Court could be set off against costs of an appeal on the Bankruptcy side. Has then the Judicature Act altered the bankruptcy rule? There is indeed no express alteration, but a power is given to taxing masters to allow a set-off of costs. That power does not apply to the costs of two independent proceedings such as these, and relates only to the common law side. Then is there anything in the fact that both these sets of costs were incurred in the Divisional Court when sitting to hear appeals from the County Court? I think not. The costs of the appeal from the County Court in the company matter ought not to be deducted from the costs incurred in the bankruptcy matter. The costs of the bankruptcy proceedings should be kept distinct, they are special proceedings, they are *strictissimi juris*, and the costs of them should be dealt with on that footing. They may have the effect of altering a debtor's status. The set-off cannot be allowed.

Application refused.

Solicitors for the applicant, *Harvey* and *Capron*, for *E. C. Newey*, of Birmingham.

Solicitors for the respondent, *F. Hatton* for *Goodrich-Clarke* and *Smith*, of Birmingham.

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Jan. 20.

(Before the PRESIDENT (Sir Francis Jeune.)

THE PARIS. (*a*)

Solicitor—Lien—Charging order—Assignment—Notice of right to lien—Solicitors Act 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

Where in an action a plaintiff has, through his solicitors' exertions, recovered a sum of money, whether by compromise or otherwise, and this sum is received from the defendants by the defendants' solicitors for the purpose of discharg-

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

ing the defendants' liability, the fact of the existence of the action is notice to the defendants' solicitors of the right of the plaintiff's solicitors to a lien on the fund. And if the defendants' solicitors, without the knowledge of the plaintiff's solicitors, received from the plaintiff himself authority to apply the fund in discharge of debts due from him to the defendants' solicitors and other persons, their clients, and they so applied the money, such application of the money cannot be treated as an assignment thereof without notice within the meaning of the Solicitors Act 1860 (*s.* 28), *so as to deprive the plaintiff's solicitors of their right to a charging order.*

THIS was a summons adjourned into court.

A collision having occurred between the steamships *Sam Weller* and *Paris*, Mr. Barton, the owner of the former vessel, brought an action against the *Paris*. In that action Messrs. Crump and Co. acted as solicitors for Mr. Barton, and Messrs. Downing, Holman, and Co acted for the owners or the underwriters of the *Paris*. Under a compromise made in June, 50 per cent. of the damages was to be paid over by the defendants to the plaintiff, the amount on which this percentage was to be computed being left to be determined by the award of an arbitrator. At this time certain debts were due from Mr. Barton to certain persons represented by Messrs. Downing, Holman, and Co. On the 25th July the following letter was given to Messrs. Downing, Holman, and Co. by Mr. Barton, by his managing clerk:

In reply to your favour of the 22nd inst. Mr. Barton desires me to say that he agrees to your settling the amount due to yourselves, to Messrs. Helmore and Co., and Messrs. Holman and Sons, out of the money coming in from s.s. *Paris*.

On the 2nd Nov. the award of the arbitrator was made, the effect of which was to fix the sum due by the defendants to the plaintiff. Under the letter, Messrs. Downing, Holman, and Co. paid away to themselves and the firms mentioned in the letter, certain sums amounting to the whole sum due to the plaintiff by the defendants.

Messrs. Crump and Co., having called upon Messrs. Downing, Holman, and Co. to pay over to them the money or the amount which represented their costs, were informed that the money had been paid away under the order. Messrs. Crump and Co. now applied for a declaration giving them a charge upon this fund.

Dawson Miller, for Messrs. Crump and Co., in support of the application.—The act done by the defendants' solicitors was an act done to defeat our lien. Only a *bonâ fide* purchaser for value without notice can defeat our right:

Solicitors Act 1860 (23 & 24 Vict. c. 127), s. 28;
Dallow v. *Garrold*, 52 L. T. Rep. 240; 13 Q. B. Div. 543; 14 Q. B. Div. 543.

Notice means notice of the right to a lien, and not of the existence of a charging order:

Cole v. *Eley*, 70 L. T. Rep. 892; (1894) 2 Q. B. 180;
Faithfull v. *Ewen*, 37 L. T. Rep. 805; 7 Ch. Div. 495;
The Leader, 18 L. T. Rep. 767; 3 Mar. Law Cas. O. S. 118; L. Rep. 2 A. & E. 314;
Eisdell v. *Coningham*, 28 L. J. 213, Ex.

Boyd (*Gough* with him), *contrâ*.—The court will make no charging order where the whole of the money has been *bonâ fide* paid over and paid away before any application for a charging order under the statute, and before any judgment of the court is obtained:

Seton on Decrees, 5th edit., vol. ii., p. 931;
Shippey v. *Grey*, 42 L. T. Rep. 673; 49 L. J. 524, Q. B.;
Ross v. *Buxton*, 60 L. T. Rep. 630; 42 Ch. Div. 190;
Read v. *Dupper*, 6 T. R. 361;
The Hope, 49 L. T. Rep. 158; 5 Asp. Mar. Law Cas. 126; 8 P. Div. 144.

Primarily the clients who have employed the solicitors are responsible. The order charging the sum involved is only made by way of collateral security to prevent the solicitor losing his costs, and not unless it is shown that the client is unable to pay, nor when the application for the charge is practically that of the client:

Jackson v. *Smith*, 53 L. J. 972, Ch., at p. 976.

So far as regards all parties except Messrs. Downing, Holman, and Co., there is no evidence that they are affected with notice of the action.

Dawson Miller in reply.

The PRESIDENT (Sir Francis Jeune), after stating the facts, proceeded:—When Messrs. Crump called upon Messrs. Downing and Holman to pay over to them the money or the amount which represented their costs, they were told that the money had been paid away under the order; and the question is, whether, under these circumstances, they are entitled under the Solicitors Act to a declaration giving them a charge upon this fund. Now it is said that they cannot have this, for three reasons. In the first place, it is urged that, before judgment, or before what in the agreement of the parties is equivalent to a judgment, viz., the award of the arbitrator, there was this letter and the money was actually paid away. So it is said there is no fund upon which the declaration can be made; that the case is similar to one in which the plaintiffs and defendants, or the plaintiffs' and defendants' solicitors, behind the backs of everybody, compromised the suit to bring it to an end, so that there never was any judgment. It is exactly in the same way as if the money had been paid away and is irrecoverable. Now, is that so? I do not think it is. There appear to me to be two answers to the case put forward. In the first place, it is true there was no judgment, or what was equivalent to an actual judgment, until Nov. 2; but there was a compromise early in June, and it appears to me that fixed, not the actual sum due, because that had to be worked out by the arbitrator, but the fund to be recovered by the exertions of the solicitors. It seems to me that for all purposes that was a sum which, though not realised, was recovered within the meaning of the Act. I think that is supported by the decision to which I have been referred in the case of *Ross* v. *Buxton* (*ubi sup.*). Then there was another point. It appears to me that the assignment under which they claim, and which is dated June 25, 1895, is void within the Act. The terms of the Act are: "that all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect." Was this an act done to defeat, or which operated to defeat, the charge or right of the plaintiff's solicitors? It clearly was an act which operated to defeat, and it is enough to say that in this case

it is relied upon as defeating, the claim, because, if it does not defeat the claim of the plaintiff's solicitors, nothing does. Therefore, it appears to me quite clear that it is an act operating to defeat. Then, was it made to a *bonâ fide* purchaser for value without notice? I think it was not made without notice. There was clear notice to Messrs. Downing and Holman, and they were acting as solicitors for Messrs. Helmore, and for Messrs. Holman, and on their own behalf. I think there was notice, on the face of the document, that this was money which was to come from the *Paris* out of the fruits of the judgment successfully obtained, or to be obtained, by the plaintiff. It seems to me to be clear, upon the cases which are cited, that it is not necessary that there should be notice of the claim of the solicitors; it is quite sufficient if there is notice that the assignment is out of the fund realised by a successful action. The authority of *Cole* v. *Eley* (*ubi sup.*) and of *Dallow* v. *Garrold* (*ubi sup.*) appears to be quite sufficient to show that. In these circumstances I think that this assignment must be treated for this purpose as void. What, then, is the state of things? It is, that these persons have obtained money which they were not entitled to have, and in accordance with the authorities it is clear that they are bound to pay back that money, about which, however, no practical difficulty arises, because, in the letter written by Messrs. Downing and Holman, they make themselves personally liable for anything which the defendants would have to pay. I have said that I think this agreement was made in fact after the compromise, and that that is the same thing as if it had been made after the actual judgment. But I do not know that it matters, because, even if it had been made before the judgment, but in view of it, I think it comes to exactly the same thing. The case of *Faithfull* v. *Ewen* (*ubi sup.*) seems to bear out that view, because there the mortgage which was in question, and which was held not to defeat the solicitors' claim, was a mortgage made *pendente lite*. Therefore, taking the most favourable view of it for Messrs. Downing and Holman, I cannot put this letter in a higher position than that. When once that conclusion is arrived at, the consequence follows that the money must be paid back by the persons who received it, and therefore the solicitors are entitled to a charging order. Two other points have been made. One is, that there was no notice to Messrs. Helmore and to Messrs. Holman. But I am quite clear that notice given to their solicitors acting for them is equivalent to notice to them; indeed, I do not see how more effective notice could be given than to the solicitors acting for them. The only other point was, that not Mr. Barton, but the underwriters, were liable to pay, as they were the real clients. But Mr. Barton is the plaintiff on the record, and his authority in the matter is so clearly recognised that his order is taken for the distribution of the proceeds. I think, therefore, it would require to be made out very clearly indeed to convince me that there was anybody else who was the real plaintiff in the matter. I doubt, indeed, whether the solicitors were acting for anybody except Mr. Barton, but certainly it is not made out that they were. In these circumstances I think the solicitors are entitled to a charge upon this fund.

Solicitors: *William A. Crump* and *Co.*; and *Downing, Holman,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Feb. 4.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re HUBBUCK; HART *v.* STONE. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Administration—Tenant for life and remaindermen—Capital and income—Apportionment—"Property not actually producing income"—Debt due to testator—Realised security insufficient to pay capital.

By his will, dated in Aug. 1890, *a testator, who died in Dec.* 1890, *devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, and to pay the income to his wife during her widowhood; and he directed the corpus to be held upon trust for his nephews and nieces. The will contained a power to postpone the sale and conversion, and a declaration that all income produced from the estate in its actual condition for the time being, whether consisting of property or investments of an authorised or of an unauthorised description, and whether of a wasting or permanent character, should be applicable as income under the will, no part thereof being, in any event, liable to be retained as capital. Then followed this proviso: "But no property not actually producing income which shall form part of my estate shall be treated as producing income, or as entitling any party to the receipt of income."*

A debt was due to the testator at the time of his death of which the trustees could not obtain payment, and they therefore took from the debtor as security for it, and interest, a third mortgage upon certain policies of assurance on his life. The debtor died in the lifetime of the tenant for life, without having ever paid any interest on the mortgage. After payment of the prior charges, the trustees received out of the policy moneys a sum which was less than the amount of the principal due to the testator's estate.

Held, that the sum received by the trustees represented arrears of interest as well as principal; and that, according to the well-settled rule of the court, it must be apportioned between the tenant for life and the remaindermen, the proviso in the will relating to property not actually producing income not being applicable.

Decision of Stirling, J. reversed.

CHARLES ALFRED HUBBUCK, by his will, dated the 26th Aug. 1890, after making certain bequests, devised and bequeathed all his real and personal estate not otherwise disposed of (subject to the payment of his debts, funeral and testamentary expenses, and legacies), unto and to the use of his wife Edith Emily Hubbuck and Edward Hart and F. G. Evan Jones, upon certain trusts, which included trusts for calling in, conversion, and investment, and trusts under which Edith Emily Hubbuck was entitled to the income of the trust estate during so long as she should remain the testator's widow, and under which if she married

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

again she was to be entitled to an annuity of 750*l.* per annum during the remainder of her life, and under which, subject as aforesaid, the corpus of the trust estate was to be held as follows: As to one moiety, if the testator's widow should die without being married again, for her testamentary appointees, and in default of and subject to any such appointment upon the trusts declared of the other moiety of the trust estate; and as to the other moiety of the trust estate, and as to the whole, if the testator's widow should marry again, upon trust to pay certain legacies to a niece and two nephews of the testator, and subject thereto upon trust for such of the testator's nephews and nieces, children of his sisters and of his brother [naming them] as should be living at the testator's death equally.

The will contained the following clause:

Provided always and I hereby declare that the said trustees or trustee may postpone the sale, conversion, or collection of all or any part or parts of my said real and personal estate respectively (including any property of a wasting nature) so long as they or he shall deem proper, but my real estate shall be considered as personal from the time of my death, and during such postponement the said trustees or trustee may manage or let my real or leasehold estate, and make out of the income or capital of my real and personal estate any outlay which the said trustees or trustee may consider proper for improvements, repairs, insurance, calls on shares, premiums on policies or otherwise, for the benefit or in respect of my real and personal estate; and I declare that the net rents and profits, or other income, produced from every or any part of my said real or personal estate previously to the conversion or collection thereof . . . shall be applied in the same manner in all respects as if the same were income arising from the investments hereinbefore authorised, and that all income produced from my estate in its actual condition for the time being, whether consisting of property or investments of an authorised or of an unauthorised description, and whether of a wasting or permanent character, shall as well during the first year from my death as at all times afterwards, be applicable as income under the trusts of this my will, no part thereof being in any event liable to be retained as capital; but no property not actually producing income which shall form part of my estate shall be treated as producing income, or as entitling any party to the receipt of income.

The testator appointed his widow and Edward Hart and F. G. Evan Jones executors of his will.

The testator died on the 23rd Dec. 1890 without leaving any child.

At the time of the death of the testator there were owing to him from Edward Hart, sen., the following sums: (*a*) 2000*l.*, which was lent in Oct. 1889, without security, carrying interest at 5*l.* 10*s.* per cent., and repayable in two years if demanded; and (*b*) 1500*l.* advanced in Sept. 1890, for which four promissory notes were given to the testator for securing the repayment by instalments at six, nine, twelve, and fifteen months respectively, with interest at 4*l.* per cent. This interest was subsequently treated as being at the rate of 5*l.* per cent., Edward Hart, sen., stating that that was the intention at the time the sum of 1500*l.* was advanced.

The promisory notes above mentioned were not met as they became due, and Edward Hart, sen., was pressed on behalf of the trustees of the will to make some arrangement as to his indebtedness; but, being in financial difficulties, he was unable to make any substantial payment, and it was believed that, if proceedings were taken against him, he would be forced into bankruptcy, and that very little would be recovered. Eventually it was arranged, as the best that could be done by the trustees under the circumstances, that Edward Hart, sen., should give the security next hereinafter mentioned to secure the repayment of the sums of 2000*l.* and 1500*l.*, making together 3500*l.*

Accordingly, by an indenture of mortgage, dated the 1st April 1892, Edward Hart, sen., assigned to the trustees three policies of assurance on his own life in the London Life Association for sums amounting together to 6300*l.* (subject to a mortgage or charge of 2600*l.* with interest in favour of the association, and also subject to a mortgage or charge of 700*l.* and interest at 5*l.* 10*s.* per cent. in favour of the Rev. John Marks Ashley) to secure the sum of 3500*l.* with interest at 5*l.* 5*s.* 9*d.* per cent., that being the average between 5*l.* 10*s.* per cent., the rate payable on the sum of 2000*l.*, and 5*l.* per cent., the rate payable on the sum of 1500*l.*

On the death of Edward Hart, sen., on the 29th Nov. 1894, the policy moneys became payable; and on the 9th Jan. 1895 the trustees received from the association the sum of 3669*l.* 14*s.*, being the balance of the policy moneys after deducting the amount claimed by the association under their securities.

No interest was ever paid by Edward Hart, sen., in respect of the mortgage debt of 3500*l.*

In Sept. 1895 the testator's widow married again.

An originating summons was taken out by Edward Hart and F. G. Evans Jones against the testator's widow and one of the persons entitled in remainder, asking (*inter alia*) how and on what principle, having regard to the terms of the will, the sum of 3669*l.* 14*s.* was to be apportioned as between capital and income of the estate of the testator, and in particular whether, for the purposes of such apportionment, moneys paid by the trustees were in the first place to be treated as repaid out of that sum with interest, and if so with what rate of interest respectively, and what part of that sum was to be paid to the testator's widow as income, and what part was to be retained by the trustees as capital.

The summons was adjourned into court, and came on to be heard before Stirling, J. on the 13th Nov. 1895, when his Lordship decided that, according to the true construction of the will, the testator's widow was not entitled to any part of the residue of the sum of 3669*l.* 14*s.*, after making thereout the several payments referred to; and that the whole of such residue formed part of the capital of the testator's estate.

From that decision the testator's widow now appealed.

O. L. Clare for the appellant.—According to the general rule laid down by the authorities some part of the sum of 3669*l.* 14*s.* received by the trustees must be treated as income, and the appellant is entitled to such part:

Turner v. *Newport*, 2 Ph. 14;
Cox v. *Cox*, L. Rep. 8 Eq. 343;
Ackroyd v. *Ackroyd*, L. Rep. 18 Eq. 313;
Re The Earl of Chesterfield's Trusts, 49 L. T. Rep. 261; 24 Ch. Div. 643;
Re The Duke of Cleveland's Trusts; *Hay* v. *Wolmer*, 73 L. T. Rep. 313; (1895) 2 Ch. 542;
Re Morley; *Morley* v. *Haig*, 73 L. T. Rep. 151; (1895) 2 Ch. 738.

In the present case the clause in the will does not affect the general rule, because the realised security cannot be treated as "property not actually producing income."

W. M. Cann for the respondent, the remainderman.—The realised security cannot be treated as property "actually producing income." To treat as actually producing income a fund which did not produce income would be to disregard the express provisions of the will. "Actually producing" means "producing from time to time." "Actually" means something real as opposed to something merely estimated. Apart from the rule laid down in *Turner* v. *Newport* (*ubi sup.*), and the other authorities cited on behalf of the appellant, she, as tenant for life, could take no portion of the 3669*l.* 14*s.* The rule is artificial, and is founded on a hypothesis. The clause in the present will was inserted to prevent the question of apportionment from arising. If, however, the court is against my contention on that point, then the question is, how the fund is to be apportioned. Though *Turner* v. *Newport* (*ubi sup.*) governs this case, unless the clause in the will takes it out of *Turner* v. *Newport* (*ubi sup.*), yet I submit that the fund ought only to be apportioned as from the 1st April 1892, the date of the mortgage of the policies of life assurance. The apportionment between the tenant for life and the remaindermen can only be taken as from the date of the security, which has been realised. [*Clare.*—I do not object to that. KAY, L.J.—There are many cases which have followed *Re The Earl of Chesterfield's Trusts* (*ubi sup.*) and *Cox* v. *Cox* (*ubi sup.*) as to the mode of apportionment. *Clare* referred to *Re Foster*; *Lloyd* v. *Carr* (63 L. T. Rep. 443; 45 Ch. Div. 629).]

Stallard for the respondents, the trustees.

No reply was called for.

LINDLEY, L.J,—I confess that at first I did not quite grasp this case; but now that I understand it I am bound to say that I think Stirling, J.'s decision is erroneous. By the will the testator directs his property to be converted, and directs his trustees to pay the income to his wife so long as she shall remain his widow, and, if she shall marry again, then he directs that she is to have an annuity of 750*l.* a year. Then there is a power enabling the trustees to postpone the sale and conversion, and then there follows this clause respecting what is to be done with the income: "I declare that the net rents and profits or other income produced from every or any part of my said real or personal estate previously to the conversion or collection thereof . . . shall be applied in the same manner in all respects as if the same were income arising from the investments hereinbefore authorised, and that all income produced from my estate in its actual condition for the time being, whether consisting of property or investments of an authorised or of an unauthorised description, and whether of a wasting or permanent character, shall, as well during the first year from my death as at all times afterwards, be applicable as income under the trusts of this my will, no part thereof being in any event liable to be retained as capital." That is a provision to get rid of the decision in *Howe* v. *Lord Dartmouth* (7 Ves. 137) and to let the widow take the income whatever it is. Then come these words: "But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income." What does that clause mean? That clause is evidently put in for the protection of the remaindermen, to prevent the tenant for life from requiring any income not actually earned to be made good at the expense of capital. It would protect the remaindermen, for instance, in the case of the income not being sufficient to pay the annuity. The effect of Stirling, J.'s order, though I did not see it at first, is to take from the tenant for life that which according to the rules of this court is income, and to give it to the remaindermen. The effect of it is, to produce a result which is just the reverse of what was intended or contemplated. The position of affairs to which we have to apply this clause is as follows: The testator had a debt owing of 3500*l.* That debt could not be got in when he died, and the trustees, doing the best they could, obtained a security from the debtor. They took some policies of life assurance as a security, and there being some charges on them they took subject to those charges, and I understand that they paid off one. The state of things to which we have to address ourselves is this: that the trustees, not being able to get in the debt, took some policies of life assurance as a security. After the testator's death, and before the widow married again, they realised the security, and, after paying off the first charge, the security produced a sum that was less than what was due on the security—less by all the interest and less by a portion of the capital. Now, what does that sum realised by the security represent? If you asked any commercial man or any accountant or lawyer he would say that that sum represents both the arrears of income and the capital, and that it ought to be apportioned so as to provide for the amount of interest due at 5 per cent., the rest being capital. In that state of things, but for this clause in the will, so much of that money as represents income would go to the tenant for life, and the security would have actually produced it. It produced the money, and if some of the money has to be treated as income it produced income. It is said, however, that so much of that money as is income is to go from the tenant for life to the remaindermen, to whom it does not belong. When you come to grapple with it, it does appear to me that Mr. Clare is right when he says that part of this money which the security has produced represents income during the life of the tenant for life and before she married again. Accordingly, it appears to me that we must allow this appeal and make an order such as is asked for by the notice of appeal; that is to say, that the defendant, the widow, is entitled to have the residue of that sum of money apportioned between capital and income. There will be a declaration, therefore, that the residue of the sum of 3669*l.* 14*s.* remaining after payment of the sums directed to be paid is to be apportioned between the tenant for life and the remaindermen as from the date of the mortgage, the 1st April 1892. The costs of all parties will come out of the capital of the estate.

KAY, L.J.—Out of respect to Stirling, J., from whom we are differing, I will add a few words. The sum which has been realised from the security taken by the trustees after the testator's death, for a debt due to the testator, is not sufficient to

pay the capital of that debt. The debt was 3500*l.*, and the sum realised after payment of prior charges is only about 3000*l.* What was due was not merely the sum of capital, but arrears of interest which accrued during the lifetime of the tenant for life. The ordinary rule of the court is to be applied to that first of all. What is that sum which has been recovered? Is it capital or is it income; or is it partly capital and partly income? By the settled rule of the court that sum recovered is partly capital and partly income. You cannot possibly alter that. That is the ordinary rule, and that is a very well settled rule. That is independent of the will, and without looking at the will at all. In that state of things you have to apply the will. Now I find that the will gives to the widow the income produced by the testator's residuary estate, of which this debt formed part. Whether any portion of the estate is a wasting security or not, the actual income of the whole residue is given to the widow so long as she remains the testator's widow, and if she marries again then she has an annuity. As I have already said, this sum was realised while she was his widow, and the whole arrears of income are arrears of income which accrued due while she was a widow. That the widow, as the tenant for life, was entitled to so much of this sum as represents income cannot therefore be denied for a moment. Is there anything in this will which alters that? If there be, the effect of it is, as has already been said, to give to the remaindermen that which is income, and which *primâ facie* belongs to the widow. Where is there anything in this will which does that? The clause relied on is in these words: "But no property not actually producing income which shall form part of my estate shall be treated as producing income, or as entitling any party to the receipt of income." Did this sum produce income or not? Here is this sum realised during the lifetime of the widow, the tenant for life, part of which is income and part of which is capital. If that is not producing income, I do not know what the words mean. That security being realised has produced income. You cannot say that this clause applies, because the security did not produce income. Then, if the security does produce income—although it does not produce it year by year, but produces it after a delay, and a lapse of time during which there was no income made—can you say that the effect of this clause is to give the income to the remaindermen, and take it away from the tenant for life? I cannot find a word in the will to that effect. The clause seems to me to be intended as a protection to the remaindermen in cases of this kind. Suppose there was some investment which could not well be realised, and which produced no income at all, and suppose the widow was to say, "I am entitled to have that valued as from the death of the testator, and to have 4 per cent. out of the capital as my income on that." This clause I think is meant to meet such a case as that. The tenant for life is not entitled, where the investment produced no income whatever, to have an imaginary income paid to her out of the capital at the expense of the remaindermen. But that is not this case. Another mode of illustrating the case is this: Suppose this mortgaged money realised produced enough to pay both principal and all the arrears of interest. Could the remaindermen say, "We will take the whole fund, both principal and interest?" It seems to me impossible. If they could not in that case, why should they take part of the fund which is a portion of the income to which *primâ facie* the tenant for life is entitled? With very great deference to the judgment of Stirling, J., I think that this will does not touch the particular facts that have happened in such a way as to deprive the tenant for life of this income, which by the rule of the court she is entitled to, and to give it to the remaindermen. It would be totally contrary to the meaning of this provision of this particular will. I therefore agree that the decision of Stirling, J. must be reversed, and that we must allow this appeal.

SMITH, L.J.—The whole ground has been fully covered by what has been said by the Lords Justices who have preceded me, and I have nothing to add except to say that I entirely agree with them.

Appeal allowed.

Solicitors for the appellant, *Few* and *Co.*, agents for *A. J. Hart*, Eastbourne.

Solicitors for the respondents, *F. G. Evan Jones*; *Stones, Morris*, and *Stone*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Dec. 13, 1895.

(Before NORTH, J.)

HUDSON *v.* CRIPPS. (*a*)

Landlord and tenant—Residential flat—Common scheme—Restrictive covenants.

In Feb. 1895 *the plaintiff took from the defendant for a term of three years, determinable by her after the first year by a month's notice, five rooms, being Flat* 21 *in a building known as Oxford Mansions, Marylebone. The agreement, which was on a printed form, used in fact for all the flats which were let, provided that the tenant should not carry on any business in the rooms demised, nor use them for any purpose other than dwelling-rooms; and should observe a number of regulations thereto annexed, which provided for the use of the lift and other matters, showing that the building was intended to be used for residential flats. The defendant had begun extensive structural alterations for the purpose of turning the greater part of the building into a fashionable club. He did not propose to interfere with the plaintiff's flat or access thereto. The plaintiff brought an action to restrain the alterations.*

Held, that the plaintiff was entitled to have the general character of the building preserved, and the defendant must be restrained from using the building for any purpose other than residential flats, and from making any alteration therein with a view to such use.

THIS was an action brought by the tenant of a flat in a building known as Oxford Mansions against her landlord for specific performance of the agreement under which she held the flat, and to restrain him from making alterations in the building alleged to be inconsistent with the agreement and to cause a nuisance to the plaintiff.

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

The agreement, which was dated the 22nd Feb. 1895, was to take all those five rooms known as Flat 21 Oxford Mansions, in the parish of St. Marylebone, for twelve months certain from the 1st March 1895, and thenceforth from month to month, terminable by one month's notice on either side, but with a proviso that the landlord should not give such notice unless for nonpayment of rent or breach of covenant for three years.

The tenant agreed not to carry on or permit or suffer to be carried on on the premises any trade or business whatever nor do any act which might be or grow to be a nuisance, disturbance, or annoyance to the landlord or his tenants, or to use the premises or any part thereof for any purpose other than dwelling-rooms, and to observe and perform all the annexed regulations and conditions.

The landlord agreed to keep the entrance, staircase, and verandahs cleaned, lighted, and repaired, and that the tenant paying the rent and observing and performing the covenants and conditions should have quiet enjoyment of the premises.

The regulations and conditions annexed to the agreement provided for the time during which the street door should be open, for the supply of keys to the tenants of each flat, the removal of dust and supply of coals, use of the lift, and other similar matters, showing, as the judge held, that the building was intended to be used for residential flats under conditions arranged for the benefit and convenience of all the occupants.

The landlord in Nov. 1895 commenced very extensive alterations in the building for the purpose of using it as a fashionable club. The defendant contended that only the ground and first-floor were being altered, but the judge held that the alterations were intended to extend to the second floor, on which the plaintiff's flat was situated.

The plaintiff now moved for an injunction restraining the defendant, the landlord, from interfering with the plaintiff's quiet enjoyment of the premises, and from doing anything upon the premises inconsistent with the agreement, and also for a mandatory injunction to compel the defendant to light and clean the passages leading to the plaintiff's flat.

Swinfen Eady, Q.C. and *Job Bradford* for the plaintiff.—We ask for an injunction to restrain the nuisance inflicted upon us by the defendant's altering the whole character of the building. It is said by the defendant that he has not covenanted not to alter that character. That is not necessary. It is enough that the defendant has let the plaintiff her flat under restrictions and conditions which applied to all the flats, and were evidently intended for the benefit of all the residents:

Spicer v. *Martin*, 60 L. T. Rep. 546; 14 App. Cas. 12;

Davis v. *The Corporation of Leicester*, 70 L. T. Rep. 599; (1894) 2 Ch. 208.

In *Ryan* v. *Mutual Tontine Westminster Chambers Association* (67 L. T. Rep. 820; (1892) 1 Ch. 117), an order compelling the landlord of a set of flats to provide a porter was refused. But in that case the defendants admitted their liability to damages; and the question was whether that agreement could be specifically enforced by injunction.

Buckmaster for the defendant.—The injunction is asked for by the notice of motion on the ground of breach of the covenant for quiet enjoyment. This is absurd. There has been no interference with the plaintiff's possession. What is proposed to be done is merely to put a glass roof over the quadrangle at the height of the first floor and to alter the ground and first floors. Nothing is to be done to the second floor, and the access to the plaintiff's flat will not be interfered with. As to the nuisance caused by the alterations, it is not suggested they are being made in an improper way, and if the defendant has a right to make them, the plaintiff must put up with the necessary inconvenience, which is only temporary:

Jenkins v *Jackson*, 60 L. T. N. S. 105; 40 Ch. Div. 71.

And if the plaintiff has any claim on this account it is one for damages for nuisance:

Grosvenor Hotel Company v. *Hamilton*, 71 L. T. Rep 362; (1894) 2 Q. B. 836.

Then it is said there is an implied contract not to alter the character of the building. The defendant has never covenanted not to alter it, In *Spicer* v. *Martin* (*ubi sup.*) and the other cases relied on by the other side, there was some representation to the plaintiff, either by published plan or a building scheme or otherwise, that all the houses in question were subject to the same covenants as those entered into by the plaintiff. Here there was no representation. The fact that an agreement is on a printed form does not entitle a tenant to assume that other flats or houses are subject to the same covenant:

Tucker v. *Vowles*, 67 L. T. Rep. 763; (1893) 1 Ch. 195.

NORTH, J.—In this case I think the plaintiff is entitled to an injunction in a form I will mention directly, though I think that the injunction asked for is one that could not be granted. The injunction asked for proceeds first of all upon the footing of an interference with the quiet enjoyment of the plaintiff, but I do not understand the covenant for quiet enjoyment to be a covenant which means that the plaintiff is to enjoy the premises without the nuisance of a noise in the neighbourhood. It is a covenant for freedom from disturbance by adverse claimants to the property. But I think the plaintiff is entitled to relief to a limited extent by reason of the implied obligation entered into by the parties to the agreement that was signed between them. The premises were built several years ago, and from the time they were built, subject to a certain exception I will mention presently, they have been used as residential flats, to use a well-known phrase of the present day. The plaintiff herself had lived there for some time under a similar agreement, and at that time the premises were all used as private residences in the same way as they were when she entered into this agreement on the 22nd Feb. 1895. Then what is the agreement? I think that it is an agreement which shows on its face that it was made with respect to a certain flat forming part of a larger building all used for this particular purpose. Now, looking at this agreement itself, it is evidently not intended to apply to this particular flat alone. It is a printed agreement, and the names of the parties, the number of the flat, and the dates are left blank. That is filled in in this

case by the date and the names of the parties, and it runs: "The landlord agrees to let and the tenant agrees to take all those five rooms known as flat No. 21, Oxford Mansions." So that there is a clear reference here to five rooms making up together a certain flat in a building, which everyone knew at the time was used as flats, and which was shown by this agreement to contain twenty-one flats at least, how many more I do not know. There are covenants not to do various things, and to use the rooms for private dwelling-rooms only. Then there is a further covenant to observe and conform in all respects to the annexed regulations and conditions. Now, these regulations are most important. [His Lordship stated the regulations shortly as above and continued:] No one can read those without seeing that they contain a scheme for the general management of this building composed of several flats in such a way as to be suitable to the convenience of all the persons who are tenants of the building. It would be idle to suppose that these requirements were made except for the purpose of the convenience of all the tenants there, and when the landlord enters into this arrangement with each tenant it is obviously intended to be for the benefit of all the tenants. Whether these buildings were built originally with any such scheme in view I do not know, and it seems to me entirely unimportant. They were at any rate existing as a series of flats all held in common occupation under a common management, though let to different tenants. It seems to me it is a case which comes exactly within the principles laid down by Lord Macnaghten in *Spicer* v. *Martin* (*ubi sup.*), which the other learned peers all agreed to definitely, though Lord Fitzgerald did suggest that on one ground he might possibly have been adverse. It is a very clear judgment, which has always been accepted as settling the law from that time onwards. Now, what has the defendant done here which is inconsistent with that? He is proceeding to convert the building into a club. According to his own case the ground floor and the first floor are all to be converted for that purpose. The inner quadrangle is to be covered over. As regards the upper floors, I think they are to be treated in the same way. It is clear that certain alterations are going on there now which apparently are inconsistent with the use of these upper floors as flats. For instance, all the kitchen ranges are being taken away from the flats on the ground that kitchens are no longer necessary there, and that something else is to be substituted. As regards this point the plaintiff swears that she has seen a prospectus in which it is said that it is proposed to have 100 bedrooms in connection with the club, and she says that is just about the number of rooms the upper floors would provide. It is quite true this statement has been made in an affidavit in reply, but I have not been asked to allow the matter to stand over in order that this statement might be disputed. Under these circumstances what is proposed is really to convert this building, consisting of private residences and flats, one of them occupied by the lady who is the plaintiff in the action, into a large club, to be occupied by members day and night. This lady's residence, instead of being isolated, is to be a residence in the middle of and surrounded by a building occupied by what is intended to be a fashionable club. I think that is such a departure from the arrangement made with the landlord by the agreement that she is entitled to have a judgment to restrain it. I think the proper form of order will be to restrain the defendant from using, or permitting the premises to be used as a club or otherwise than as residential flats, or making or permitting to be made any alterations therein with a view to such user thereof as is hereby restrained. I mentioned that there was an exception to the use of this building as residential flats. It appears from the evidence that some parts of the ground floor have been used as offices. I do not mean to interfere with that, and words must be added to the effect that this order is not to prevent the use of the offices existing on the ground floor as heretofore. The injunction, of course, must not continue after the determination of the plaintiff's tenancy.

Solicitors: *Walter Webb* and *Co.*; *A. Toovey.*

Thursday, Jan. 16.

(Before NORTH, J.)

Re WISE; JACKSON *v.* PARROTT. (*a*)

Infant — Maintenance — Discretion of trustees — Past maintenance—Discretion not exercised.

W. by will directed his trustees to apply the whole of the income of his personal estate, or such part as they should in their absolute discretion think fit, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of his sister J., until they should respectively attain the age of twenty-three years, and to accumulate the residue of such income; and he gave the capital of his said personal estate to such of the children of J. as should attain the age of twenty-three years as tenants in common in equal shares. W. died in 1888. *His sister survived him, and had two children only, both born in his lifetime. By an order made in Jan.* 1889 *upon a summons taken out by the trustees, it was declared that the gift of capital to the children who attained twenty-three was void for remoteness; but that, on account of other clauses in the will, the persons to take it could not be ascertained until the death of J., and the trustees were ordered to accumulate the surplus income until further order. In* 1895 *the two children of J., one of whom had attained twenty-three and the other twenty-one, took out this summons for the determination of the questions whether the trust for maintenance was not good, and whether the trustees ought not to have applied, and ought not now to apply, the accumulated income for maintenance, &c.*

Held, that the trust for maintenance could be severed from the gift of the capital, and was good; that the accumulation by the trustees had plainly not been an exercise of their discretion, and that they had now, notwithstanding that one child had attained twenty-three, a discretion to apply all or any part of the income which accrued down to the date of her attaining twenty-three in payment of the past maintenance of the two children, and to apply any part of the income which had accrued since that date, or

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

should accrue before the younger child attained twenty-three, in or towards his maintenance.

WILLIAM WISE, who died on the 26th Feb. 1888, by his will, dated the 19th Oct. 1887, gave all his real estate upon trust out of the rents thereof to pay certain annuities to his brother, George Wise, and his sister, Margaret Hine Jackson, and to dispose of any surplus of such rents as part of his residuary personal estate; and on the death of his said brother and sister, upon trust, for the child, if only one, or all the children, if more than one, of his sister, M. H. Jackson, who, either before or after her death, should live to attain the age of twenty-three years, and the issue of such children as should be then dead in equal shares *per stirpes*. And he bequeathed all the residue of his personal estate unto his said trustees upon trust to sell, and convert, and invest as therein mentioned:

And to stand possessed of the income arising from such investments, upon trust to apply the whole, or such part thereof as my trustees or trustee for the time being in their absolute discretion shall think fit, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of my said sister, Margaret Hine Jackson, until they respectively attain the age of twenty-three years, and to accumulate and invest as capital any unapplied portion of such income; and, upon further trust as to both the capital and income of such investments, to stand possessed thereof upon trust for the child, if only one, or for all the children, if more than one, of my said sister, who, either before or after her decease, shall live to attain the age of twenty-three years, such children, if more than one, to take in equal shares as tenants in common, and the issue of such of the children of my said sister as may be then dead, such issue taking only as tenants in common the share which their respective parents would have taken if living.

The will contained a gift over to all the testator's nephews and nieces in case of the death without issue of all M. H. Jackson's children in her lifetime.

The testator died on the 26th Feb. 1888.

Margaret Hine Jackson survived the testator. She had two children only, viz., the plaintiff Florence Mary Jackson, who was born on the 10th March 1869, and the plaintiff Frederick William Jackson, who was born on the 28th May 1874.

In July 1888 the trustees of the will took out a summons to determine the validity of the devise and bequest of the testator's residuary estate, and by the order made on this summons, on the 30th Jan. 1889, the court declared that the effect of the devise of real estate could not be determined until the deaths of both the annuitants; that the bequest of the residuary personalty to the children of M. H. Jackson was void for remoteness, but that the persons to take the residuary personalty could not be determined until the death of M. H. Jackson, and the trustees were ordered to accumulate the surplus income of the real and personal estate until further order.

The trustees accumulated the income under this order until 1895, without applying any part of the income for the maintenance or benefit of Mrs. Jackson's children.

In May 1895 this summons was taken out by Florence Mary Jackson and Frederick William Jackson against two of the trustees of the will and two of the testator's next of kin, asking whether the trust for the application of income was not valid; whether the trustees were not bound to apply the whole income unless in their discretion they applied part; and whether, as they had not exercised any discretion, the whole income which accrued between the testator's death and the 10th March 1892, when the plaintiff Florence Mary Jackson attained twenty-three, ought not to have been applied, and ought not now to be applied for the benefit of both plaintiffs; and the subsequent income until F. W. Jackson should attain twenty-three ought not to be applied for his maintenance and benefit.

Swinfen Eady, Q.C. and *Dickinson* for the plaintiffs.—The trust for the application of the income is severable from the gift of capital and is perfectly good:

Gooding v. *Read*, 1 D. M. & G. 510;
Re Watson; Cox v. *Watson*, W. N. 1892, p. 192.

The trustees have power to resort in any year to accumulations of past years:

Edwards v. *Grove*, 2 L. T. Rep. 620; 2 De G. F. & J. 210.

The trustees have not exercised any discretion in this case. They only invested the income by way of interim investment. Where trustees have not exercised their discretion the court will put the matter right, though the time for exercising the discretion has passed:

Wilson v. *Turner*, 48 L. T. Rep. 370; 22 Ch. Div. 521.

The trustees can therefore now apply the accumulations during the years before Miss F. M. Jackson attained twenty-three for the maintenance and benefit of both plaintiffs.

Chaster for the trustees.—The trustees did not intend to say in exercise of their discretion that maintenance was not necessary. [NORTH, J.—I think there should be an affidavit to that effect.]

Stallard for one of the testator's next of kin.—I cannot dispute that this trust for maintenance is severable from that for capital. But the trustees cannot possibly now apply the money for past maintenance, the children have been maintained. There was no duty laid on the trustees to apply anything. That distinguishes the case from *Wilson* v. *Turner* (*ubi sup.*). In that case there was a neglect of duty on the trustees part.

It was suggested that the defendants, the next of kin, should be appointed to represent all the next of kin.

NORTH, J.—As I understand this is an originating summons, in which the parties interested as beneficiaries have served the trustees. They also have made two of the next of kin parties. It was not necessary to do so, but the court probably would not have dealt with the matter if no next of kin were here without requiring that some one or more should be made parties. Two have been made parties in the first instance, and I do not think it necessary to make any order binding the rest. The rules of court provide for such a summons as this being dealt with in the absence of some of the parties interested, and I deal with this summons in that way. As regards the question of construction I thought, on reading the will, that the point was reasonably clear that the trust for

persons before the age of twenty-three describing the persons was quite a different trust from the other trust for persons after attaining the age of twenty-three, although the description of those persons might correspond with that of the persons who came under the first trust; that is to say, the trust for maintenance was quite a different and separate trust from the trust as to the capital. Two cases have been cited which show that what was my opinion on this will is the view which has been taken by the court in other similar cases. One of these, in the Court of Appeal, *Gooding* v. *Read* (*ubi sup.*) was very like the present case, the other before Chitty, J. was even stronger: *Re Watson* (*ubi sup.*) I think, therefore, this trust is good. [His Lordship read the words of the trust and continued:] I see nothing to make that bad or void in any way. I have no doubt the separate trust under which the capital is given over is bad, because there are certain inherent defects in the way in which that trust has been attempted to be created. Some seven or eight years have elapsed since the testator died, and during the whole of that time the income has been accumulated. I felt some difficulty at first, for I thought that the trustees had deliberately chosen to capitalise the income, and that in itself was *primâ facie*, at any rate, an exercise of the discretion to the effect that the income was not required for maintenance, and ought to be accumulated, and I required some further information to be given by the trustees. I had not then given due weight to a clause which I find in the order made by me declaring the construction of the will on points which are not now material. It was then ordered that the plaintiffs, the trustees of the will, do accumulate the surplus of the real and residuary personal estate until further order. If the parties had contemplated the question which has now arisen probably some words might have been inserted there giving liberty to any person to apply as to the income. That was not done, and the direction to accumulate until further order bound the trustees until it was varied, and they had no longer a discretion as to applying any part of the income for maintenance without a further order of the court. Under these circumstances it seems to me that the trustees in capitalising the income have not exercised any discretion, and that it is open to them now to exercise the discretion which was given them by the testator's will in the clause that I have read, unless there is anything in the will itself which prevents it. The point is as to applying the income of past years for maintenance at a date when those years have expired. I see no difficulty in the present case in doing so. The question does not arise whether if the trustees had exercised their discretion and capitalised income they could resort to those capitalised accumulations. In point of fact they have not exercised their discretion for the reason I have given, and it seems to me that it is open to them to exercise it now. It does not seem to me to be very material whether they have that discretion now or not because if they had a discretion which they have not exercised the court would exercise it for them on a proper application, and in exercising it I should consult the trustees, and should pay great attention to what they said they would have done if they had not been directed to invest the surplus income. But I think the right thing to say is that the discretion is not gone. I find nothing in the will to prevent the trustees exercising their discretion at any time, and I think that they may do it now. Under these circumstances the fact that the testator's eldest daughter attained twenty-three four years ago does not, in my opinion, deprive the trustees of the power of exercising the discretion as to the income between the testator's death and the time she attained twenty-three, which has not been exercised. The fact no doubt that that child has been maintained and educated is a point that the trustees will consider when they have to deal with the question in what way they should now exercise their discretion, but in my opinion they have a discretion, and I have no doubt they will give due consideration to the point. I think, therefore, the order should be made in the terms of a declaration . . . that the trustees may now in their absolute discretion apply all or any part of the income of the residuary personal estate (including the income arising from the investment of rent of real estate) which accrued down to the 10th March 1892, and of the accumulations thereof, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of both plaintiffs; and a similar declaration as to the income accrued after that date for the maintenance, &c., of F. W. Jackson until he attains twenty-three.

Solicitors: *Hickin, Smith,* and *Capel Cure; Ingle, Holmes,* and *Son*; *R. E. Bartley*; *Collyer-Bristowe* and *Co.*

Dec. 5, 6, 9, 10, 11, 12, 13, *and* 18, 1895.

(Before WILLIAMS, J. sitting as an additional Judge of the Chancery Division.)

Re KINGSTON COTTON MILL COMPANY LIMITED (No. 2). (*a*)

Company — Winding-up — "Misfeasance" — Directors — Auditors — Companies (Winding-up) Act 1890 (53 *&* 54 *Vict. c.* 63), *s.* 10.

The word "misfeasance" in sect. 10 *of the Companies (Winding-up) Act* 1890 *covers every misconduct by an officer of a company as such for which such officer might have been sued apart from the section.*

Charges, therefore, against the auditors of a company of having through want of the exercise of ordinary skill and diligence sanctioned accounts containing false statements do, if they are proved and coupled with pecuniary damage to the company, constitute a misfeasance within the meaning of the section.

Directors who pay away the funds of a company under an honest belief in a state of facts which would justify the payment, are not to be held liable to replace those funds because it turns out that on the true facts the payments were ultra vires.

Directors of a company act reasonably in accepting the manager's certificate as to the value of the stock-in-trade.

Although it is no part of the duties of the auditors of a company to take stock, they are not entitled to rely on the manager's certificate as to its value if an ordinary careful examination of the books of the company ought to make them suspect the truth of it.

(*a* Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

SUMMONS.

This was a summons under sect. 10 of the Companies (Winding up) Act 1890 taken out by the official receiver and liquidator of the Kingston Cotton Mill Company Limited, asking for a declaration that the respondents, S. Lambert, A. Mouat, V. H. Parker, G. G. Macturk, J. W. Halden, and W. Jackson, directors of the company, and the respondent, B. Pickering, a past auditor thereof, were jointly and severally liable to pay to the applicant four several sums of 36*l.* 0*s.* 10*d.*, 38*l.* 12*s.* 4*d.*, 38*l.* 12*s.* 4*d.*, and 38*l.* 17*s.* 4*d.*, which, being moneys of the said company, were improperly applied in payment of dividends on certain preference shares 1882 for the years 1890, 1891, 1892, and 1893, respectively together with interest thereon, and that the respondent A. E. Peasegood, a past auditor of the said company, was liable to pay to the applicant the several sums of 38*l.* 12*s.* 4*d.* and 38*l.* 17*s.* 4*d.* applied, as aforesaid, for the years 1892 and 1893, together with interest thereon. The summons also asked with respect to each and all of the respondents (but as to the respondent Peasegood only as from the date when his firm of Pickering, Peasegood, and Judge became the auditors of the company) a finding that they were guilty of misfeasance or breach of trust in relation to the company, in that they respectively authorised the issue and circulation of divers reports and accounts of the company, and in particular those for the years 1884 to 1892 inclusive, containing false and misleading entries with respect to (i) the value of the company's mill, machinery, and site, (ii) the value of the company's stock in trade, particularly for the year 1888 and the subsequent years, and (iii) the company's reserve fund, and that by reason of such misfeasances or breaches of trust, the respondents other than Peasegood were jointly and severally liable either to pay to the applicant the sum of 80,770*l.* 10*s.* (representing the company's trading loss since the year 1884), or other the sum total of the loss sustained or resulting to the company by or from such misfeasances or breaches of trust, and the respondent Peasegood also was liable to pay to the applicant such due proportion of such sum or sum total as the court might prescribe; or, in the alternative. that the respondents respectively might be ordered to contribute such sums of money to the assets of the company by way of compensation in respect of such misfeasances or breaches of trust respectively as the court might think just.

The company was incorporated in 1879 for the purpose of purchasing the undertaking property and business of a company of the same name.

The articles of association were substantially the same as those in Table A to the Companies Act 1862.

Art. 140 was as follows:

The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet containing the particulars required by their articles, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs; and, in case they have called for any explanation or information from the directors, whether such explanation or information has been given by the directors, and whether the same has been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

The respondents Lambert, Mouat, Parker, Macturk, and Halden were original directors of the company, and remained on the board until the winding-up.

The respondent Jackson was appointed a director in the year 1882; prior to that date he had been general manager only, and from that time forward combined both offices.

The respondents Pickering and Peasegood were members of a firm of chartered accountants carrying on business under the name of Pickering, Peasegood, and Judge. The firm were appointed auditors of the company in 1892, Pickering having before that date been sole auditor, and in that capacity signed all the balance-sheets.

On the 18th April 1894 an order was made for winding-up the company compulsorily.

On the 11th Feb. 1895 the present summons was taken out by the official receiver and liquidator.

A summons had been taken out by Pickering and Peasegood asking that all proceedings under the first summons might be stayed as against them on the ground that they were not officers of the company within sect. 10 of the Companies (Winding-up) Act 1890, but the summons had been dismissed by the Court of Appeal (see *ante*, p. 482; (1896) 1 Ch. 6).

The misfeasance summons now came on to be heard. The facts of the case were shortly as follows:

In 1880 the directors published their first summary of accounts, in which the first item on the asset side was entered as "Mill, machinery, and site, construction account as before, 227,048*l.* 5*s.* 4*d.*

In Dec. 1884 the directors procured, for the purpose of obtaining a loan on mortgage, a valuation of the mill property from Messrs. Grundy and Son of Manchester, in which the total value of the property was put down at 76,833*l.* This valuation was not referred to by the directors in any of their subsequent reports, and in the balance-sheets for 1889, 1890, 1891, and 1892 the following item appeared: "Mill, machinery, and site, with new packing plant, economiser, new steel boilers, compounded engines, and new boiler-house, as per construction account, 196,610*l.* 0*s.* 7*d.*" A reserve fund was also entered as existing. The stock-in-trade for the years 1889, 1890, 1891, and 1892 was entered in the trade account as of the value of 29,760*l.* 3*s.* 2*d.*, 44,482*l.* 10*s.* 9*d.*, 53,918*l.* 5*s.* 1*d.*, and 60,966*l.* 5*s.* 6*d.* The same sums were also entered in the account of liabilities and assets with the addition of the words "as per manager's certificate." The effect of these last entries was that the account showed a profit which led the directors to suppose that they were entitled to pay the preference dividends in question, and to state that there was a reserve fund.

Jackson, the manager, admitted that he had deliberately inflated the amount of the entries for stock-in trade in order to cover losses and make things look better. He stated that this was done by him individually, and without the knowledge or sanction of any of the directors. They knew nothing about it, and he never declared it to them.

It was admitted by both sides during the argument that the summons must be confined to matters which occurred within the six years immediately prior to the issue of the summons.

The respondent Mouat had died since the issue of the summons.

Cozens-Hardy, Q.C., *W. D. Rawlins*, and *Marshall Hall* for the summons.—The directors and auditors have been guilty of misfeasance, and are therefore liable under sect. 10 of the Companies (Winding-up) Act 1890. The directors knew that the balance-sheets and accounts for the years 1890, 1891, 1892, and 1893 were false. The stock-in-trade appeared therein at an inflated value, and capital had been lost and not replaced. The payment, therefore, of dividends inasmuch as it was made out of capital was improper. Dividends cannot be paid otherwise than out of profits, and if paid out of capital such payment is a breach of trust, and repayment may be enforced by summary proceedings:

Re Oxford Benefit Building and Investment Society, 55 L. T. Rep. 598; 35 Ch. Div. 502.

[WILLIAMS, J. referred to *Lee* v. *Neuchatel Asphalte Company* (61 L. T. Rep. 11; 41 Ch. Div. 1). *Haldane*, Q.C. referred to *Verner* v. *General and Commercial Investment Trust*, 70 L. T. Rep. 516; (1894) 2 Ch. 239.] The articles of the company (art. 120) contain express provisions that dividends shall only be paid out of profits. As against the auditors we rely on

Re London and General Bank (No. 2); 73 L. T. Rep. 304; (1895) 2 Ch. 673.

Verner v. *General and Commercial Investment Trust* (*ubi sup.*) was not the case of a trading company, and therefore does not apply. We submit that the directors and auditors fell short of the standard of duties required by the court and by the articles of the company. The directors cannot be heard to say that they did not know their own articles, which were practically the same as those in Table A. They allowed the auditors to abstain from making a report as required by the articles. Lambert, Parker, Jackson, and Macturk knew all about the valuation, and allowed the mill to stand in the balance-sheet at an inflated figure. If they had put the mill at cost price they would have had to write off a large amount for depreciation on the other side of the account. [WILLIAMS, J.—What damage do you say accrued to the company from their not dealing with depreciation in the right way?] If the fact had been disclosed to the shareholders they would have stopped business at once. [WILLIAMS, J.—You have called no evidence to show that these particular shareholders, if they had known the facts, would have stopped business.] If the mortgagees had known the truth they would have foreclosed or sold the property. The loss is none the less because it is a loss of borrowed money. [WILLIAMS, J.—Assume that the auditors did not perform their duties relating to the audit, you cannot fix them with liability unless you can show that the balance-sheet contained misrepresentations to their knowledge.]

Farwell, Q.C. and *E. C. Macnaghten* for Lambert.—There is no cause of action against Lambert. Sect. 10 of the Act of 1890 does not create any new right. It only substitutes a summary remedy for which an action lies:

Coventry and Dixon's case, 42 L. T Rep. 559; 14 Ch. Div. 600;

Cavendish Bentinck v. *Fenn*, 57 L. T. Rep. 773; 12 App. Cas. 652;

Buckley on Companies, 6th edit., p. 523.

Messrs. Grundy and Co.'s valuation of the property has absolutely nothing to do with the case. Directors are under no obligation to have an annual valuation made of the property of the company, and to write down the capital in accordance with it. The cost price of the mill and plant was the only proper thing to put down in the capital account. The capital and income account are quite distinct. The reserve fund is that which is taken out of the income account. Nothing will make income capital. This is a charge of fraud. [WILLIAMS, J.—Misfeasance in the nature of a breach of trust. You cannot put it higher than that.] After *Lee* v. *Neuchatel Asphalte Company* (*ubi sup.*) and *Verner* v. *General and Commercial Trust* (*ubi sup.*) it is impossible for the official receiver and liquidator to say that the dividends in question were not properly paid. It is no part of the duty of the directors to make good out of profits loss of capital before distributing a dividend. As regards the damages claimed for misrepresentation there has been no falsehood or deception, and there is no evidence that anyone has been deceived. It must be proved that the loss to the company arose from the misfeasance of the directors. It is said that various items in the accounts were from year to year inflated, but there is no evidence that the directors were aware of this inflation. It is said that the directors abrogated their functions by not taking stock themselves. They could not have done so. They were not experts. Jackson was. The directors are not bound to examine the books of the company:

Re Denham and Co., 51 L. T. Rep. 570; 25 Ch. Div. 752.

And cannot be made liable for being defrauded:

Land Credit Company of Ireland v. *Lord Fermoy*, 23 L. T. Rep. 439; L. Rep. 5 Ch. 763;

Barnard v. *Bagshawe*, 7 L. T. Rep. 544; 3 De G. J. & S. 355.

Directors are entitled to rely on the statements of experts so long as they believe them to be honest. They are not therefore liable for the fraud of their manager or officer whom they have no reason to distrust. They are in no sense trustees for creditors of the company:

Poole, Jackson, and White's case, 38 L. T. Rep. 659; 9 Ch. Div. 322.

Directors are not liable unless from their wrongful act the company has suffered damage which is the direct consequence of that act:

Walker v. *Goe*, 32 L. T. Rep. O. S. 336; 3 H. & N. 395; 4 H. & N. 350;

Waddell v. *Blockley*, 41 L. T. Rep. 458; 4 Q. B. Div. 678.

Even if the directors in the present case had informed the shareholders of the true state of the company it is impossible to assume that the shareholders would have insisted upon the company being wound-up at a particular date. They also referred to

Derry v. *Peek*, 61 L. T. Rep. 265; 14 App. Cas. 337;

Rance's case, 23 L. T. Rep. 828; L. Rep. 6 Ch. 104;
Re Midland Land and Investment Corporation (unrep., see Palmer's Com. Prec., 6th edit, part 1, p. 440);
Marzetti's case, 42 L. T. Rep. 206.

Haldane, Q.C., *Swinfen Eady*, Q.C., and *Eve*, Q.C., for Pickering and Peasegood, the auditors.—The case of the auditors is somewhat different from that of the directors. They are professional men and are bound to bring reasonable skill to the performance of their duties. On the other hand they are not trustees. Sect. 10 of the Act of 1890 creates no new rights or liabilities. An action against the auditors would have to be based either on deceit or on breach of contract to use reasonable skill. To sustain an action of deceit it would be necessary to show (1) that the statement complained of was untrue in fact; (2) that it was untrue to the knowledge of the persons making it; (3) that the statement was relied upon; and (4) that damage directly resulted to the company from acting on such statement. Here the evidence would not be sufficient to support such an action. We ask to be permitted to reserve the questions (1) whether the auditors were officers of the company, the decision of the Court of Appeal on that point being under appeal; and (2) whether, assuming they were officers a mere act of negligence would come within sect. 10 of the Act of 1890. [WILLIAMS, J.—I do not think you can reserve the question of jurisdiction. If you raise it I must deal with it now.] Then we elect to raise it. We submit that to bring a case within the section it is not sufficient to show that the act complained of is one of mere negligence, but it must be shown that it amounts to a misfeasance in the nature of a breach of trust:

Cavendish-Bentinck v. *Fenn* (*ubi sup.*);
Re London and General Bank, 72 L. T. Rep. 611; (1895) 2 Ch. 166;
Re London and General Bank No. 2 (*ubi sup.*);
Re Liberator Permanent Benefit Building Society, 71 L. T. Rep. 406;
Coventry and Dixon's case (*ubi sup.*).

Mere negligence on the part of an auditor would not have been sufficient ground to sustain an action against him at common law. A mere error of judgment will not render him liable.

Cozens-Hardy, Q.C., in reply on the preliminary objection as to jurisdiction.—There is no legal validity in the objection. The argument on behalf of the auditors gives no meaning to the words "contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just," in sect. 10. The point now raised was decided by the Court of Appeal in *Re London and General Bank* (No. 2) (*ubi sup.*), wherein the auditor was held liable to make compensation not for fraud or breach of trust, but for breach of his duty as auditor. It is said that that is contrary to the decision of James, L.J. in *Coventry and Dixon's case* (*ubi sup.*) The language there is ample for the facts before the judge. It could not be suggested that any common law action would have lain against directors for acting without qualification. It is said that if a director takes a bribe it can be recovered, because it is the money of the company. I submit it is not; but it could be recovered under sect. 165:

Lister and Co. v. *Stubbs*, 62 L. T. Rep. 654; 45 Ch. Div. 1;

or under sect. 10:

Re North Australian Territory Company; Archer's case, 65 L. T. Rep. 800; (1892) 1 Ch. 322.

On the fair construction of sect. 10 and on the authorities I submit that an officer of a company who has undertaken certain duties and has been guilty of a breach of such duties resulting in a loss to the company is liable to make compensation for such loss on summary proceedings under the section.

Haldane, Q.C. in reply on the preliminary objection and on the question of contract.—*Archer's* case (*ubi sup.*) is in my favour. Sect. 10 only applies to the case of misfeasance in the nature of a breach of trust resulting in a loss to the company:

Cavendish-Bentinck v. *Fenn* (*ubi sup.*).

Liability is not created by mere nonfeasance:

Re Wedgwood Coal and Iron Company, 47 L. T. Rep. 612.

The dicta in these cases are not inconsistent with the decision in *Re London and General Bank* (*ubi sup.*). [WILLIAMS, J. referred to *Re Cardiff Savings Bank*; *Davies' case* (62 L. T. Rep. 628; 45 Ch. Div. 537).] Officers of a company are not liable as constructive trustees where no property has come to their hands:

Re Forest of Dean Coal Mining Company, 40 L. T. Rep. 287; 10 Ch. Div. 450;
Barnes v. *Addy*, 30 L T. Rep. 4; L. Rep. 9 Ch. 244.

[WILLIAMS, J.—I shall not stop the case on this objection; but shall deal with it in my judgment. As at present advised I am of opinion that every wrong which an officer of a company as such does, whether it amounts to a breach of trust or not, is within sect. 10]. Then as to the question of contract. The contract into which a professional man usually enters is to use reasonable care and skill. He does not bind himself not to commit errors of judgment:

Purves v. *Landell*, 12 Cl. & F. 91.

Lindley, L.J. in *Re London and General Bank* (No. 2) (at p. 683 of (1895) 2 Ch.) in pointing out what are the duties of an auditor says, "Where there is nothing to excite suspicion a very little inquiry will be reasonably sufficient." Here there was nothing to excite the auditors' suspicions. *Walker* v, *Goe* (*ubi sup.*) is also in their favour. The balance-sheets in this case were not, no doubt, ideal balance-sheets, but they were sufficiently correct. It was not the duty of the auditors to take stock. This could only be done by experts. They were therefore entitled to rely on the certificate of the manager.

Yate Lee for Halden and Macturk.—Halden took no part in the management of the company for ten years, and his case is, therefore, governed by

Re Denham and Co. (*ubi sup.*);
Re Cardiff Savings Bank; *Marquis of Bute's case*, 66 L. T. Rep. 317; (1892) 2 Ch. 100.

Macturk's position is very similar to that of the other directors, and I adopt the arguments which have been urged on their behalf. And I say further, that to a person unskilled in accounts the

balance-sheets showed balances available for the payment of dividends.

A. & B. Terrell for Parker.—Sect. 10 of the Act of 1890 does not extend to an action for deceit sounding in damages, nor to an action for negligence also sounding in damages, because there cannot be any such action by a company against its directors as a body. The directors are in the position of partners, and it has never been suggested that in a partnership action one partner could be liable to another partner for negligence. To maintain an action for negligence it must be shown that there was employment. Here there is no employment. If an action were brought against a director for fraud, it would have to be proved that the representations complained of were made by the director, and that they were, in fact, acted upon. It would be an insuperable objection to such an action that the company, acting through its directors, was deceived by its directors. Here, if the facts had been known to the shareholders, *non constat* that the company would have been wound-up. The balance-sheets were in the proper form:

Wilmer v. *Macnamara and Co. Limited*, 72 L. T. Rep. 552; (1895) 2 Ch. 245

The directors did all that was required of them by the articles as to audit.

Mr. Jackson, who appeared in person, took no part in the argument.

Cozens-Hardy, Q.C. in reply.—The auditors were officers of the company, and were therefore bound to perform the duties imposed upon them by the articles. They were bound to make a report to the members showing the correct state of the company's affairs. This they never did. Again, they never did what was required of them apart from the articles. Further, they did not use reasonable care and skill. The fraud of the manager could have been discovered by a proper investigation of the books themselves. It is true that it is no part of an auditor's duty to take stock, but it is his duty to see that the items in the account are not fictitious Here they relied entirely on Jackson's certificate. [WILLIAMS, J.—The only question is whether it was their duty to go any further.] I submit it was. The case of the directors other than Halden is governed by

Re Oxford Benefit Building and Investment Society (*ubi sup.*).

Admitting that the directors were *quasi* trusees, they were bound to exercise such reasonable care as mercantile men would use in the conduct of their own affairs:

Leeds Estate Building and Investment Company v. *Shepherd*, 57 L. T. Rep. 684; 36 Ch. Div. 787.

[WILLIAMS, J.—You have to make out pecuniary damage. It seems to me that with regard to the statement as to fixed capital, the auditors and directors are exempted by the decisions in *Lee* v. *Neuchatel Asphalte Company* (*ubi sup.*); *Verner* v. *General and Commercial Investment Trust* (*ubi sup.*).] *Verner* v. *General and Commercial Investment Trust* (*ubi sup.*) is distinguishable from the present case. It was not the case of a trading company, and cannot be extended to companies of that kind. I say, therefore, that there is no authority binding upon the court to hold that directors are to keep the value of their fixed capital at a fixed figure without writing off a yearly sum for depreciation.

Cur. adv. vult.

Dec. 18.—WILLIAMS, J. delivered the following written judgment:—This is a summons under sect. 10 of the Companies (Winding-up) Act 1890, which is practically a re-enactment of sect. 165 of the Companies Act 1862. The respondents are respectively the directors and auditors of the company, and it is common ground that the summons is now to be confined to matters which occurred within six years prior to the issue of the summons. [His Lordship then referred to the summons and continued:] In so far as the summons charges improper application of moneys of the company in the payment of dividends, the answer of the respondents is (1) that the payments were not an improper application, because of the two accounts of the company the revenue account in the years in question showed a sufficient profit for payment of the dividends, because there is no obligation on the company to deduct losses in respect of fixed capital before arriving at the profit balance, and that, in so far as the deduction of the sums appearing in the balance-sheet in excess of the true value of the stock-in-trade is concerned, the actual figures appearing in the balance-sheet were accepted by the directors under the certificate of the manager; and that the directors were guilty of no want of reasonable skill and care in the performance of their duties by accepting such certificate of the manager without further inquiry, and that the directors accepted such figures in good faith and in the belief that they were true. And the auditors say that in the balance-sheets and accounts which they certified the figures in respect of the stock-in-trade were stated, as the fact was, to be by the manager's certificate, and that the auditors had no duty to go behind that certificate, and showed no want of reasonable skill and care in abstaining from so doing, since they believed the certificate to be true and had no ground for suspecting the contrary. But, in so far as the summons charges the directors with the issue and circulation of reports and accounts containing false and misleading entries with respect to the company's mill, machinery, and site, and the value of the company's stock-in-trade for the year 1887 and the subsequent years, and charges the auditors with sanctioning the same, it is urged that such misconduct or failure of duty, if proved, cannot properly be made a subject of the misfeasance summons, not being a breach of trust, at all events so far as the charge relates to the auditors. I think that, perhaps, I had better deal with the preliminary objection to my jurisdiction to entertain these claims under a misfeasance summons. Now the words of the section are as follows: "Where in the course of the winding-up of a company under the Companies Act it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied, or retained, or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver or of the liquidator of the company, or of any creditor or contributory of the company, examine into the

conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied, or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such mis-application, retainer, misfeasance, or breach of trust as the court thinks just." It seems to me that the word "misfeasance" covers every misconduct by an officer of the company as such for which such officer might have been sued apart from the section. The charge against the auditors here is that they either knowingly or through the failure to use reasonable skill and care, certified accounts which ought not to have been certified. This is misconduct for which, in my opinion, either the company when solvent or the company in liquidation could have sued the auditors and recovered any pecuniary damage actually sustained by the company. It is said that this is contrary to the dicta of the Lords Justices, and in particular the dictum of James, L.J. in *Coventry and Dixon's case* (*ubi sup.*), when he said that "misfeasance" means "misfeasance in the nature of a breach of trust"—improper retention or application of the moneys or property of the company, or misfeasance by which the company's property has been improperly wasted or the company's credit improperly pledged to the pecuniary loss of the company. Now I would first observe that this dictum was not necessary for the decision of the case; all that was necessary to be decided or was decided in *Coventry and Dixon's case* (*ubi sup.*) was, as is pointed out by Jessel, M.R., in *Flitcroft's* case (48 L. T. Rep. 86; 21 Ch. Div. 519), that an officer would not be liable to be proceeded against under sect. 165 of the Companies Act 1862, unless he was guilty of some misconduct for which he might have been sued apart from the section, not, it will be observed, apart from the Act; secondly it is to be remembered that the respondents in *Coventry and Dixon's case* (*ubi sup.*) were *de facto* directors, and that the Lords Justices are speaking of the liability of directors rather than of officers generally. At all events, the case of *The Leeds Estate Building and Investment Company* v. *Shepherd* (*ubi sup.*) is conclusive to show that the failure to use reasonable skill and diligence will render an auditor liable to an action for damages. And the case of *Re Cardiff Savings Bank; Davies' case* (*ubi sup.*) shows that the omission or neglect by a trustee and manager of a savings bank to comply with certain statutory provisions as to audit may constitute a misfeasance within the meaning of the section. I hold in the present case that the charges against the auditors of having, through want of the exercise of ordinary skill and diligence, sanctioned accounts containing false statements do, if they are proved and coupled with pecuniary damage to the company, constitute a misfeasance within the meaning of this section. I will now proceed to deal with the question of how far, on the evidence before me, the charges against the directors and auditors respectively have been proved. In my judgment it is proved that the mill was not of the value mentioned in the accounts published by the directors. I think that the figure therein mentioned purports to be value and not cost, and that the directors knew that the value of the mill, machinery, and site was not half the value mentioned in the balance-sheet, and that the respondent Pickering knew this, but not the respondent Peasgood. I think, further, that the value of the stock-in-trade was much less than that stated in the balance-sheet, to an increasing extent in each year subsequent to 1887, but that neither directors nor auditors were aware of this, they having acted upon the certificate of the manager, Jackson, believing the same to be true, and Jackson having admitted that he deliberately gave false certificates. I find that the directors acted reasonably in accepting the certificate of the manager. I postpone what I have to say as to the auditors' conduct in this relation. I find further, that on the true state of accounts, if you deduct from the assets the excess in value put upon the mill and the stock-in-trade, there were no profits out of which the dividends could be paid, and the same is true if you deduct the excess in either respect. Having found these facts, I will answer in the light of them first the question whether the directors are liable in respect of the dividends. With regard to the excess in value of the stock-in-trade, I should hold, if I were free to decide this case according to my own judgment, that a director is in no sense a trustee. The Act does not say that a director is a trustee. He is not the owner of the funds which he has to apply, and I should have thought that he might safely be treated as the paid manager and agent of the company, and might well be held not to be responsible for the misapplication of the funds of the company unless he, through want of care or fraud, misapplied those funds. If it is said that, if his responsibility were thus defined, he would not be responsible if, by the direction of the shareholders, he applied the funds to a purpose which the company could not authorise because it was a purpose *ultra vires*, my answer would be that, if he did so without carelessness or fraud, he ought not to be held liable, and that if he did so knowing that the purpose was *ultra vires*, or carelessly, he ought to be held responsible, not because he is a trustee, but because the ownership of the company is limited—*i.e.*, is limited to the application of the funds to the statutory purposes, and his duty to the company as manager is not knowingly or carelessly to apply the funds to a purpose *ultra vires* of the company, even though he may have the authority of the shareholders: for a company does not seem to me, in regard to questions of *ultra vires*, to be an aggregate of the shareholders, but a substantive legal entity. I do not think that anyone can doubt that thus to define the duties of a director is more in accordance with commercial necessity and the sense of the commercial community than it is to hold directors liable to refund dividends which they have misapplied without fraud or carelessness, on the ground that legal principles compel lawyers to hold them liable in such a case as trustees or *quasi*-trustees. Nor is the view which I have suggested without high legal authority, for it seems to me that it is the basis of the decision of Chitty, J. in *Re Denham and Co.* (*ubi sup.*), and of the dicta of James and Mellish, L.JJ. in *Rance's case* (*ubi sup.*). James, L.J. says: "If the directors by placing unfounded reliance upon the representations of their servants or actuaries, had arrived at the conclusion that they had made a divisible profit, this court ought

not to sit as a Court of Appeal from that conclusion." And Mellish, L.J. says: "I quite agree that, if directors or a proper actuary had made out a profit and loss account, the court ought to assume very strongly indeed that it was a correct account, and ought not, without very strong reasons showing that it was done *malâ fide*, to set it aside or declare a dividend made upon it improper." It is to be remembered that, in arriving at a conclusion on the question whether a divisible profit has been made or not, the directors must, in regard to unrealised property, base their answer upon an estimate, and the judgment in *Stringer's case* (20 L. T. Rep. 591; L. Rep. 4 Ch. 475) goes upon the assumption that directors who have exercised an honest but over-sanguine judgment are not to be held liable for the payment of dividends where events subsequently show that there were no profits out of which they could be declared. The point in *Stringer's case* (*ubi sup.*) was not as to repayment of dividends, but arose on an application for an injunction. There is, however, a considerable bulk of authority to show that directors are trustees for the company of such funds as are committed to their control in such sense that they will be liable for a misapplication of the funds which is *ultra vires* of the company independently of any proof of fraud or actionable negligence by the directors. The authorities as to the liability of directors as trustees seem to begin with the case of *Re National Funds Assurance Company* (39 L. T. Rep. 420; 10 Ch. Div. 118), followed by *Flitcroft's case* (*ubi sup.*), and more recently by *Re Oxford Benefit Building and Investment Society* (*ubi sup.*), by the *Leeds Estate Building and Investment Company* v. *Shepherd* (*ubi sup.*), and by *Re Faure Electric Accumulator Company* (59 L. T. Rep. 918; 40 Ch. Div. 141); but in no one of those cases can I find that directors were held liable unless the payments were made either with actual knowledge that the funds of the company were being misappropriated or with knowledge of the facts that established the misappropriation. Take, for example, *Re Faure Electric Accumulator Company* (*ubi sup.*) in which Kay, L.J. expressly finds that no imputation whatever is to be made upon the honesty or honourable conduct of the directors, but proceeds to find them liable for having committed breaches of trust in making certain payments out of the money of the company which were *ultra vires*, the purpose for which the payment was made being known to the directors, although they were ignorant of its illegality, as, indeed, were many, if not a majority, of the legal profession. On the whole, I have come to the conclusion that there is no such bulk of authority as binds me to hold that directors who pay away the funds of the company under an honest and reasonable belief in a state of facts which would justify the payment must be held liable to replace those funds because it turns out that on the true facts the payments were *ultra vires*. Having arrived at this conclusion in law, it remains for me to inquire on this part of the case whether these directors in fact paid away these dividends in the honest and reasonable belief that the necessary profits had been earned. I have not the slightest doubt but that they honestly believed it, and that the grounds of their belief were the statements of the manager, whom they had no reason to suspect. The only matter to be urged against them is, that the auditors, to their knowledge, did not comply with article 140. The article is as follows: [His Lordship read it and continued:] But, in my judgment, compliance by the auditors with the provisions of art. 140 would not have led to the discovery of the fraud of the manager. With regard to the over-statement of the value of the mill and machinery, it seems to me that, even assuming this statement to be a statement of value and not of cost, it is not, having regard to the decisions in *Lee* v. *Neuchatel Asphalte Company* (*ubi sup.*) and *Verner* v. *General and Commercial Investment Trust* (*ubi sup.*), a material misstatement so far as the declaration of the dividend is concerned, because, even assuming that to the knowledge of the directors such a depreciation in the value of the fixed capital had occurred as suggested, it would not make the declaration of the dividend *ultra vires*, nor prevent the payment of a dividend out of the excess of current receipts over current payments. It is no part of my duty to express an opinion on these decisions. I have only to follow the principles laid down within them, provided I think that the facts of the present case are governed by those principles. It is true that the present case is not the case of a company formed to work a necessarily wasting property, as was the case in *Lee* v. *Neuchatel Asphalte Company* (*ubi sup.*); nor the case of an investment company, as in *Verner* v. *General and Commercial Investment Trust* (*ubi sup.*); but I think that this case falls within the principles of those two cases read together. The remaining charge against the directors is, that they, by the misstatement in the balance-sheet as to the assets of the company in regard to the mill and machinery and the stock-in-trade, were guilty, at all events in respect of the mill, of making a statement as to the value of the assets which they knew to be untrue, and that the company has been damaged thereby by continuing to trade on the assumption that the assets were of the value stated in the balance-sheet, and that the directors are liable to make good the losses of the company while it continued so to trade. It seems to me that the directors are not so liable, because, in my judgment, the damages are too remote, and are not proved in fact to have been the consequence of the misstatements in question. The suggestion that such damages may be treated as resulting from the over-statement of the value of the assets seems to be based principally on a passage in the judgment of Stirling, J., in *Leeds Estate Building and Investment Company* v. *Shepherd* (*ubi sup.*); but Stirling, J. arrived at no such finding in fact, and in the present case I do not think I can do so. The company, if one takes the stock-in-trade on the manager's statement and then calculates the assets with the mill, &c., at their true value, does not seem to me to have been insolvent until the last year of its existence, and it is to be remembered that so long as the mill was a going concern the mortgagees were not likely to call in their debt. I know it is said that the mortgagees would have called in the debt but for having the accounts shown to them with the inflated value of the mill, but I think that there is no proof of this in fact. I therefore hold that the directors are not liable in respect of any of the charges mentioned in the misfeasance summons. I am not sorry so to hold, because I think

that the directors who held half the share capital of the company honestly tried to do their duty. With regard to the auditors the case is more difficult. They are, of course, entitled to the benefit of my decision with respect to the dividends, so far as it is based on *Lee* v. *Neuchatel Asphalte Company* (*ubi sup.*) and *Verner* v. *General and Commercial Investment Trust* (*ubi sup.*), and in regard to the remoteness of the damage; but with regard to the stock-in-trade their case is very different from that of the directors, for they certainly were not entitled to rely upon the manager's certificate if an ordinary careful examination of the books ought to have made them suspect that statement. Now, it is plain to me that, if the auditors had added to the stock-in-trade at the beginning of any year the purchases of raw material in that year and had deducted therefrom the sales, they must have seen that the statement of the stock-in-trade at the end of the year was so remarkable as to call for explanation, and they called for none. It is said that it is no part of the duty of an auditor to take stock. I agree it is not; but when it is said that it is no part of his duty to test the accuracy of the manager's certificate by a comparison of the figures in the books that require auditing, I cannot agree. I think, therefore, that I must hold the auditors liable for the preference dividends which have been paid, with such costs as are applicable to this part of the case; and, having regard to the mode in which the auditors disregarded the articles as to the audit and the manner in which the audit was carried out, I do not think they ought to receive any costs. I think the directors ought to have their costs. The respondent Jackson must be declared liable for the dividends improperly paid and the costs. If the auditors can distinguish between the costs which can be attributed to charges of fraud having been made and the costs of claims not involving a charge of fraud, they will not have to pay the former, but it will be difficult to make the distinction. The official receiver has only done his duty in making the inquiry, and will not be personally liable for any costs. He must, however, pay the costs ordered to be paid out of the assets at once, and not postpone the payment to other charges.

Solicitors: *Robbins, Billing*, and *Co.*; *Paterson, Snow, Bloxam*, and *Kinder*, for *Champney* and *Forward*, Hull; *Collyer-Bristow, Russell, Hill*, and *Co.*; *Hicks* and *Son*, for *Leak, Till*, and *Stephenson*, Hull; *Chester, Mayhew, Broome*, and *Griffiths*, for *Holden, Sons*, and *Hodgson*, Hull.

QUEEN'S BENCH DIVISION.

Monday, Jan. 13.

(Before WRIGHT and KENNEDY, JJ.)

STERN AND OTHERS *v.* THE QUEEN. (*a*)

Inland revenue—Probate duty—Shares in foreign railways—Certificates of shares in England—Documents of title—Liability to probate duty.

A testator died in this country possessed of securities for certain shares in railways in the United States of America. These securities were certificates issued to and held by the shareholders certifying that the person named therein is entitled to the number of shares specified therein, and upon every certificate there was indorsed a form of transfer and power of attorney in blank, and when the indorsed transfer has been duly executed by the registered owner, the name of the transferee being left in blank, delivery of the certificate by him, with intent to transfer, transmits his title to the shares, and the transferee can transfer his interest by handing the certificate to another. These certificates were in England at the testator's death, and were marketable as securities for the shares, and the whole beneficial interest in the same belonged to the testator and passed under his will as part of his personal estate.

Held, that probate duty was payable in respect of these securities, inasmuch as they were documents of value in this country in the hands of the executors, which documents vouched and were necessary for vouching the title to the shares, and were such that their delivery in this country transferred to the transferee all the transferor's rights therein.

CASE stated between the suppliants and the Attorney-General in a petition of right.

Baron De Stern died in England on the 20th Oct. 1889, having duly made his will, whereof he appointed the suppliants the executors. The suppliants obtained probate of the will, and for the purpose of obtaining such probate they made the usual affidavit required by sect. 27 of the Customs and Inland Revenue Act 1881. With this affidavit was delivered by the suppliants an account of the particulars of the personal estate for or in respect of which the probate was to be granted and of the estimated value of such particulars, and the suppliants paid duty accordingly.

Subsequently the suppliants discovered (if their contention be correct in law) that there had been erroneously included in the affidavit and account a portion of the personal estate of the deceased which should not have been included therein, and the suppliants alleged that such portion was not liable to probate duty.

The Attorney-General alleged that the suppliants' contentions were not correct in point of law, and that the portion of the estate was properly included in the affidavit and account, and that the same was liable to probate duty.

The commissioners declined to return the duty alleged by the suppliants to have been overpaid, and the suppliants then filed a petition of right, claiming the return of the sum of 8187*l.*, as being the amount of duty overpaid.

The portion of the estate so alleged to have been included in error consisted of certain securities set forth in a schedule, and these securities consisted of shares in railway companies constituted under the laws of divers of the States included in the United States of America, or under the laws of the said United States. These companies are all domiciled in the United States, and for the purposes of this case the laws applicable to the several companies may be taken to be identical.

The "documents of title," which are issued to and held by the shareholders in these American railway companies, are certificates certifying that the person therein named is entitled to the number of shares named therein in the capital

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

stock of the company, and certifying as to the manner in which the shares are transferable. Upon every certificate there is indorsed a form of transfer and power of attorney in blank, and in a schedule annexed to this case were set out forms of the certificates and indorsements thereon in the case of the different companies in question.

By American law (as stated in evidence in the case of *The Colonial Bank* v. *Cady*, 63 L. T. Rep. 27; 15 App. Cas. 267, which it has been agreed shall be applied to this case, and, subject to the power of the court, to draw inferences therefrom), "when" (per Lord Watson in his judgment in the *Colonial Bank* v. *Cady*, 63 L. T. Rep., at p. 32), "the indorsed transfer has been duly executed by the original owner of the shares, the name of the transferee being left in blank, delivery of the certificate in that condition by him or by his authority transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders, and obtaining a new certificate in his own favour. The appellants' witnesses say that delivery of the certificate with the transfer executed in blank, 'passes the property' in the shares; but that statement must be accepted subject to the explanations by which it is qualified. The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognised by the company as entitled to vote and draw dividends in respect of the shares until the transferee or holder for the time being obtains registration in his own name. It would therefore be more accurate to say that such delivery passes, not the property in the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares, without risk of his right being defeated by any other person deriving title from the registered owner. According to the custom of bankers and stockbrokers, both in this country and America, a certificate with the indorsed transfer executed in the manner already described, is regarded as being 'in order,' and its delivery in exchange for value received is understood to be sufficient to pass the full title of the registered owner. Even when the delivery has been fraudulent, as in the present case, the Supreme Court of New York has held that the registered owner cannot reclaim the document from a holder who has given valuable consideration in good faith, and without notice of the fraud. But it is necessary to observe that the decision of the court did not attribute to the instrument any privilege or negotiability in the legal sense of that term. It was based, to use the language of one of the appellants' witnesses, "upon the circumstance that the registered owner has so dealt with the certificate as to lead the purchaser for value to believe that he was making a good title to it. In other words, the foundation rests in the principle of estoppel. . . . When the executors of a registered owner find it necessary to dispose of his shares, they may for that purpose sign either the indorsed transfers or a separate transfer. But these documents themselves are insufficient to enable a person to whom the executors intend to pass the shares, to obtain registration and a new certificate in his own name. In order to effect that object it must be proved to the satisfaction of the company that the persons signing the transfer as executors really possess that character, and also that their signatures to the transfer are genuine. Although registration may be obtained upon the production of such evidence, the documents are not 'in order,' or, in other words, are not accepted in commercial circles as sufficient vouchers of title, unless they are accompanied by an extract of the probate, and an attestation of the genuineness of the executors' signatures, by the United States Consul or other competent officer."

The statements in the body of the certificates, such as that the shares are transferable in person or by attorney in the books of the company, and the like statements, do not prevent the delivery of a certificate with the transfer and power of attorney signed in blank by the registered owner being as between the parties to the transaction a good assignment of the shares both in law and in equity, or prevent such delivery from passing the title to the shares both legal and equitable. As between the parties to the transaction, the transfer is entirely completed by the delivery of the certificates as aforesaid, and the deliveree of the certificates can effectually transfer his interest by handing his certificate to another. But the company, for the purposes of the right to vote, the receipt of dividends and the other rights of shareholders, is entitled to have regard only to the registered shareholders, and where a registered shareholder is indebted to the company, the company can (if the debt from the shareholder became due to the company before the company had notice of the transfer of the share) refuse to register a transfer of the shares until the obligations of the shareholder have been satisfied. The practice and course of business is, that the registered owner receives the dividend from the company and then pays it over to the holder for the time being of the certificate, such payment being made on production of the certificate which is then indorsed with notice and date of such payment.

At the time of the death of Baron De Stern, and for a long time theretofore, the whole of the securities in question were marketable securities, and were marketable in England and were commonly bought and sold and dealt in on the London Stock Exchange and other markets in England for securities of the kind. The American railway shares were dealt in in the markets in the manner above described.

At the date of the death of Baron De Stern the certificates for the whole of the shares now in question were in England, and were in the possession either of the baron or of his agents or of his trustees for him, and the whole beneficial interest in and title to the securities were the property of and belonged to Baron De Stern, and

the same pssed under his will as a part of his personal estate, and at the time of such death the persons in whose possession the certificates were were in England, and the persons in whose names the shares were registered were in some cases persons resident in England or elsewhere in the United Kingdom, and in some cases not. With regard to these certificates, the transfers and powers of attorney indorsed thereon had, at the date of the death of the testator, in some cases been duly signed and executed by the persons or firms whose names were inserted in the certificates and in whose names the shares were registered; in other cases the transfers had not been duly signed or executed; and in some cases it was uncertain whether they had or had not been so signed or executed.

There was a schedule which showed how the suppliants had dealt with the shares. The whole of the sales of such shares were effected in England and on the London Stock Exchange, with the exception of the sales of the 1000 Northern Pacific Preference and 2170 Illinois Central, which were effected in New York.

The question for the opinion of the court was, whether the suppliants were exempt from probate duty in respect of any, and if so, which of the securities in question.

Cohen, Q.C. (*F. Moulton*, Q.C. and *A. T. Lawrence* with him) for the suppliants. — No probate duty is payable by the suppliants in respect of any of the shares in question, though the certificates were in England at the time of the testator's death. Since the establishment of the Probate Court probate duty is not payable in respect of any property except in those cases in which before the establishment of the court probate duty was payable. Before the establishment of the Probate Court duty was not payable in respect of any property of the testator which was not in the eye of the law situated in England at the time of the testator's death, and it is immaterial as regards this case whether the property after the testator's death came into the hands of, and was administered by the executors. If, for example, a chattel belonging to the testator be abroad at the time of his death probate duty is not payable in respect of this chattel, though if the chattel should long afterwards come into the possession of the executor he would have to deal with the chattel as executor, and he would have to deal with it and administer it as part of the estate. The real question and test, therefore, is not whether the property or the proceeds of the property comes into the hands of the executor to be administered by him as executor. [WRIGHT, J.—Does that apply not only to a chattel which is capable of *situs* but also to a chattel which is not capable of *situs*?] Yes, it has been laid down by the Privy Council and other courts that debts are capable of *situs*, and a debt due from a person resident abroad is situate abroad. Sect. 92 of the Court of Probate Act 1857 (20 & 21 Vict. c. 77), does not fix probate duty, but merely says that the law relating to probate duty shall be the same as it was before, and the principal statute relating to probate duty in former times was the 55 Geo. 3, c. 184, s. 38, and "the law appears to be now settled that the amount of the probate duty is to be regulated, not by the value of all the assets which an executor may ultimately administer, but by the value of such part as is at the death of the deceased within the jurisdiction of the court by which the probate or letters of administration are granted":

Williams on Executors, 9th edit., p. 542;
The Attorney-General v. *Dimond*, 1 Cr. & J. 356;
The Attorney-General v. *Hope*, 1 Cr. M. & R. 530.

There is here in England a document which is evidence of the title to property abroad, and which document can be disposed of in England, but there is no probate duty payable in respect of such document. If the document had been a negotiable instrument and no act was to be done abroad to complete and perfect the title to the property represented by the document, then probate duty would have been payable in respect thereof. But these certificates are not negotiable instruments; they are pieces of paper and represent shares, but they only convey a *jus ad rem*, the right to go, or to send, to America to have the names of the holders registered as shareholders, and behind the certificates are the shares which are registered in America. Our next proposition is, that debts or obligations due to the testator from persons or companies domiciled abroad, or the shares of the testator in companies domiciled abroad, are not in the eye of the law situate in England, and are therefore not subject to the duty:

The Commissioner of Stamps v. *Hope*, 65 L. T. Rep. 268; (1891) A. C. 476.

The same principle applies to a bill of exchange in England, and probate duty is not payable in respect thereof:

Yeoman v. *Bradshaw*, 3 Salk. 70.

And to shares in companies domiciled abroad, where it has been held that the shares are locally situated where the head office is:

In the Goods of Ewing, 44 L. T. Rep. 278; 6 P. Div. 19;
The Attorney-General v. *Higgins*, 2 H. & N. 339;
Laidlay v. *The Lord Advocate*, 15 App. Cas. 468.

And as regards shares of a company domiciled abroad no probate duty is payable:

Fernandez's case, 22 L. T. Rep. 219; L. Rep. 5 Ch. 314.

The mere fact of the certificates being saleable in England and of value in England does not render them liable to the duty, for a chattel which is abroad may be valuable and saleable in England. The case of *The Attorney-General* v. *Bouwens*, (4 M. & W. 171) has an important bearing on the present case, and in considering that case it is material to bear in mind that the documents now in question are not negotiable instruments, that is to say, they are not on the face of them convertible to bearer, and they do not convey such title as negotiable instruments would convey, because it has been found, and is so stated in the judgments of the learned lords in *The Colonial Bank* v. *Cady* (*ubi sup.*), first, that it is only by virtue of estoppel that a registered owner can be deprived of his title, and, secondly, that a document of this kind only conveys a *jus ad rem* as regards property in shares—the right in America to have the owner's name registered as shareholder. The company is entitled to refuse to register in two cases, namely, where there is a notice that the certificate has been stolen from

the registered holder, and where there is a lien on the shares in respect of debts due from the registered holder, and in the case of an executor, the company require a copy of the probate and a certificate of some magisterial official. In *Gorgier* v. *Mieville* (3 B. & C. 45) and *Goodwin* v. *Robarts* (35 L. T. Rep. 179; 1 App. Cas. 476) it was held that, if the bonds of a foreign Government are on the face of them payable to bearer, and are usually transferable by delivery, then those documents are negotiable instruments. The documents in those cases were negotiable instruments, but it is not so in this case. In *Attorney-General* v. *Bouwens* (*ubi sup.*) payment could have been obtained in London, and nothing had to be done to entitle the holder of the bonds in that case to obtain complete property in what was represented by those bonds, and the documents there may be said to represent the property: whereas in the present case it is otherwise, and the person who has the bonds has never become, or acquired the status of, a shareholder. There are some dicta in the judgment in that case which cannot be supported, and the reasoning is illogical and unsatisfactory.

The *Attorney-General* (Sir R. Webster) (The *Solicitor-General*, *Vaughan Hawkins*, and *Danckwerts* with him) for the Crown.—The case of *The Attorney-General* v. *Bouwens* (*ubi sup.*) has been unduly depreciated during the argument, but that case has never been questioned, up to the present time. It is mentioned and summarised in Williams on Executors, 9th edit. p. 545; and it is also summarised in the judgment of the Exchequer chamber in *Goodwin* v. *Robarts* (33 L. T. Rep. at p. 273; L. Rep. 10 Ex. at p. 342), and cited by Lord Blackburn in *Crouch* v. *The Credit Foncier of England* (29 L. T. Rep. at p. 265; L. Rep. 8 Q. B. at p. 384). It is said that it is sufficient to dispose of this question and to distinguish this case from *The Attorney-General* v. *Bouwens* (*ubi sup.*), that the person who buys the certificate can, if he likes, go to America and get his name registered, and that that will give him the right to vote and receive dividends directly. That ought not to make the difference. What had Baron Stern got here? He had got certificates, which in the great majority of cases were already executed by the persons whose names were in the certificates, and he had got the indorsement or transfer in blank by the vendors whose names were upon the register, and it is found as a fact, and it is most important to bear in mind, that these certificates pass from hand to hand through any number of holders, and are bought and sold until a particular transferee chooses to have his own name put upon the register. The transaction may be regarded as a sale of shares; the certificate is an interest in shares, but the particular marketable security has an existence, and is a document analogous in many respects to a bill of lading or a dock warrant. It is a document which entitles the person who has got it lawfully to put himself in a position to communicate with the transferor. It is said that that is not such a marketable security as falls within *The Attorney-General* v. *Bouwens* (*ubi sup.*). The test is this: does the transfer of the document give a marketable title to that property which Baron Stern possessed and would have had to sell if he had been alive. We submit it does. Baron Stern did not get his name registered as the owner of these various shares, because he would, or might, thereby be limiting their negotiability in the market. In all these classes of securities in question in this case either the transferors have executed or persons in the position in which Baron Stern was could call upon them to execute the transfer in blank. These are his shares, his pieces of paper, his securities, and if he had desired to sell them in the market he could have done so. These certificates are chattels; they are in England, and are worth money in the English market, and therefore the sum arising from the sale of the interest in those chattels is liable to probate duty. He referred to *The Attorney-General* v. *Dimond* (*ubi sup.*) and *The Attorney-General* v. *Hope* (*ubi sup.*), and was then stopped.

Cohen, Q.C. in reply.

WRIGHT, J.—The case finds that the certificates, the value of which is in question in this petition of right, were documents of title issued and held by the shareholders in certain foreign companies, which certificates certify that the person therein named is entitled to the number of shares specified and so forth. Upon every certificate there is indorsed a form of transfer and a power of attorney in blank. Then there is a paragraph in the special case which repeats with respect to this case most of the judicial statements of fact or inferences of fact, which were drawn in the House of Lords in the case of *The Colonial Bank* v. *Cady* (*ubi sup.*). I think that the true inference to be drawn from the statements made in the case is that the duty has been properly claimed and paid upon these documents. It is not a matter which is capable of any lengthened statement, but the way I put it is this: There is in this country, within the jurisdiction of the Ordinary, now the Probate Court, a document the existence of which vouches, and is necessary for vouching, the title of someone to the foreign share, so that in the absence of that document no one at all could establish a title to the share. It is found by the case that the certificates are currently marketable here as securities for that share, and the dividends payable on that share; and it is found in fact that the delivery of the certificate in this country *ipso facto* affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt, or the mere evidence of a simple contract debt, is supposed to exist only at the debtor's residence. It being a marketable security operative, though not completely operative to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary, now the Probate Court. Therefore I think that the Crown is entitled to succeed.

KENNEDY, J.—I agree, and for the same reasons.

Judgment for the Crown.

Solicitors for the suppliants, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitor for the Crown, *The Solicitor of Inland Revenue*.

Saturday, Jan. 18.

(Before Lord Russell, C.J., Wright and Kennedy, JJ.)

Re Galwey. (*a*)

Extradition—Fugitive criminal — British subject —Jurisdiction of British Government to surrender British subject to Belgium — Treaty between Great Britain and Belgium—Extradition Act 1870 (33 *& 34 Vict. c.* 52), *s.* 6.

By an extradition treaty made between the British and Belgian Governments—to which the Extradition Acts were applied by Order in Council—it was provided that: "In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects."

Held, that, under this treaty, while the executive Government of this country are not bound to surrender a fugitive criminal who is a British subject, they have a discretion to surrender and may surrender such person, although a British subject, upon a prima facie *case being made out and the requirements of the Extradition Acts being duly complied with.*

Rule calling on the Governor of Her Majesty's prison at Holloway to show cause why a writ of *habeas corpus* should not issue directed to him commanding him to have the body of Frederick Galwey before the court.

Notice of the rule was directed to be given to the governor of the prison, the ambassador for the kingdom of Belgium, the Home Secretary, and the committing magistrate.

Galwey was on the 11th Dec. 1895 brought up at Bow-street, and on the 1st Jan. 1896 was committed by Mr. Vaughan, police magistrate, for extradition to the kingdom of Belgium on a charge of fraudulently receiving valuable securities well knowing them to be stolen within the jurisdiction of the kingdom of Belgium.

The rule was obtained on the sole ground that Galwey is a British subject, and as such is not liable to the Extradition Act 1870, and the treaty and declaration purporting to be made pursuant thereto.

In 1812 the father of the prisoner was born in Ireland, and in 1838 went to Bruges in the kingdom of Belgium, and remained and was married there in 1845, and he was then a British subject, and declared himself to be such. In 1846 the prisoner was born at Bruges, and resided there until 1870, when he came to England, and except during part of the year 1888 when he was in Brussels, he has resided in England ever since.

The learned magistrate held that a *primâ facie* case had been made out against the prisoner, and that he was not a British subject, and he made the commital order for extradition.

For the purposes of this argument it was assumed and admitted that Galwey is a British subject, domiciled in Belgium, and that he has been domiciled in Belgium practically all his life.

The Extradition Act 1870 (33 & 34 Vict. c. 52) provides:

Sect. 6. Where this Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.

The Treaty between Her Majesty and the King of the Belgians for the Mutual Surrender of Fugitive Criminals (signed at Brussels, 20th May 1876), provides:

Art. 1. It is agreed that Her Britannic Majesty and His Majesty the King of the Belgians shall, on requisition made in their names by their respective diplomatic agents, deliver up to each other reciprocally any persons [except as regards Great Britain, native born and naturalised subjects of Her Britannic Majesty, and, except as regards Belgium, those who are by birth or who may have become citizens of Belgium], who being accused or convicted as principals or accessories, of any of the crimes hereinafter specified, committed within the territories of the requiring party, shall be found within the territories of the other party.

By a declaration between the British and Belgian Governments for amending art. 1 of the Extradition Treaty of the 20th May 1876 (signed at London the 21st April 1887, and Extradition Acts applied by Order in Council from the 30th May 1887) it is provided:—

Art. 1.—The words "Except as regards Great Britain, native born or naturalised subjects of Her Britannic Majesty, and, except as regards Belgium, those who are by birth, or who may have become citizens of Belgium," which occur in art. 1 of the Extradition Treaty of the 20th May 1876, are suppressed.

Art. 2.—The following paragraph is added to art. 1 of the said treaty: "In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalisation."

Sir *Richard Webster*, A.-G. (Sir *Robert Finlay*, S.-G., and *Sutton* with him) showed cause against the rule.—The only ground on which this rule was granted was that on the terms of the treaty there is no power to deliver up a British subject, and for the purposes of this argument Galwey must be taken to be a British subject, for, although the magistrate held that he was not a British subject, on the materials before me I could not contend that he was not, and there is a *primâ facie* case that he was. Upon the terms of the treaty it is abundantly clear that he can be given up although he is a British subject. First came the Treaty of 1876, and under another treaty, which had practically the same excluding words, Cockburn, C.J. in the year 1877, in *Reg.* v. *Wilson* (3 Q. B. Div. 42) expressed his regret that British subjects could not be handed over. It was argued in that case that the language of the Act ought not to be construed as imperative, but as discretionary, but it was pointed out by Cockburn, C.J. that the treaty did not give a discretion, for it said that no British subject should be delivered up. The treaty under which that case was decided was the treaty between Her Majesty and the Swiss Confederation made in March 1874, and contained words similar to those in the Treaty of 1876, which we are now considering; and it was probably in view of the objection taken in that case that the words in the Treaty of 1876 were suppressed and the words in the Declaration of 1887 substituted, and Field, J. at the end of his judgment in that case says—

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

speaking of the treaty then in question—"It is not that one country shall not be bound to deliver up, but that no subject shall be delivered up to the other country." So that Field, J. there uses the words which are subsequently embodied in the present treaty. The Secretary of State always had a discretion in the matter whatever the circumstances were, and that discretion the secretary still retains, and it is reasonable to expect that in any treaty there is still that discretion left, and accordingly the words used are that in no case shall the parties be bound to surrender their own subjects. These words give a discretion and cannot be construed as importing prohibition; and as it is in the interests of international justice that criminals should not be retained unless for good cause, it is also in such interests that this discretion should still exist; and although the court in *Reg.* v. *Wilson* (*ubi sup.*) expressed with regret the view that they could not order the criminal to be handed over, we now have a treaty between the two countries, which enables justice to be done, and when there is clear proof of the crime the court can hand over the British subject, although it is not bound to do so if for good reasons the Secretary of State thinks fit not to hand him over.

F. M. Abrahams for the Belgian Government.—The Belgian Government are anxious for the extradition to be proceeded with.

Bower in support of the rule.—It is not necessary for me to contend that the British Government is prohibited from handing over; but when once it is shown that the accused is a British subject it is for the Crown to contend and to prove that they are compelled to hand him over. The Crown has to establish that. [Lord Russell, C.J.—The treaty does not prohibit or render unlawful the handing over; all it says is that the Executive Government shall not be bound to hand over. If that is so, is it not a matter for the exercise of the political discretion of the executive and not for the judicial?] I agree and I contend that I am still entitled to the rule, as Galwey is not in prison in the exercise of a discretion of a political officer of the Government. There has been no such discretion exercised; there was a hearing by the magistrate, and a remitting of the accused to prison on the theory that he is a person liable to be surrendered under sect. 6 of the Extradition Act 1870. As between the two contracting countries there is no treaty obligation on Great Britain to hand him over to Belgium; and as between the Government of this country and the accused there is no right to hand him over. Allegiance implies protection; the accused owes Her Majesty allegiance; she owes him protection and she cannot hand him over unless absolutely bound to do so by treaty. The case is as if, *quâ* British subject, there were no treaty whatever. All a subject could say would be that Her Majesty is not bound to hand him over; and it could never be said in the case of a subject that she had prohibited herself from handing him over. If there had been communications between the proper representatives of the two Governments, and as the result Her Majesty had agreed to hand him over, very likely I should have nothing to say: but that is not so. Here the man is in prison, and I submit that he can only be lawfully in prison on the theory that he is lawfully liable to be surrendered under sect. 6 of the Act of 1870. When we look at the treaty we see that the Government is not bound to surrender the accused, but he is in prison on the theory that he is bound to be surrendered.

Lord Russell, C.J. — In my judgment the rule in this case must be discharged. For the purpose of considering the question before us we assume—for it has not been questioned—that the offence in respect of which the prisoner is detained under an order of committal is one within the treaty and the statute. We must also assume that he is a British subject, and in my judgment we must further assume that the demand for extradition by the Belgian Government is assented to and supported by the executive Government of this country. The question turns upon the construction of the Extradition Act 1870, into which and in connection with which is to be read the terms of the treaty. Now the treaty, originally made in 1872, was modified in 1876, and as modified in 1876 it contained, as it originally stood, this stipulation, that Her Britannic Majesty and the King of the Belgians shall, on requisition made in their names by the respective agents of the other power, deliver to each other respectively any persons—then follow these words for which I cite the passage—"Except as regards Great Britain native-born and naturalised subjects of Her Britannic Majesty." As the treaty then was, assuming the case of *Reg.* v. *Wilson* (*ubi sup.*) to have been properly decided, assuming the treaty to have stood in that position, the Extradition Act would not have authorised the extradition of the criminal, because from extradition were excepted native-born and naturalised subjects of Great Britain. That the case of *Reg.* v. *Wilson* (*ubi sup.*) decides, and I think rightly decides. I do not stop to consider whether, even if the treaty did not apply, there might not have been some other steps taken with the view to extradition. *Reg.* v. *Wilson* (*ubi sup.*) decides, and rightly decides, that extradition could not be made under the treaty and the Extradition Act which applied to the Treaty. That being the original form of the treaty, it was subsequently altered, and it is quite probable that it was altered because of the case of *Reg.* v. *Wilson* (*ubi sup.*), or of other cases in the same sense, for in that case Cockburn, C.J. expresses regret that this country should not be enabled, under the extradition law then existing, to deliver in proper cases even British subjects who have offended against the laws of another country, as to which offences against the laws of another country, even although they might be crimes, and probably would be crimes common to both countries, yet they could not be adequately dealt with or punished under the criminal law in this country. Accordingly in 1887, the treaty is designedly altered; the excepted words, which excluded native born and naturalised subjects of Great Britain altogether from extradition under the statute and the then existing treaty, are excluded and these words are substituted, "In no case nor on any consideration whatever shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalisation." What does that mean? It means surely that

while they are not bound they may under the treaty, and any legal enactment which relates to the treaty, make such extradition. Then we turn to the statute in connection with which the treaty has to be construed. Sect. 6 provides: [His Lordship read the section and proceeded:] The Act applies in the case of this foreign State, Belgium, but it was contended on behalf of the prisoner that in the present case the prisoner is not so liable to be apprehended and surrendered. It seems to me he clearly was. Let us conceive the case of an application being made to a secretary of State—and no particular secretary of State is referred to in the Act—and that in that application in any given case the facts of which might be notorious, such as (amongst others) that the person against whom the application was made is a British subject, and that the circumstances under which he was charged with having committed a crime were such that in the clear opinion of the Secretary of State, the officer of the Government, he ought not to assent to his extradition and ought not to exercise the power which the treaty and the Act conjointly give, then it clearly would be within his competence to say, "I shall not assist the extradition of this particular alleged criminal." In this case, however, what the secretary did was to sign a warrant in conformity with the terms of the first form of the second schedule to the Act. This warrant was addressed to the chief magistrate of the metropolitan police-court, and it recited the treaty arrangement and the Order in Council applying the Act; it also stated that a requisition had been made to one of the principal Secretaries of State by diplomatic representatives for the surrender of a particular person; then it proceeded: "Now, I hereby by this my order under my hand and seal, signify to you"—that is the chief magistrate—"that such requisition has been made and require you to issue your warrant for the apprehension of such fugitive. provided that the conditions of the Extradition Act 1870, relating to the issue of such warrant, are in your judgment complied with." It seems to me that that is as clear and distinct an assent on the part of the representatives of the executive Government to the demand for extradition as can possibly be, and I decline entirely to give any effect to the argument which may be stated compendiously thus: It is not denied that there might be such a requisition made by the diplomatic representatives of the demanding power to the executive Government here, but the suggestion is that that must be shown to have been a formal demand, and that the assent must have been given by the Secretary of State in some other way than by his signing the form of order which I have cited to the stipendiary magistrate. I do not for a moment mean to convey that the Secretary of State, having given that order to the chief magistrate of the metropolitan police-courts, may not, when at a later stage he becomes more fully aware of the facts than he was before, withdraw that assent, even at a later stage, and say that this is not a case in which the executive Government of this country think that extradition ought to be granted. I am far from saying that even at this moment, or at a later moment, before the accused is handed over to the foreign Government, if there be grounds for urging it, it is not perfectly open to those representing the person now in custody to make representations to the Crown if reasons exist why extradition should not be made. But all these considerations are matters of a political complexion, and they are not matters which enter into the duty of the judiciary to determine. The man having been taken into custody, is brought before the metropolitan police magistrate, and an order of committal made, and, after such order of committal, we would be entitled to review the decision of the magistrate, not in the sense of entertaining an appeal from his decision, but in the sense of determining whether there was sufficient evidence of the offence and of the other necessary conditions for the application of the Act to give the magistrate jurisdiction to make the order of committal. It seems to me that the only ground on which this *habeas corpus* can be successfully maintained is that the committal order was made without jurisdiction, and was illegal. I see no ground or pretence whatever for making any such contention, and I think this application is not in any sense well founded. Lastly, upon this argument before us the executive Government of the country appear in the only way in which they can be represented in our courts, by the recognised law officers of the Government of the day. They are here expressing the wish of the executive Government that this extradition shall take place, and it seems to me it is impossible for us to go beyond that and to entertain any considerations which may or may not—if they exist—be properly addressed in another quarter. I would observe that it is quite obvious, without pointing it out in detail, that the whole tenor of the argument for the accused is in contravention of the argument and of the judgment in the case of *Reg.* v. *Wilson* (*ubi sup.*), and Field, J. in one passage in his judgment in that case contemplates this very case. He pointed out that in that particular case, as the treaty with Switzerland then stood, extradition of British subjects was excluded, and he also pointed out how different would the result of the decision of the court have been if it had not been an exclusion, but had been a case in which an option was left to the government. He says: "Is there not in this very treaty an exception? It is not that one country shall not be bound to deliver up, but that no subject shall be delivered up to the other country." On these grounds I think that this application must entirely fail, and that this rule must be discharged.

Wright and Kennedy, JJ. concurred.

Rule discharged.

Solicitor for the applicant, *Joseph Davis.*

Solicitor for the Crown, *The Solicitor to the Treasury.*

Solicitors for the Belgian Government, *Michael Abrahams, Sons,* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Dec. 6, 9, *and* 18, 1895.

(Before BARNES, J. and a JURY.)

PARRY (otherwise PERRY) *v.* PARRY (otherwise PERRY). (*a*)

Divorce suit—Husband's petition—Adultery of wife—Finding of jury that petitioner conduced to wife's adultery—Divorce Act 1858 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Discretion of court—Decree.*

In a suit by a husband, the adultery was admitted and proved, but the jury found that the petitioner had been guilty of wilful neglect and misconduct, which had conduced to his wife's adultery.

The Court, notwithstanding the finding of the jury, exercised the discretion conferred by sect. 31, *and granted a decree* nisi, *but directed that the decree should not be made absolute until the petitioner secured to the respondent an allowance.*

THIS was the petition of the husband, praying for a divorce on the ground of his wife's adultery with a man unknown. The adultery was admitted, but the respondent counter-charged conduct conducing to the adultery. Thereupon a decree was applied for on behalf of the petitioner, but was opposed on behalf of the respondent, who asked, moreover, that if the decree were granted at all, it should only be upon terms. The rest of the facts will be found in the judgment on further consideration.

Priestley (*Inderwick*, Q.C. with him), for the petitioner, referred to 20 & 21 Vict. c. 85, s. 31, and argued that it was a matter entirely in the discretion of the court. The petitioner's conduct was too remote to be a *causa causans* of the adultery. The respondent was able to maintain herself as a cook, and no order for an allowance to her should be imposed upon the petitioner. If, however, an allowance were ordered, 5*s.* a week would be ample. He referred to

Davies v. *Davies*, 32 L. J. 111, P. & M.;
Cunnington v. *Cunnington*, 28 L. J. 101, P. & M.

If an allowance is ordered, it should be *dum sola et casta vixerit*:

A.'s Divorce Bill, L. Rep. 12 App. Cas. 366;
Langworthy v. *Langworthy*, 11 P. Div. 85.

Marshall Hall for the respondent.—There is no reported case in which the court has exercised its discretion under sect. 31 in favour of a petitioner after a verdict of a jury finding that his conduct has conduced to the adultery complained of; though it is not contended that the court has not a discretion even in such a case. This is not a case, however, in which the discretion should be exercised. In *Edwards* v. *Edwards and Francis* (70 L. T. Rep. 39; (1894) P. 33), which is, perhaps, the nearest case to the present, there was no finding by the jury that the petitioner's cruelty had not conduced to the adultery of the respondent. If a decree is granted, the allowance should be at least 10*s.* a week. He also referred to

Hawkins v. *Hawkins and Hope*, 10 P. Div. 177.

Cur. adv. vult.

Dec. 18.—BARNES, J. delivered the following written judgment:—In this case, which was tried before me with a common jury last week, the petitioner sought to obtain a dissolution of his marriage with the respondent in consequence of her adultery with a man unknown, which resulted in the birth of a child on the 27th July 1894, of which the petitioner was not the father. The respondent admitted that she did, on one occasion, in or about the month of Nov. 1893, commit adultery with an unknown man, and, that as the result of this act, she became pregnant, and subsequently on the 27th July 1894, gave birth to the child, of which the petitioner was not the father. But she further pleaded that the adultery so committed was conduced to by the conduct of the petitioner. I was satisfied, upon the evidence before me, that the respondent had been guilty of the adultery which resulted in the birth of the child above mentioned; and the only question which was left for the consideration of the jury was, whether or not the petitioner had been guilty of wilful neglect or misconduct conducing to the adultery. The jury found that he was so guilty, and the case was reserved for further consideration before me, as to whether or not I should, under the circumstances, exercise my discretion by pronouncing a decree *nisi*, notwithstanding the verdict of the jury. On the further consideration before me it was argued by the petitioner's counsel that I ought to make a decree *nisi* without any conditions under the circumstances; whereas the counsel for the respondent urged that no decree ought to be made, and that, if any were made, it should only be pronounced on terms of the petitioner making an adequate provision for his wife. A number of cases were cited to me, in which the court had either exercised, or refused to exercise, its discretion in pronouncing decrees *nisi*. It is enacted by the terms of the 31st section of the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85): "In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, . . . then the court shall pronounce a decree declaring such marriage to be dissolved; provided always that the court shall not be bound to pronounce such decree if it should find that the petitioner has during the marriage been guilty of adultery, . . . or, in the opinion of the court, has been guilty of such wilful neglect or misconduct as has conduced to the adultery." In several cases the court has exercised its discretion by pronouncing a decree where a petitioner has committed adultery under exceptional circumstances—such, for instance, as adultery committed under a mistake of fact, or a mistake of law, or under compulsion. The court has also exercised its discretion in favour of a petitioner in some cases where he has been found guilty of cruelty. In *Pearman* v. *Pearman and Burgess* (1 Sw. & Tr. 601) the jury found that the respondent was guilty of adultery, and that the petitioner had been guilty of cruelty, and a decree *nisi* was pronounced. In *Badham* v. *Badham and Gorst* (62 L. T. Rep. 665), where the wife had previously obtained a judicial separation on account of her husband's cruelty, the husband subsequently obtained a decree *nisi* for the dissolution of his marriage on account of his wife's adultery with the co-respondent; and, in *Edwards* v. *Edwards and Francis* (70 L. T. Rep. 39; (1894) P. 33),

(*a*) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law.

where the jury found that the respondent and the co-respondent had committed adultery, and the petitioner had been guilty of cruelty towards his wife, a decree *nisi* was pronounced with the provision that the decree should not be made absolute unless and until the petitioner secured to his wife by deed a certain allowance for her maintenance. In *Newman* v. *Newman* (L. Rep. 2 P. & D. 57), upon a petition for dissolution of marriage, it was proved that the husband had been guilty of incestuous adultery, and the court also found that the petitioner had been guilty of unreasonable delay in presenting the petition, but, notwithstanding this finding, the court exercised its discretion in favour of the petitioner, and pronounced a decree *nisi*. I am not aware of any reported case, and none was cited to me, in which the court had exercised its discretion in favour of a petitioner where he has been found guilty of conduct conducing to his wife's adultery; but it is clear from the wording of the section, and from the distinction drawn in the section between connivance and conduct conducing to adultery, that the court may, even in such a case, exercise its discretion in the petitioner's favour, just as it may do so, and has done so, in cases such as those to which I have above referred, which are dealt with by the earlier parts of the proviso in the said section. It is obvious that, if a husband is guilty of conduct conducing to his wife's adultery, the court would not be readily disposed to pronounce a decree in his favour, as he is a party to his own wrong. But conduct conducing to adultery may vary greatly in degree. There may be such conduct as would lead necessarily and presumably to adultery, and, on the other hand, there may be conduct which so remotely conduces to adultery, that, while it may be said that there is some slight evidence that it did conduce to adultery, the conduct may yet be rather a *causa sine qua non* rather than a *causa causans*. In cases at the first extreme, the court could not reasonably be asked to pronounce a decree in the petitioner's favour, unless, perhaps, there were some very exceptional circumstances in the case; but in cases approaching the other extreme, there may not be sufficient in the petitioner's conduct to cause the court to refuse to exercise its discretion in the petitioner's favour. If the present case had been tried before me without a jury, I doubt whether I should have found that the petitioner was guilty of conduct conducing to his wife's adultery, although there may have been some evidence to support the finding of the jury. Taking that finding as it stands, I am at liberty to consider the weight to be attached to it. In my opinion, if the petitioner's conduct conduced to his wife's adultery, the case was rather one of the latter kind to which I have just referred than of the former, and the verdict may be interpreted on this basis. The petitioner and respondent were both domestic servants at the time of their marriage, and, for a time, both continued in service, and then were out of service for a short period. Afterwards, the petitioner obtained a situation as butler, which he has retained for ten or eleven years, and his wife took lodgings, where she was known as his wife, where she was visited by the petitioner from time to time, and was supplied by him with from 15*s*. to 1*l*. a week. Two children were born, one in 1884 and the other in 1891. The petitioner was away for long periods abroad with his master, but his remittances to his wife seem to have been regularly kept up. Latterly, the respondent seems to have taken to drink, and she gave birth to an illegitimate child in 1894, upon which these proceedings were instituted. The points most pressed against the petitioner were, that he and the respondent had an illegitimate child before marriage, and, that he had not sufficiently looked after her, especially during the latter part of the time. He seems to have had a doubt as to the paternity of the child born in 1891, which, however, she positively states to be his, and no doubt an unsatisfactory state of things existed between the parties for some time before her adultery which might not have existed had they been living together. But it is impossible to leave out of consideration, in such cases as this, that marriages between domestic servants may result in prolonged separations, just as in the case of sailors and others, who have to be away for lengthy periods, during which the husband can do little more than make adequate provision for his wife. Although the conduct of the petitioner in this case may, as the jury found, have conduced to his wife's adultery, in my opinion it has not conduced thereto to such an extent as to prevent me from exercising my discretion in his favour. I am of opinion, however, that the petitioner ought not to obtain his decree without making some provision for his wife; and, after due consideration, I have come to the conclusion that a decree *nisi* should be pronounced, but I direct that it shall not be made absolute unless and until the petitioner has secured to the respondent, by a proper deed, the annual sum of 20*l*., payable by equal monthly instalments during their joint lives *dum sola et casta vixerit*. There must also be the usual order for the wife's costs. I understand the petitioner to ask for the custody of the two children born in 1884 and 1891, and I therefore order that he do have the custody of these children.

Solicitors: for the petitioner, *Martyn* and *Martyn*; for the respondent, *Pilgrim* and *Phillips*.

NOTE.—In *Millis* v. *Millis and Brown*, where the co-respondent had been served by advertisements and had not appeared, the jury, after a trial lasting several days, found the one specific act of adultery with the co-respondent proved against the respondent, but found that the petitioner had been guilty of wilful neglect and misconduct which had conduced to the respondent's adultery, and they also found that the petitioner had been guilty of cruelty towards the respondent, the Court (Barnes, J.) exercised its discretion in favour of the petitioner and granted him a decree *nisi*, but directed that the decree should not be made absolute unless and until the petitioner should have secured, by proper deed, to the respondent the sum of 26*l*. per annum, to be payable weekly, during the joint lives of the petitioner and respondent.

END OF VOL. LXXIII.